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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanaka under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006.

Maheswaryamah widow of
Kanagasabapathy Subramanium,
Pathanpuram Polikandy,
Valvettithurai

Plaintiff

Vs.

SC Appeal No. 29/2013
SC/HCCA/LA No.109/2012
HC/CA/NO: 35/08
DC Point Pedro No: 16425/Land

1. Kanthan Velupillai (deceased)
2. Wife Saraswathy
3. Thambimuthu Nanthakumar
4. Wife Thanaledchumy
   All of Polikandy, Valvettithurai

Defendants

And

Maheswaryamah widow of
Kanagasabapathy Subramanium,
Pathanpuram Polikandy,
Valvettithurai

Plaintiff- Appellant

Vs

1. Kanthan Velupillai (deceased)
2. Wife Saraswathy
3. Thambimuthu Nanthakumar
4. Wife Thanaledchumy
   All of Polikandy, Valvettithurai

Defendants- Respondents

AND NOW

Maheswaryamah widow of
Kanagasabapathy Subramanium,
Pathanpuram Polikandy,
Valvettithurai

Plaintiff- Appellant- Appellant

Vs

1. Kanthan Velupillai (deceased)
2. Wife Saraswathy
3. Thambimuthu Nanthakumar
4. Wife Thanaledchumy
   All of Polikandy, Valvettithurai

Defendants- Respondents-Respondents

Before: **Jayantha Jayasuriya, PC, CJ.**

Murdu N.B. Fernando, PC, J and

A.H.M.D. Nawaz, J.

Counsel: V. Puvitharan, PC, with G.A. Arunraj, T. Yokaruban and V. Rinogi instructed by M. Jude Dinesh for the Plaintiff-Appellant-Appellant.

Geoffrey Alagaratnam, PC, with K.V.S. Ganesharajan, Ms. Mangaleswary Shanker and Vithusha Loganathan for the Defendants-Respondents-Respondents.

Argued on: 10-07-2024 and 04-09-2024

Decided on: 12-11-2024

Murdu N.B. Fernando, PC. J.,

This is an Appeal against the judgement of the Civil Appellate High Court of the Northern Province Holden in Jaffna ("the High Court").

The Plaintiff-Appellant-Appellant ("the Plaintiff/ the Appellant") instituted a pre-emptive rights application, in the District Court of Paruthithurai, also known as Point Pedro ("the District Court") in terms of the *Thesawalamai* Pre-Emption Ordinance seeking *inter-alia*

that the Plaintiff is entitled to pre-empt the share sold by the 2nd Defendant, on Deed No. 4721 dated 21-07-1981 to the 3rd and 4th Defendants and to declare the said Deed as null and void.

The Defendants-Respondents-Respondents ("the Defendants/ the Respondents") rejected the said contention and moved for dismissal of the Plaint.

The District Court dismissed the case of the Plaintiff with costs. The Plaintiff went before the High Court and the High Court too, dismissed the Plaintiff's appeal.

Being aggrieved by the said decision the Plaintiff came before this Court. The Court granted leave to appeal on four Questions of Law raised by the Plaintiff. The fifth question was raised on behalf of the Defendants.

The said Questions of Law in *verbatim* are as follows:

1. Was the High Court of Civil Appeal, Jaffna in grave error in proceeding to affirm the judgement of the District Court on the erroneous basis, that the land in extent 9 lms 1½ kls in respect of which the Petitioner sought to enforce her right of pre-emption, not a divided land and it is an undivided portion of a larger land in extent of 35 lms totally disregarding the oral and documentary evidence, which overwhelmingly showed that the said land in extent of 9 lms 1½ kls is a divided land, with well defined boundaries?
2. Did the High Court of Civil Appeal, Jaffna having concluded that the conditional transfer Deed No 4721 was not genuine, thereby accepting the Plaintiff's position that the said deed was executed in order to circumvent the provisions of the Pre-Emption Ordinance, err in law in concluding that the provisions of the Pre-Emption Ordinance were not applicable to a conditional transfer?
3. Did the High Court of Civil Appeal, Jaffna err in concluding that the land in extent of 9 lms 1½ kls in respect of which the Plaintiff sought to enforce her right of pre-emption was not a divided land, without considering the fact that even the Notice of Deed of Sale given by the 2nd Defendant referred to the land, as the land in extent of 9 lms and 1½ kls?
4. Did the High Court of Civil Appeal, Jaffna err in totally failing to consider the submissions of the Plaintiff, that the learned District Judge was in grave error in holding that the Defendants had complied with the Pre-Emption Ordinance by having entrusted Notice of Sale of Deed No 4689 marked P3 at the Local Council office, disregarding the Plaintiff's position that as the notice of the proposed sale was not given in compliance with Section 5 of the Pre-Emption Ordinance, the sale by Deed No 4721 marked P6 should be declared null and void and judgement should have been entered in favour of the Appellant?
5. In view of the learned District Judge's answers to issues 16 and 17 and on a construction of Deed No 7687 marked as P7 produced by the Appellant, can the Appellant maintain this Appeal?

