THE ATTORNEY-GENERAL *v.* KIRIYA *et al.*

1897.
December 16.

D. C., Chilaw, 671.

Sannas—Non-registration—Causes beyond the control of the person producing the instrument—Ordinance No. 12 of 1840—Proviso to s. 7 of Ordinance No. 6 of 1866.

Where defendants sought to account for the non-registration of a *sannas* produced by them in evidence by proof that one Hapuwa, who, before his death, was very old, infirm, and blind for many years, kept secret the fact that he had the *sannas* in his possession until a few days before his death—*held* by LAWRIE, A.C.J., and WITHERS, J. (BROWNE, J., *dissentiente*), that the cause shown for non-registration was insufficient, and that the *sannas* was not saved by the proviso* to section 7 of Ordinance No. 6 of 1866.

THIS was an action in ejectment brought by the Attorney-General, who alleged that the defendants unlawfully entered upon Kebellewalla-mukalana, a virgin forest of about 42 acres in extent, and felled the timber trees standing thereon and broke up the soil, to the damage of Rs. 200 to the Crown.

The defendants pleaded *inter alia* that the land in question was part of a larger tract called Karawita-agara, which the defendants and others, who are not parties to the present action,

* Proviso to section 7 of Ordinance No. 6 of 1866: Provided that if it shall be established to the satisfaction of the court before which any such deed, sannas, ola, or other instrument is produced that the same was not registered owing to the absence from the island of the holder thereof, or of his being under some legal disability, or from other causes utterly beyond the control of the person producing it in evidence, such court may allow the production of such deed, sannas, ola, or instrument, and the same shall be received in evidence notwithstanding that the same shall not have been previously registered as herein directed.

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have undisturbedly possessed by a title adverse to and independent of the Crown for upwards of a third of a century next previous to the action, by virtue of a royal grant or *sannas* dated 1646.

At the trial the District Judge (Mr. G. A. Baumgartner) held the *sannas* inadmissible for want of registration, and, even if admissible, not proved to be applicable to the land claimed by the Crown. The following order of the District Judge sets forth his reasons :—

The sannas is an important document of title, conveying a right, as the defendants say, to some 7,000 or 8,000 acres of land. What is the account given of its custody, and of the reasons for its non-registration ?

The defendants' story is that it was in the custody of one Hapuwa, who, before his death, was very old, infirm, and blind. Indeed, he is represented as having been blind for many years. He is said to have kept the fact that he had the sannas in his possession a secret until a few days before his death. He then handed it to his son Tambiya. who has given evidence for the defence.

The date of the death of Hapuwa it is of great importance to fix. The defendants contend that it took place about 1881, and so after the period allowed for registration. It lay on them to establish this, but no serious attempt has been made to do so. Nothing could be looser than the evidence on this point ; but so far as there is agreement among the witnesses, a date twenty-five years ago is fixed as that of Hapuwa's death. Hapuwa's own son Tambiya, and Horatala, who calls himself grandson, both say it was twenty-five years ago, that is in 1871. These two ought to know better than the other witnesses, and I find accordingly that Hapuwa died about 1871. This agrees more or less with the evidence of Sundarahami, who says the death was twelve or fourteen years before the survey. Mr. Corea states that the survey was in 1886, and so the date of Hapuwa's death would be from 1872 to 1874. All this period, 1871–74, is prior to the expiration of the period to which the time for registration was extended under section 2 of the Ordinance, namely, 1st February, 1875. On Hapuwa's death his son Tambiya held the sannas. There is great contradiction as to the time when he first disclosed it to others. Hapuwa, the present headman, who ought to know, says, it was first made known in 1886, when, in consequence of lands in the village being surveyed by Government, the villagers were in want of deeds to prove their claims to land. Tambiya, on the other hand, says he showed the sannas to others a year or two after he got it. He therefore made it known in 1872 or 1873. Yet, again, he says he did not disclose its existence till five or six years ago. Such reckless contradictions induce very grave suspicion, and justify the Court in adopting the date least favourable to the defendants. I hold, then, that it must have been generally known about 1872 or 1873 that the sannas existed and that it was in Tambiya's possession, and the Court has a right to assume that this must have come to the knowledge of Horatala, who, in the year of Hapuwa's death, says he was making such diligent inquiries in order to find this sannas. Horatala, I find, had an interest in the land under the sannas at that time. He shows that he had very good reason to suppose the sannas was with Hapuwa, yet he quite unaccountably failed to press his search for it. From what he says, Hapuwa offered no opposition, but on the contrary desired him to find the sannas and get it registered. Horatala, I hold, was a person bound under section 6 of the Ordinance to inform the Registrar of the whereabouts of this sannas.

He did not do so. He is the person, or one of the persons, who in the present case produce the sannas in evidence. There was no cause utterly beyond his control preventing the registration of the sannas. On the contrary, very natural steps on his part would have secured its registration.

If, on the other hand, Tambiya, who was the first person to produce the sannas in evidence, namely, in the previous case 643, Chilaw, is still to be regarded as the person so producing, he is still more clearly disqualified than Horatala from claiming the benefit of the proviso. His only excuse for not registering it between 1871 and 1875 is his ignorance of the law. The proper interpretation of the expression "person producing it in evidence" was discussed during the argument. I think it is very evident that the words require to be restricted in interpretation in a reasonable manner, if the Ordinance is not to be rendered illusory, but in the circumstances of the present case it is not necessary to lay down what that interpretation should be. I will say, however, that there is a good deal to be said for the Solicitor-General's contention that Tambiya must still be regarded as the person producing, otherwise he has only to make a transfer of it to some other person, who could not have controlled the registration, and the sannas would then become admissible. It would be admissible at one moment and non-admissible at another, a result which could not have been intended by the Legislature, and which the Court must avoid by finding, if reasonably possible, some restricted interpretation of the words of the Ordinance. But whether Horatala or Tambiya be considered the person producing, the result is the same. I find the defendants not entitled to the benefit of the first proviso of section 7.

