between the nearest heirs of the acquirer and his tarwad. The referring order in the Full Bench case shows that notwithstanding the *dicta* of the High Court the usage of the people has not been altered, that as a matter of custom it is the immediate heirs of the acquirer that succeed to his property at his death. In these circumstances I am of opinion that there is no scope for the application of the doctrine of *stare decisis*. The case is a curious one in which the people have followed their customary law for a period of about half a century notwithstanding the attempt of the High Court to modify it. They have succeeded in inducing the Court to depart from the principle in several respects. I do not think that we should hesitate to pronounce a judgment which would be in accordance with both law and custom. I think for these reasons that the decision in the Full Bench case in *Govindan Nair* v. *Sankaran Nair*(1), cannot be applied to the self-acquisitions of a female member of a tarwad. My answer to the question referred to the Full Bench is that the self-acquisitions of a female would descend to her nearest heirs under the Marumakkatayam law.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

MAMMALI AND EIGHT OTHERS (PLAINTIFF), APPELLANTS,

v.

ACHARATH PARAKAT MALIGAPURAYIL CHERIA KUNHIPAKKI HAJI AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

1912. September 6 and October 18.

Limitation Act (IX of 1908), art. 120—Pre-emption, right of—Knowledge of sale, essential for the article to apply.

In a suit by an othidar to enforce his right of pre-emption, the right to sue cannot be said to arise unless the plaintiff has the necessary knowledge of the sale. Such a right can only be exercised when the othidar knows first of all that

(1) (1909) I.L.R., 32 Mad., 351 (F.B.).

* Second Appeal No. 356 of 1911.

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the property is sold or attempted to be sold to another person and what the terms on which it is proposed to be sold are. Without such knowledge he is not in a position to elect.

Ramasami Pattar v. *Chinnan Asari* (1901) I.L.R., 24 Mad., 449, and *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) I.L.R., 29 Mad., 336 (F.B.), distinguished.

Cheria Krishnan v. *Vishnu* (1882) I.L.R., 5 Mad., 198, *Vasudevan* v. *Keshavan* (1884) I.L.R., 7 Mad., 309, and *Ammotti Haji* v. *Kunhayen Kutti* (1892) I.L.R., 15 Mad., 480, commented on.

SECOND APPEAL against the decree of T. A. RAMAKRISHNA AYYAR, the acting Subordinate Judge in North Malabar, in Appeal No. 346 of 1909 presented against the decree of P. P. RAMAN MENON, the District Munsif of Tellicherry, in Original Suit No. 545 of 1908.

Suit by othidars to enforce their right of pre-emption.

The plaintiffs sued to enforce their right of pre-emption as othidars under a deed of the year 1890. The equity of redemption or the Jenmi interest of the othi grantor was sold in court auction in the year 1895; and the defendants became purchasers of it. Possession of the property was still with the othidars. The defendants recently tendered the othi amount and asked the four of the plaintiffs to receive it and surrender possession of the property. But the plaintiffs repudiated the defendants' purchase claiming right of pre-emption in them and prayed that the defendants should be compelled to execute a registered deed of conveyance in their favour.

The Honourable Mr. *J. L. Rosario*, the Advocate-General, for the appellants.

The Honourable Mr. *T. V. Seshagiri Ayyar* for the respondents.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

JUDGMENT.—This appeal arises in a suit instituted by an othidar to enforce his right of pre-emption; and the question argued before us is, whether the lower Courts are right in dismissing the suit on the ground that it is barred by limitation without finding that six years had elapsed since the date the plaintiff came to know of the sale by auction. There is no finding when the plaintiff had knowledge of the auction sale and we are asked to consider whether it is enough for an othidar who seeks to enforce his right of pre-emption to show that he has come to Court before the expiry of six years from the date he came to know of the sale to a third person. It is contended on behalf of the respondent that article 120 of the Limitation Act does not imply

that time runs from the date when the othidar came to know of the sale, in other words, the right to sue arises from the date of the sale or the contract to sell, independently of when he had knowledge of such sale or contract. We may mention that there is no dispute before us that article 120 applies to this case, for it is clear that article 10 does not apply because the othidar himself is in possession and there has been no registered instrument of sale within the meaning of that article. Article 120 is in general terms. The third column of that article lays down that the six years run from the date "when the right to sue accrues." It is argued by Mr. Seshagiri Ayyar on behalf of the respondent that we should be adding words which are not in the article if we were to hold that the right to sue arises on the plaintiff coming to know of the sale, of which he complains. No doubt generally speaking, article 120 does not make it a condition that the plaintiff should have knowledge of the facts which give rise to the cause of action before time begins to run. But there can be no doubt and this Mr. Seshagiri Ayyar very fairly concedes that if the nature of the right imports as a necessary condition, knowledge of certain facts then the right to sue cannot be said to arise in such a case unless the plaintiff has the necessary knowledge. The right of pre-emption which an othidar has depends entirely on the custom which prevails in the West Coast. The materials from which the usage is to be gathered, and the nature and extent of the right of pre-emption are to be found in certain decisions of this Court. The cases to which we have been referred are *Cheria Krishnan* v. *Vishnu*(1), *Vasudevan* v. *Keshavan*(2), *Kanharankutti* v. *Uthotti*(3), *Ammotti Haji* v. *Kunhayen Kutti*(4), *Krishna Menon* v. *Kesavan*(5), *Ramasami Pattar* v. *Chinnan Asari*(6), *Kurri Veerareddi* v. *Kurri Bapireddi*(7) and *Kadakamvalli Sankaran Mussad* v. *Mokkath Ussain Haji*(8). None of these authorities directly decided the present question. The case in *Ramasami Pattar* v. *Chinnan Asari*(6) is hardly in point, because there the right to purchase the property in preference to third person was conferred by an express contract: and the