The Plaintiff's case

- The Plaintiff and the Defendants are subject to the Thesawalamai law and the land in dispute is situated in the District of Jaffna.
- The Plaintiff was the owner of an undivided 1/3rd share of the property morefully described in the plaint. The English translation of the Schedule to the Plaint reads as follows:

> *"At Polikandy Kurichchi, Udupitty [kovil] Parish, Vadamaradchy division in the District of Jaffna, Northern Province, the land called "Nampithavathai" in extent 35 lacham V.C. House 1, out of this eastern half of the western side half in extent 9 lacham V.C. 1½ kullis. Bounded on the East by [the property of] Parameswary wife of Karthikesu Selvaratham and others, North by the Lane, West by [the property of] Thangamma wife of Subramanium and others, South by [the property of] Mutukesu Kanthavanam and others and the all hereof"*

- The 2nd Defendant was the owner of an undivided 1/6th share of the said land. The 2nd Defendant executed a Notice of Intention dated 29-06-1981 (**P3)**, to sell the share held by her in the disputed land, for a sum of Rs. 15,000.00
- The Notice of Intention to sell (**P3),** was not displayed in accordance with the law. Nevertheless, the Plaintiff by letter dated 20-07-1981 (**P4**), informed the Town Council that she was willing to purchase the 2nd Defendant's share.
- Contrary to the provisions of the *Thesawalamai* Pre-emption Ordinance, the 2nd Defendant took steps to sell her interest in the land to the 3rd and 4th Defendants by Deed bearing No 4721 dated 21-07-1981 (**P6**). The consideration in the said Deed was for a sum of Rs. 20,000.00 and it was a conditional transfer.
- The Plaintiff alleged, that the said transfer to the 3rd and 4th Defendants who were neither heirs nor co-owners, was of no force or avail in law, and that therefore the Plaintiff is entitled for a declaration that the said Deed bearing No. 4721 (**P6**) is null and void.
- Further, the Plaintiff prayed for a declaration that she is entitled to pre-empt the 1/6th share sold by the said Deed (**P6**) and that the 2nd Defendant should convey her interest to the Plaintiff, and if the 2nd Defendant fails to do so, that the Registrar of the District Court be directed to effect the necessary conveyance. An Order to place the Plaintiff in possession of the said 1/6th share of the disputed land and to eject the 3rd and 4th Defendants was also sought by the Plaintiff.

The Defendants' case

- The 2nd Defendant transferred her 1/6th share to the 3rd and 4th Defendants who were co-owners of the larger land in extent 35 lms, in accordance with the law.
- The larger land was never partitioned, but certain co-owners for convenience possessed certain portions of the land and have executed deeds on the basis that the land was divided.

Therefore, the contention of the Plaintiff, that the 3rd and 4th Defendants were not co-owners is palpably wrong.

The Trial

- The Plaint was filed before the District Court on 20-08-1982 and Answer was filed on 20-07-1983. On 01-10-1984 the trial began and issues were raised by the Plaintiff and the Defendants.
- After almost two decades, the trial re-commenced in the year 2003, and additional issues were raised. The evidence of the Plaintiff was led and cross-examined in detail and many deeds and documents (**P1** to **P7**) were led. The evidence of two other official witnesses too were led.
- Thereafter, for the defence the 3rd Defendant gave evidence and marked deeds and documents (**D1** to **D7**) and closed the case.
- On 08-05-2008, the learned District Judge having analysed the evidence led, delivered judgement and dismissed the plaint and the case of the Plaintiff upon the basis that the Plaintiff has failed to prove that the execution of the Deed bearing No. 4721(**P6**) violated the provision of the *Thesawalamai* Pre- Emption Ordinance and/or that the Deed **P6**, has no force in law.

