

GL-6-2

17, 1961

IN THE PRIVY COUNCIL

No.10 of 1958

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

MANGALESWARI, daughter of Velupillai
Selvadurai of Karaveddy, a minor,
appearing by her next friend Sinnamma
widow of Sellar of Chavakachcheri

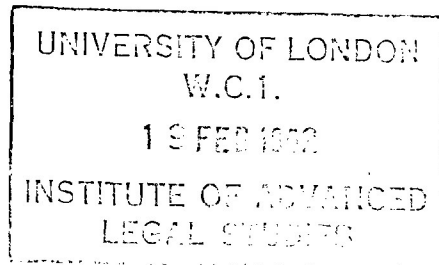
- and -

VELUPILLAI SELVADURAI and OTHERS

C A S E

FOR THE 2nd, 5th, 6th, 7th
and 8th RESPONDENTS.

LODGED the 29th March, 1960



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A.L.BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Solicitors and Privy Council
Agents for the 2nd, 5th, 6th,
7th and 8th Respondents.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON
B E T W E E N:

MANGALESWARI, daughter of Velupillai
 Selvadurai of Karaveddy, a minor,
 appearing by her next friend Sinnamma
 widow of Sellar of Chavakachcheri
Plaintiff - Appellant

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- and -

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1. VELUPILLAI SELVADURAI of
Kareveddy;
 2. POORANAM, widow of Veeragathiar
Ramalingam of Chavakachcheri,
personally and as Guardian-ad-
litem of Sudendra and
Ramalingam Nimalan,
 3. VELUPILLAI SUNDARALINGAM of
Chavakachcheri,
 4. YOGESWARY, wife of Velupillai
Sundaralingam of Chavakachcheri,
 5. MANGALESWARY, daughter of V.
Ramalingam of Chavakachcheri,
 6. MADURESWARI, daughter of
V.Ramalingam of Chavakachcheri,
 7. SUDENDRA, daughter of V.
Ramalingam of Chavakachcheri,
 8. RAMALINGAM NIMALAN of
Chavakachcheri,
- all of Nos.2,3,4,5,6,7 and 8 having
 been substituted in place of the late
 Veeragathiar Ramalingam of Chavakach-
 cheri pursuant to the Order of the
 Supreme Court of Ceylon dated the 18th
 December 1957;
9. VALLIPURAM SUBRAMANIAM of
Chavakachcheri;
 10. SUBRAMANIAM SIVARAJAH of
Chavakachcheri and
 11. SUBRAMANIAM RAJASINGHAM of
Chavakachcheri,
- both of Nos.10 and 11 having been
 substituted in place of the late
 Sinnathangam, wife of Vallipuram
 Subramaniam of Chavakachcheri
 pursuant to the said Order
Defendants - Respondents

C A S E

RecordFOR THE 2nd, 5th, 6th, 7th and 8th RESPONDENTS

pp. 34 & 36.

This is an appeal from a judgment and decree of the Supreme Court of Ceylon, dated the 25th June, 1952, allowing an appeal by Veeragathiar Ramalingam (since deceased) from a judgment and decree of the District Judge, Chavakachcheri dated the 28th November, 1950. In allowing the appeal the Supreme Court dismissed the Appellant's action in the District Court with costs.

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pp. 25 & 28.

p.22 L.2.
p.25 L.12.

2. The Appellant (Plaintiff in the action) is the daughter of the 1st Respondent V. Selvadurai and his deceased wife Ratnam. Up to the time of filing of her plaint, the Appellant was a minor, of the age of 20 years or thereabouts, (born in 1930) and the suit was instituted in her name pursuant to Section 476 of the Civil Code by Sinnammah Widow of Sellar of Chavakachcheri by a plaint dated the 30th August 1950 in the District Court of Chavakachcheri.

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p:25 L.8.
p.25 L.10.

3. By virtue of the last Will of the said Ratnam, the Appellant and the 1st Respondent each became entitled to an undivided half share of a land called "Kaddukkarny". Subsequently, the 1st Respondent sold his undivided half share to the said Veeragathiar Ramalingam (Deceased) by Deed No. 15,268, of 11th September, 1937. The said Ramalingam by deed No.10,610 dated the 10th August, 1947 sold part of the land comprised in Deed No.15,268 to Sinnathangam, wife of Vallipuram Subramaniam, the said V. Subramaniam being the present 9th Respondent in this appeal.