(1) (1882) I.L.R., 5 Mad., 198.
(2) (1884) I.L.R., 7 Mad., 309
(3) (1890) I.L.R., 13 Mad., 490.
(4) (1892) I.L.R., 15 Mad., 480.
(5) (1897) I.L.R., 20 Mad., 305.
(6) (1891) I.L.R., 24 Mad., 449.
(7) (1906) I.L.R., 29 Mad., 336 (F.B.).
(8) (1907) I.L.R., 30 Mad., 388.

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ABDUR RAHIM AND SUNDARA AYYAR, JJ.

Full Bench decision in *Kurri Veerareddi* v. *Kurri Bapireddi*(1), is cited only to show that a mere contract in favour of the defendant to sell the property to him is no answer to a suit in ejectment. Here the suit is by the othidar himself to establish his right. The other cases deal with different questions relating to the right of pre-emption possessed by an othidar. Apart from any particular form of language that has been used in some of these cases, we think it can be fairly inferred from the course of decisions in this Court that the right of the othidar consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. It is obvious that such a right can only be exercised when the othidar knows first of all that the property is sold or attempted to be sold to another person and what the terms are on which it is so proposed to be sold. If he has no knowledge of either fact he is not in a position to make any election. As it is put in some of the cases an othidar is entitled to have an opportunity given to him to make the election to which his right of pre-emption entitles him. If this be the correct apprehension of the othidar's right, we think it follows that the right to sue does not arise until the othidar knows of the sale of the property and the terms of the sale. Both the lower Courts have dismissed the suit finding the question of limitation against the appellant reckoning the period of limitation from the date of sale and as we have stated, it is not found when the othidar came to know of the auction sale. That is a point which must be decided, for in our opinion time would only run from the date of the othidar's knowledge of the sale. We therefore resolve to set aside the decrees of both the Courts and remand the suit to the District Munsif for disposal according to law having regard to the above remarks.

We may mention that in some of the cases, viz., in *Cheria Krishnan* v. *Vishnu*(2), *Vasudevan* v. *Keshavan*(3) and *Ammotti Haji* v. *Kunhayen Kutti*(4), language is used which might imply that the right of pre-emption consists in a right to have an offer made by the owner of the property to sell the property to the

(1) (1906) I.L.R., 29 Mad., 336 (F.B.). (2) (1882) I.L.R., 5 Mad., 198.
(3) (1884) I.L.R., 7 Mad. 309. (4) (1890) I.L.R., 15 Mad., 480.

othidar for the same price for which he has contracted to sell to a third person. We might have some hesitation in saying that this is an accurate definition of the nature of the right, because such a definition if strictly pursued to its logical conclusions might lead to difficulties and complications. We however refrain from pronouncing any definite opinion on that point as the learned Advocate-General says that if it be found that his client had knowledge of the sale more than six years before the institution of the suit he would not be prepared to contend in the facts of this case that the suit would still be within time, because no offer was made to him by the owner of the property before the auction sale.

The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

NEELAM TIRUPATIRAYUDU NAIDU GARU AND TWO OTHERS (DEFENDANTS), APPELLANTS,

1912. October 14 and 23.

v.

VINJAMURI LAKSHMINARASAMMA (PLAINTIFF), RESPONDENT.*

Trustee—Breach of trust—Liability in damages—Failure to invest trust funds in authorised securities—Indian Trusts Act (II of 1882), sec. 20—Failure of unauthorised security—Degree of care and prudence—Indian Trusts Act (II of 1882), ss. 15 and 20—Fund 'to be applied immediately or at an early date construction of—Fund payable to minor—If payable to guardian—Liability of trustee for interest—Interest on damages—Indian Trusts Act (II of 1882), ss. 41 and 23.

A testator appointed certain persons as trustees and directed them to realise an amount payable by the Oriental Life Assurance Company and to pay a sum of Rs. 200 to his brother, another sum of Rs. 400 to his daughter for her bride's jewels and the remainder to his minor son. The trustees realised the amount due from the Insurance Company, and after paying Rs. 200 to the testator's brother, invested the balance on one year's fixed deposit with Messrs. Arbuthnot & Co. who were then believed to be in very good credit. After the deposit had been renewed several times, Messrs. Arbuthnot & Co. became insolven and the

* Second Appeal No. 1339 of 1911.