The impugned judgement

Being aggrieved by the judgement of the District Court, the Plaintiff went before the High Court. The learned Commissioners of the High Court, considered the submissions made by the parties, and examined the main issues of the Appeal, which were itemized as follows:

- Was the land described in the schedule to the Plaint, a divided piece of land or a portion of a larger land in extent 35 lms?
- Are the 3rd and 4th defendants co-owners of that larger land?
- Is conditional transfer subject to the right of pre-emption of other co-owners?
- Was the conditional transfer a fictitious one to defeat the provisions of the Pre-Emption Ordinance?

Having analysed the aforesaid issues *vis-â-vis* the law pertaining to pre-emption, the High Court came to the finding that it need not interfere, with the judgement of the trial court, and dismissed the appeal.

***Thesawalamai* and Pre-Emption**

H.W. Thambiah Q.C. in his book **Principles of Ceylon Law**, in Chapter 18, discusses the origin, codification and sources of *Thesawalamai* as follows:

"*Thesawalamai* is a special system of law applicable to the Tamil inhabitants of Jaffna. It appears to have evolved from a system of customary law applicable to the ancient Tamils […]"

"The customary laws of *Thesawalamai* appears to have been moulded by various other systems of law […] and could be described in the words of Tennyson as a 'wilderness of single instances'. […]"

"*Thesawalamai* was codified by Claasz Isaacsz, dissawe of Jaffnapatam. […] The Code is in the Dutch language, a copy of which is still preserved in the Dutch Archives. The Dutch original appears to have sunk into oblivion and its English translation in *the Legislative Enactments* is referred to by our courts. […]"

"*Thesawalamai* consists of two parts. The first is a personal law applicable to all persons who answer the description of 'Malabar inhabitants of the Province of Jaffna'. **The second part is a local law applicable to all lands situated in the Northern Province of Ceylon,** whether owned by Malabar inhabitants of the Province of Jaffna, or Sinhalese, Burghers, English, or Chinese. [...]"

"The law of Pre-emption, as found in *Thesawalamai* is of independent origin and was not imported into the customary laws of the Tamils by Muslims. The right of pre-emption as known to *Thesawalamai* is defined as the 'right recognized by the *Thesawalamai* over immovable property situated in the Northern Province of Ceylon by which certain classes of person had the right to demand the seller to sell to them at a price which any *bona-fide* purchaser is prepared to pay for the same. […]"

"Under the old law, a vendor who was governed by the law of pre-emption had to give notice to his co-owners, co-heirs and persons who had a mortgage over the land, expressing his intention to sell the property so as to enable these persons to claim the right of pre-emption by offering the market price of the land. There was no formality prescribed. Therefore notice could even be given orally […] the laxity of the law regarding the form of notice a vendor had to give, gave rise to several fraudulent practices. **On the recommendation of the *Thesawalamai* Commission the *Thesawalamai* Pre-Emption Ordinance** enacts that such notice should now be notarially executed. […] It enacts that heirs and co-owners are entitled to the right of pre-emption. It defines an heir as including descendants, ascendants, collaterals up to the third degree of succession. […]" (emphasis added)

Dr. H.W. Tambiah, in the book **Laws and Customs of The Tamils of Jaffna**, in Chapter XVIII, refers to the law of pre-emption as follows:

> "The law of pre-emption, as found in the *Thesawalamai*, is one of its chief characteristics [...] The Roman Dutch Law also contains provisions relating to the law of pre-emption under the title *jus retratus.* […]"

Having referred to the origins of the *Thesawalamai* and the pre-emption, let me now look at the main provisions of the *Thesawalamai* Pre-Emption Ordinance No. 59 of 1947 ("Pre-Emption Ordinance), under which the instant case was filed in the District Court of Paruthithurai.