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p.49.
p.52.

p.10 Ll.37-40.

4. To the said suit, so instituted in the name of the Appellant by the said Sinnammah, the Defendants were (1) the said 1st Respondent (2) the said Veeragathiar Ramalingam (3) the said Vallipuram Subramaniam the present 9th Respondent and (4) the said Sinnathangam (since deceased) the wife of the present 9th Respondent. The said 4th Defendant was made a party to the action to have her bound by the decree and the said 3rd Defendant (the 9th Respondent in this appeal) was made a party as her husband.

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p.9.

5. The Appellant in her said plaint dated 30th August, 1950, stated that she was then and had

been at the time of the said sale to Ramalingam a minor, that she was neither aware nor was she given notice of the said sale; that the 2nd Respondent was neither a co-owner nor an heir nor an adjacent land owner having a mortgage right over the said land, qualified under the law of Thesavalamai to purchase the half share in question in preference to the Plaintiff; and that the reasonable market value of the said share was Rs.1,500/-. The Appellant therefore prayed -

p.11 L.5

- (1) That the said Deed No.15,268 dated the 11th day of September, 1937, and attested by V.Sabaratnam, Notary Public, be set aside.
- (2) That the 1st Defendant be ordered to execute a deed of transfer in favour of the Plaintiff for the said undivided one-half share of the land fully described in the Schedule hereto on payment into Court by the Plaintiff for the sum of Rs.1,500 or any other reasonable sum which the Court might fix on a day to be fixed by Court.

6. The original 2nd Respondent Veeragathiar Ramalingam (Deceased) in his answer, dated the 30th October, 1950, stated, inter alia :-

"that the Plaintiff was and is a minor living under the care and guardianship of her father the 1st Defendant, that the Plaintiff had and has no means to buy the share sought to be pre-empted and that the Plaintiff was fully aware of the sale of the said share"

p.13 L.18.

.....

"that the said half-share exclusive of the improvements effected by this Defendant is now reasonably worth Rs.6,500, that the improvements effected by the Defendant are now reasonably worth Rs.4,000 and that the market value of the half-share along with the improvements is Rs.10,500".

p.14 L.14.

He therefore prayed -

- (1) that the Plaintiff's action be dismissed,

p.14 L.23.

Record.

(2) that in the event of the Court holding that the Plaintiff is entitled to preempt the said half-share, the Plaintiff be ordered to deposit in Court Rs.10,500 being the market value of the said half-share and the said improvements".

pp.14-16.

7. The Answer of the said 3rd and 4th Defendants in substance repeated the answer of the said 2nd Defendant.

p.25.

8. The District Judge, Chavakachcheri (Mr. Sri Skanda Rajah) by his judgment dated the 28th November, 1950, allowed the Appellant's claim with costs against the 2nd Defendant. He further made order "that a sum of Rs.1,500 to be deposited by the Plaintiff on or before the 18th December, 1950, and that the 2nd Defendant to continue in possession till he was compensated in a further sum of Rs. 1,500. The said deed No.10,610 was also to be set aside. The said sum of Rs.1,500 was so deposited by or on behalf of the Plaintiff.

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pp.30-34.

9. The original 2nd Respondent Veeragathiar Ramatingam (Deceased) thereupon appealed to the Supreme Court of Ceylon.

pp.34-36.

10. The Appeal in the Supreme Court was heard by Gratiaen J. and Gunasekara J. who, by judgment dated the 25th June, 1952, allowed the Appeal with costs.

11. In the course of his judgment Gunasekera, J. stated -

p.38 L.8.

"The Plaintiff, who was born in 1930, and was still a minor when this action was instituted in August, 1950, was only seven years old at the time of the sale to the second Defendant. It is contended in support of the appeal that her natural guardian, who was the first Defendant, was necessarily aware of the sale to the second Defendant and that in any event she is not entitled to have the sale set aside on the ground of want of notice.