Section **2** of the Ordinance speaks of the persons to whom the right of preference should be given, namely co-owners and heirs. Section **4** refers to an undivided share or interest in immovable property and Section **5** describes the mode of publication of notice.

Section **6** indicates three weeks of the date of publication of the notice, as the time limit for a person to whom the right of Pre-emption is reserved to exercise the right, by tendering the sum referred to in the notice and purchase the property or to enter into an agreement for such purpose. Section **7** lays down the procedure to be followed, in the event a vendor fails to adhere to the provisions of the law. Section **8** refers to the remedy, in the event the sale is complete and Section **9** the time limit for actions to be instituted for enforcing a right.

Section **10** speaks of registration of a *lis pendens* being compulsory, for enforcing a right of pre-emption, Section **11** refers to deposit of purchase money as proof of a plaintiff's *bona-fides*. Section **13** specifically states that all co-owners and heirs shall be deemed to have an equal right to pre-empt and that there shall be no preference or precedence among them.

The Appeal before the Supreme Court

The genesis of this Appeal, was the institution of a case in the District Court, upon the basis that the Appellant was a co-owner of the disputed land, holding an undivided 1/3rd interest. The Appellant's grievance was that the 2nd Respondent, another co-owner sold her 1/6th share of the disputed land, to the 3rd and 4th Respondents, who were neither heirs nor co-owners to the disputed land, without granting the Appellant, the co-owner, the right to pre-empt to purchase the 2nd Respondent's said 1/6th interest of the disputed land.

This brings us to the pivotal issue in this Appeal. What is the 'disputed land'?

The Appellant refers to the disputed land in the Schedule to the Plaint as follows:

> *"Nampithavathai' in extent 35 lacham V.C [Vakuru Culture] House 1, out of this eastern half of the western side half in extent 9 lacham V.C. 1½ kullis*."

The Appellant's contention relating to the disputed land is that it is a land in extent 9 lms 1½ kls and forms a divided portion, of the land called '*Nampithavathai*', whereas the Respondents take up the position that the disputed land is an undivided portion of the larger land referred to in the Schedule of the Plaint, in an extent of 35 lachams. However, the Schedule of the Answer refers to the extent of the disputed land as 29 lachams.

The 2nd Respondent also contends, that the 3rd and 4th Respondents are co-owners of the larger land and thus, the 2nd Respondent has not violated the laws of pre-emption, in disposing of her 1/6th interest in the 'disputed land' to the 3rd and 4th Respondents.

If I may use another phraseology, the Appellant refers to the 9 lachams 1½ kullis land as a separetly demarcated, independent block of land, co-owned by the Appellant, the 2nd Respondent and another but not the 3rd and 4th Respondents, whereas the Respondent's contention is that the 9 lachams 1½ kullis land is not an independent block of land, as alleged and had never been surveyed or partitioned, and as such it is not a separately carved out or demarcated block of land, but an undivided portion of the larger land 'Nampithavathai', co-owned by the Appellant, the 2nd, 3rd and 4th Respondents and others. The Appellant refers to the larger land as a land in extent of 35 lms, whereas the Respondents refer to such land as a land in extent of 29 lms.

I wish to refer to Section 4 of the Pre-Emption Ordinance at this stage. It reads as follows:

> "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 or interest in immovable property** […]" (emphasis added)

Thus, in order to maintain the District Court case and to obtain relief under the Pre-Emption Ordinance, the Appellant has to establish that the disputed 9 lms 1½ kls land is not an undivided share of the larger property but a clearly defined, demarcated and divided land. The burden of proving of same, is clearly on the Appellant. It is a fact in issue and can only be established through evidence led at a trial.

Thus, the best judge to determine such issue is the trial judge before whom the evidence is led at a trial.

In the instant case, the learned District Judge, after examining and evaluating the totality of the evidence and the deeds and documents led at the trial, came to the finding, that the land in extent of 9 lms 1½ kls is an undivided portion of a larger land, in extent 35 lachams.

Further, the trial judge held that the Appellant has failed to establish that the larger land was amicably partitioned or a partition action had been instituted, and also that no evidence whatsoever was led at the trial to establish that the larger land was ever surveyed and divided

and/or that boundaries were marked and demarcated or that the 9 lms 1½ kls land was carved out of the larger land.

Thus, even if the Appellant possessed, the 'eastern half of the western side half of the larger land', referred to as *Nampithavathai,* (as referred to in the Plaint), the learned judge held that the said 9 lms 1½ kls land is not a defined lot, but a part of the larger land. Therefore, when the 2nd Respondent intended to sell her interest in the 9 lms 1½ kls land, from and out of the larger land, the right of pre-emption could be exercised by any co-owner of the larger land.

In the aforesaid circumstances, the trial judge came to the conclusion, that the Appellant has failed to establish that the course of action initiated by the 2nd Respondent to transfer her 1/6th interest in the 9 lms 1½ kls land to the 3rd and 4th Respondents, is erroneous or faulty and/or will have no force in law.

Furthermore, it was the view of the trial judge that the Appellant has no right to institute the instant action and obtain relief, and thus dismissed the Plaint filed before the District Court with costs.

Being aggrieved by the said finding, the Appellant went before the High Court. Consequent to the hearing of the appeal, the learned Commissioners of the High Court, saw no reason to interfere with the findings of the trial judge and dismissed the appeal.

It is observed that the trial at the District Court of Paruthithurai, was conducted in the Tamil language and had been heard before a single judge, within a span of four years and the judgement written in Tamil, running into over twenty pages had been delivered by the same trial judge. Furthermore, the evidence led before the trial court and the contents of the numerous deeds, had been considered, examined and analysed by the trial judge, in coming to his conclusion, especially in respect of the findings pertaining to the 'disputed land' being the larger land in extent of 35 lachams, and is supported by good reasons.

I have considered the evidence led before the trial court, the submissions filed and especially the submissions made by the learned Presidents' Counsel before this Court and I am convinced that the Appellant has failed to establish that the disputed land was a land in extent 9 lms 1½ kls. Furthermore, I accept the contention of the Respondents, that the disputed land is the larger land and that the 3rd and 4th Respondents are co-owners of such land.

Thus, I see no reason to interfere with the findings of the learned trial judge. I also see no reason to deviate from the impugned judgement of the learned Commissioners of the Civil Appellate High Court of Jaffna.

Furthermore, I am of the view that the High Court was not in error in proceeding to affirm the judgement of the District Court pertaining to the extent of the 9 lms 1½ kls land, being an undivided portion of a larger land in extent 35 lachams.

Hence, I answer the **1st Question of Law** raised before this Court in the negative and in favour of the Respondents.

The aforesaid answer to the 1st Question of Law in my view, should determine this Appeal, since the foundation of the Appellant's case is based upon a wrong presumption, that the 3rd and 4th Respondents were not co-owners of the disputed land and has no right to purchase the interests of the 2nd Respondent over and above the Appellant, who was also said to have a right of pre-emption upon the said land.

The trial court categorically held, that the 'disputed land' is the undivided and undemarcated larger land. The said larger land is co-owned by the Appellant, the 2nd, 3rd and 4th Respondents and others, and is in extent of 35 lachams.

Thus, the Appellant has no priority, precedence or preference over the 3rd and 4th Respondents to purchase or to pre-empt to the 1/6th share of the 2nd Respondent, as the Appellant, the 2nd and 3rd Respondents, all co-own the larger land. The provisions of Section 2 of the Pre-Emptive Ordinance read together with Section 13, categorically state that co-owners shall be deemed to have equal right to pre-empt and there shall be no preference or precedence among them.

If I may digress, the proviso to Section 13 speaks of a situation, in the event of any competition among such co-owners and heirs, that the court may accept the highest offer made by any co-owner or heir. Admittedly such an occurrence did not take place in the instant case, as the Appellant did not tender the sum and purchase the property or enter into an agreement to purchase, as provided for in Section 6(1) of the Ordinance. The Appellant, consequent to Section 5 notice (**P3**) did not make an offer to purchase the interests of the 2nd Respondent and by **P4**, the Appellant only objected to the sale. The legal consequences of **P4** will be dealt in detail later on in this Judgement.