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The second Defendant averred in his answer that 'the Plaintiff had and has no means to buy the share sought to be pre-

empted', and one of the issues tried was as to whether the Plaintiff was 'a bona fide pre-emptor having funds to pay for the purchase of this half-share'. The learned Judge answered this issue in the affirmative for the reason that she 'may still be able to find the funds to pre-empt this share by mortgaging her own share', which he finds has appreciated in value. He holds that it 'may be that she has been put up by the first Defendant to file this action because the price of lands now is high'. The event proved that she was able to raise the necessary funds by the 13th December, 1950, but it seems to be clear from the evidence that her estate was insufficient for the purpose at the time of the sale by the first Defendant to the second in 1937. Her father, the first Defendant, was a labourer employed at a mill, and it is unlikely that this seven year old daughter was possessed of any property other than the half-share of this piece of land that she had inherited from her mother. According to her own evidence, she had no other landed property but she had been told by Sinnammah, her next friend in this action, that her mother had entrusted to Sinnammah a sum of Rs.1,000 in cash to be held for her. Sinnammah herself did not give evidence and there is no evidence from any other source to prove the truth of the information that she is alleged to have given the Plaintiff. The learned Judge's own view is that 'it is likely that the story that the next friend has Rs.1,000 entrusted to her by the Plaintiff's mother is an invention'.

As it appears that the Plaintiff had no sufficient means to pre-empt the share in 1937 it is immaterial whether she had notice of the first Defendant's intention to sell it. As was observed by my brother Gratiaen in the case of Velupillai vs. Pulendra et al.1 'it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased

Record

the property himself within a reasonable time rather than permit it to be sold to a stranger'."

Gratiaen J. agreed with Gunasekera, J.

p.41 L.30. 12. The Appellant by her said next friend there-
upon took steps to appeal to the Privy Council and
Final Leave to Appeal was granted on the 29th
October, 1952 to her as a minor appearing by her
said next friend and this appeal to Her Majesty is
still being prosecuted by her as a minor appearing
p.22 L.2. by her said next friend though she according to 10
her own evidence must have attained the age of 21
years in or about the year 1951.

13. The Code of Civil Procedure directs what shall be done when a minor Plaintiff attains majority as follows:-

Section 486.

A minor Plaintiff, or a minor not a party to an action on whose behalf an application is pending, on coming of age must elect whether he will proceed with the action or application. 20

Section 487.

(1) If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

(2) The title of the action or application shall, upon such order being made, be altered so as to read thenceforth thus: "A.B., late a minor, by C.D., his next friend, but now of full age".

What is majority is stated in the Civil Code as follows :- 30

Section 502.

For the purposes of this Chapter, a minor shall be deemed to have attained majority or full age on his attaining the age of Twenty-one years, or on marriage, or on obtaining letters of *venia aetatis*.

14. It is believed that the District Court of Chavakachcheri upon the application of the Plaintiff made an order in the year 1955 or early in the year 1956 giving the Plaintiff leave to proceed in her own name that is to say as "Mangaleswary alias Sivapahiam daughter of Velupillai Selvadurai of Kaithady", but no such order appears in 40

the certified Record as made either by the District Court or the Supreme Court.

15. After the said grant of final leave to appeal to Her Majesty in Council and before the despatch of the Record to the Registrar of the Privy Council, the said record became defective by reason of the death of the late Veeragathiar Ramalingam and the late Sinnathangam, formerly second and fourth Respondents to the Appeal. By an Order of the Supreme Court of Ceylon dated the 17th September, 1957 the Court declared that the above named second, third, fourth, fifth, sixth, seventh and eighth Respondents were the proper persons to be substituted for the late Veeragathiar Ramalingam and that the above named tenth and eleventh Respondents were the proper persons to be substituted on the record for the late Sinnathangam. By an Order of the Court dated the 18th December 1957 the said seven Respondents were substituted and/or entered on the record in place of the said two deceased Respondents.

16. The 2nd Respondent submits that the appeal should be dismissed with costs for the following, among other,

R E A S O N S

1. BECAUSE the half share of the land was sold to the 2nd Respondent by the father and natural guardian of the Appellant.
2. BECAUSE in the negotiations for the sale of the Appellant's father's undivided half-share of the property, her father sufficiently represented her in waiving her right to pre-empt and, in the absence of any evidence of mala fides on his part during such negotiations and the sale of his half share of the property, the sale thereof was binding on the Appellant ab initio and could not thereafter be set aside by the Appellant or her guardian ad litem.
3. BECAUSE it has not been established by the Appellant that at the time of the sale in 1937, or within a reasonable time thereafter, she or her natural guardian and father had sufficient means to pre-empt the share in question.
4. BECAUSE the judgment of the District Court was wrong.
5. BECAUSE the judgment of the Supreme Court was right.

GILBERT DOLD.