In the aforesaid circumstances, there was no bar or prohibition on the 2nd Respondent, to sell her 1/6th interest of the land to the 3rd and 4th Respondents. Moreover, the Appellant, as of right cannot demand that only she can pre-empt to the 1/6th share of the 2nd Respondent and therefore move court to declare the Deed **P6** by which the 2nd Respondent's interests were transferred to the 3rd and 4th Respondents, is null and void and to convey the said interest to her. Hence, on this basis too, this Appeal should be dismissed.

Nevertheless, as this Court has granted leave on four other Questions of Law, I wish to examine the said Questions of Law now.

However, prior to examining the said Questions of Law, I wish to emphasise that the evidence led at the trial, clearly establish that the Appellant and the Respondents are close relatives and fall within the definition of 'heirs', as referred to in Section 2 of the Pre-Emption Ordinance.

Moreover, the ascendants of the Appellant and the Respondents, (be their parents or grandparents) for convenience, may have possessed certain portions of the larger land, and had executed deeds upon the basis that the land was divided, although in actual fact, the land was never surveyed nor demarcated, amicably or otherwise or by way of a mandatory order of court. There was no evidence whatsoever led before the trial court, that exclusive ownership of lots had been given to identified persons *i.e.,* ascendants of the Appellant and the Respondents to possess portions of the disputed land or that any of the parties had prescribed to the land.

Thus, the larger land in extent 35 lachams remains an undivided property, co-owned by the Appellant and the Respondents, who have no precedence or preference, over each other, as specifically provided for in Section 13 of the Pre-Emption Ordinance. All co-owners deem to have equal right to pre-empt and enjoy the right of pre-emption equally without preference or precedence, over one another.

Having said that, let me now move onto the 4th Question of Law raised before this Court. It pertains to the 'Notice of an intention to sell' as referred to in Section 5 of the Pre-Emption Ordinance. This is one of the principle submissions made by the learned President's Counsel for the Appellant before this Court and responded to by the learned President's Counsel for the Respondent, in great detail.

Section 5 in subsections 5(1),(2) and (3) lays down, that if any property to which Section 4 applies, is intended or proposed to be sold, the intending vendor shall sign a 'notice of intention' before a Notary Public in triplicate, setting out the actual price offered by the prospective purchaser and forthwith, forward a certified copy of such notice, to the Mayor or Chairman of the local authority, within whose administrative limits the land is situated.

Section 5(4) refers to the duty of the Mayor or Chairman to record such particulars in a register and cause such certified copy to be posted immediately on the notice board.

Section 6(1) provides, any person to whom the right of pre-emption is reserved by the Ordinance, to **tender the amount stated in the notice and buy the property from the intending vendor** within a period of three weeks from the date of publication of the notice.

The submissions of the learned President's Counsel for the Appellant before this Court is that the notice of intention was not duly published on the notice board of the Local Authority, and no certificate was issued by the relevant officer confirming that the notice had been duly published and therefore the Respondents have failed to establish the fact that there was compliance with the provisions of Section 5(4) of the Pre-Emption Ordinance.

The learned President's Counsel relied on the cases of **Jeganathan v. Ramanathan 64 NLR 289** and **Kathiresu v. Kasinather 25 NLR 331** to substantiate his contention.

In **Jeganathan v. Ramanathan** case referred to above, a Divisional Bench of the Supreme Court held that in an action for pre-emption, the plaintiff need not establish that, if

the prescribed notice had been given, he had 'sufficient means' at the material time, to buy the share which he was entitled to pre-empt. The cause of action in the said case was the failure or omission of the vendor to give notice required by law, based upon the fact that the pre-emptor had no means to purchase the relevant land.

However, in the instant case, 'sufficient means' was not the point of contention and thus, in my view the said case has no relevance to the matter in issue in this Appeal.

We note the 2nd case referred to above, **Kathiresu v. Kasinather**, was decided prior to the enactment of the Pre-Emption Ordinance. In the said case it was held, that 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.

As discussed earlier in this judgement, consequent to the findings of the *Thesawalamai* Commission, *Thesawalamai* Pre-Emption Ordinance was enacted to strengthen the law governing pre-emption and the Pre-Emption Ordinance categorically provided in Section 5, that notice of intention should be given. It is a mandatory requirement.

In the instant case, in the Plaint itself the Appellant refers to the notice of intention, and such notice being notarially executed. Further it was pleaded, that by the said notice bearing No. 4689 dated 29-06-1981 (**P3**), the 2nd Defendant gave notice of intention to sell her 1/6th share in the disputed land for a sum of Rs. 15,000.00. Thus, the Appellant accepts P3, the notice of intention to sell.

The Appellant in the pleadings further stated, no sooner she became aware of the intended sale, that she informed the Secretary to the Town Council by her letter dated 20-07-1981 (**P4**) that she was willing to purchase the said share, in accordance with the provisions of the Pre-Emption Ordinance.

The above stated facts clearly establish that the Appellant was aware of the notice of intention to sell and it was notarially executed as required under Section 5(1) of the Pre-Emption Ordinance and referred to the price of the intended sale. Further, the notice of intention had been tendered to the Town Council, as per provisions of Section 5(2) and 5(3) of the Ordinance. The only point of contention appears to be as to whether the notice was put up on the notice board, as per the provisions of Section 5(4) of the Ordinance.

In my view, putting up the notice, on the notice board is the responsibility of the Town Council and the 2nd Respondent cannot be found fault with for non-publication of notice on the notice board. In any event according to the pleadings itself, the Appellant was aware of the notice and by **P4** had responded to same.

However, it is observed that the learned trial judge having examined **P4** exhaustively, came to the finding that **P4** is not an offer to purchase, but only an objection or a protest lodged for the sale of the 1/6th interest of the 2nd Respondent to the 3rd Respondent. Further, the learned trial judge came to the finding, that by **P4**, the Appellant has not made an offer to purchase the

share of the 2nd Respondent, but only objected to the sale to the 3rd Respondent, upon the basis that the 3rd Respondent is not a co-owner of the disputed land. Furthermore, the Appellant has not tendered the amount stated in the notice of sale and has thus, failed to act in terms of Section 6(1) of the Ordinance.

Moreover, this Court has already held, having analysed the impugned District Court and High Court judgements, that the disputed land is not the 9 lms 1½ kls land, but the larger land in extent of 35 lachams. The said larger land is co-owned by the Appellant, the 2nd, 3rd and 4th Respondents. Thus, I am of the view, since 3rd and 4th Respondents are also co-owners, by only tendering **P4,** the Appellant cannot gain an advantage. Hence, **P4** has no force in law. It is only a letter of protest. It has no value and it does not fall within the parameters of Section 6 of the Pre-Emption Ordinance. Thus, I am of the view, that the Appellant has failed to invoke the right to pre-empt, guaranteed under the Pre-Emption Ordinance.

In any event by **P4**, the Appellant has not offered a sum to purchase the 1/6th interest of the 2nd Respondent. Hence, the Appellant cannot now make out a case of fatal irregularity under the provisions of Section 6(1) of the Pre-Emption Ordinance, to obtain relief as prayed for in the Petition of Appeal filed before this Court. Similarly, the Appellant cannot now, mount an attack on the deed of transfer **P6** and contend that it is a nullity and thus, should be declared null and void.

In the aforesaid circumstances, there is no merit in the submissions of the Appellant, that the High Court erred in failing to consider the submissions of the Appellant, that the trial judge was in grave error in holding that the Respondents had complied with the provisions of the Pre-Emption Ordinance, in relation to the notice of intention. Similarly, there is no merit in the submission of the Appellant that the sale of the 1/6th interest of the 2nd Respondent to the 3rd and 4th Respondents, by Deed No. 4721 dated 21-07-2018 (**P6**) should be declared null and void.

Hence, I answer the **4th Question of Law** raised before this Court in the negative and in favour of the Respondents.

Having answered the 1st and 4th Questions of Law, let me now examine the 3rd Question of Law. It is raised on the basis that in the notice of intention (**P3**) given by the 2nd Respondent, the land is referred to as 9 lms 1½ kls. Hence, the contention of the Appellant is that the said reference itself proves that 9 lms 1½ kls is a defined portion which gives credence to the Appellant's submission, that she has a right of pre-emption over the head of the 3rd and 4th Respondents. Such contention, in my view, is erroneous.

When considering the 1st and 4th Questions of Law, this Court analysed in detail the evidence and the words used in describing the land, *i.e.,* the 9 lms 1½ kls land as an undivided portion of a larger land in extent 35 lachams and came to the finding, that the High Court Commissioners did not err in their judgement. In my view, the 3rd Question of Law is intertwined with the 1st and 4th Questions and therefore, the **3rd Question of Law** too, is answered in the negative and in favour of the Respondents.

Let me now move onto examine the 2nd and 5th Questions of Law.

The 2nd Question is based on the assumption that the High Court, while accepting the Appellant's contention that the deed by which the 2nd Respondent's interests were transferred to the 3rd and 4th Respondents, was a deed of conditional transfer and therefore, was not a genuine act but was executed only to circumvent the provisions of the Pre-Emption Ordinance, erred in concluding that the provisions of the Pre-Emption Ordinance will not be applicable to a conditional transfer.

The Appellant drew our attention to the cases of **Thamu Ponnaiah v. Velupillai Ponniah 60 NLR 415** and **Saravanamuttu et al v. Vallipuram et al 50 NLR 12** to justify the said contention.

In the aforesaid **Thamu Ponnaiah** case it was held, that a court is entitled to look into the transactions and decide whether the exchange is in fact a sale, for the purposes of the Pre-Emption Ordinance. In the **Saravanamuttu** case, referred to above, the *ratio decidendi* was that a person who takes a transfer of a share from a co-owner, subject to the condition that he should re-transfer it on payment of a certain sum within a stipulated period, is also a co-owner and is entitled to the rights of pre-emption. I have no hesitation in accepting the said decisions. A court is entitled and should look into the entirety of circumstances and come to a correct finding.

However, as discussed earlier in this judgement, we have already held that the disputed land in extent 9 lms 1½ kls, is not a divided land as submitted by the Appellant, but an undivided portion of a larger land in extent 35 lacham, which was co-owned by all the relevant parties namely, the Appellant, the 2nd, 3rd and 4th Respondents.

Thus, the 3rd and 4th Respondents being co-owners of the 35 lacham land, could purchase the 1/6th interest of the 2nd Respondent without a hindrance. Such a sale will not contravene the provisions of the Pre-Emption Ordinance. Hence, in my view, whether such transfer is absolute, conditional or unconditional is immaterial. It has no bearing to the matter under consideration. The 3rd and 4th Respondents, on their own right could purchase the said interest.

Hence, I do not wish to get into an academic discourse relating to the Law of Contract vis-â-vis Law of Pre-Emption or to examine the applicability of a deed of conditional transfer on the law of pre-emption. Nor do I wish to ascertain whether the transfer of the interest by Deed No. 4721 (**P6**) in the instant matter was fictitious in nature, vexatious or executed in bad faith. Similarly, it is not necessary to discuss the applicability of the time lines in Section 8 of the Pre-Emption Ordinance on a hypothetical conditional transfer situation.

In any event, the 5th Question of Law raised before this Court, shed light to the fact, that the 1/6th interest of the 2nd Respondent on the disputed land disposed by Deed **P6,** was subsequently re-transferred to the 2nd Respondent by Deed No. 7687 (**P7**) after fullfilling the

conditions in **P6**. By the said question, the Appellant's necessity to maintain this action is questioned by the Respondents.

In the said circumstances, I see no reason to examine the consequences of a conditional transfer *vis-â-vis* the provisions of the Pre-Emption Ordinance. Hence, I refrain from answering the **2nd** and **5th Questions of Law** in determining this Appeal.

I have already answered the 1st, 3rd and 4th Questions of Law in the negative and in favour of the Respondents. For reasons morefully adumbrated in this judgement, I see no reason to interfere with the findings of the District Court and the High Court.

The District Court judgement dated 8th May, 2008 and the impugned judgement of the Civil Appellate High Court dated 10th February, 2012 is thus, affirmed and upheld.

The Appeal of the Plaintiff-Appellant-Appellant dated 21st March, 2012 is dismissed. The parties may bear their own costs.

The Appeal is dismissed.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ.

I agree

Chief Justice

A.H.M.D. Nawaz, J.

I agree

Judge of the Supreme Court