As to the applicability of the sannas to the land claimed by the Crown, it is not necessary to say much. It was for the defence to establish this. I consider they have wholly failed to do so, and I have the same complaint to make as was made by the Supreme Court in case 643, that the defendants should have indicated their claim on paper, and that there should be evidence of some trustworthy person who has examined the locality with reference to such sketch, and who could then speak as to the identity of the boundaries mentioned in the sannas with existing physical features, and as to the position of the land claimed. With reference to such features I am really left in doubt whether some of the supposed boundaries have any actual physical existence. The proof as to this part of the case is very meagre and slipshod, and altogether insufficient to satisfy the requirements of section 6 of Ordinance No. 12 of 1840.

And on the merits—that is, the question of prescriptive possession—the District Judge expressed himself as follows :—

This village Karawita-agara is shown to have an area of upwards of 800 acres, and to contain about 100 houses, with their separate gardens about them. There are fields, chenas cultivated with various kinds of crop, and cocoanut plantations of various ages. That all this should be held in common by the whole body of villagers under one single title would be a phenomenon so rare that I have heard of no case like it in Ceylon; but the defendants' Proctor having undertaken to establish the existence of this unique holding, I of course allowed him to enter into evidence.

Had he succeeded in showing that all the lands over which acts of ownership were being exercised within the village boundaries were really held in common as alleged, it would have gone very far towards proving his contention that all the land within those boundaries, including also the forest, did form one title. But the attempt, as was expected, wholly failed, and I wish to remark on the singular poverty and meagreness of evidence on the part of the defendants, considering the importance of their claim.

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I think, if their claim had been a substantial and *bonâ fide* one, there would not have been the lack of independent evidence, which is so conspicuous in this case.

Those who have given evidence are Horatala, the fourth defendant ; Elakiri Veda, a poor and ignorant man, who comes without summons, and is dependent on the defendants ; Tambiya, the person who produces the sannas ; Sinnappu Vedarala, who is also interested in the success of the present case ; Bandirala, vel-vidane ; and Sundarahami, a dismissed headman.

The two latter, though they make statements which might help the defendants, yet, in cross-examination, they both render their evidence worthless.

Such are the witnesses adduced for the purpose of establishing the tenure in common of all the land in the village Karawita-agara. Though they say that a share of the crop of the chena, or as the case might be, went to the general body of the villagers, not one of them is able to say how this was carried out in practice. Not a witness is adduced who says he ever received his share of the produce of lands cultivated by his neighbours. The witness Tambiya, who ought to know, never was present at the division of the produce of any of the lands in Karawita-agara, and he says that he does not know how the fields are held, but that the lands attached to the houses are separately possessed. I have no doubt that the alleged tenure in common of the whole of the land in the village is a fiction, invented and put forward for the purpose of this case. The defendants therefore are left to rely on such proof as they have adduced of acts of ownership of the particular lot claimed in the plaint. Here, again, the evidence adduced is conspicuously inadequate to their pretensions. Little or no value can be attached to the statements made by the interested witnesses called. Some of them say they cut fence sticks there, but the effect of this is quite neutralized by the admission of Sundarahami, that no permission is required to cut fence sticks in Crown land. It is suggested that large timber was also taken to be made into door-frames, &c., but the defendants have not taken the trouble to bring forward the witnesses who could prove the fact. But even if the villagers did take timber from the land in question, it is evident that the Crown never acknowledged their right to do so, though negligent headman may have connived at it.

The evidence establishes no use of the land, still less any possession of it adverse to the Crown. I find the Crown entitled to judgment. The defendants, as trespassers, are jointly and severally liable. I order that judgment be entered accordingly as prayed in items *a*, *c*, and *e* of the prayer of the plaint, together with Rs. 200 only as damages.

The defendants appealed.

The case came on for argument on the 29th July, 1897, before WITHERS, J., and BROWNE, A.J.

Dornhorst, for appellants.

Wendt, A. S.-G., for the Crown. *Cur. adv. vult.*

On a subsequent day their Lordships intimated that the case would be set down for re-argument before the Collective Court.

On the 5th November LAWRIE, A.C.J., and WITHERS, J., and BROWNE, A.J., heard the case.

Dornhorst, for appellants.

Rámanáthan, S.-G., for the Crown. *Cur. adv. vult.*

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The time for the registration of deeds dated before the Ordinance No. 12 of 1840 came into operation expired on 1st February, 1875. Any one desiring to read in evidence an unregistered old deed after that day had to prove—first, that the deed had been in existence prior to that date ; and second, to prove the cause why it had not been registered.

What is the cause shown by these defendants why this sannas (assuming it to have been in existence) was not registered before the 1st of February, 1875 ? They say, " We do not know why our " grand-uncle, who then was in possession of the sannas, did not " register it." In short, they show no cause at all, and the showing of a reason why the deed was not registered is a condition precedent to their being allowed to produce it in evidence.

The reason why the unregistered deed was admitted in the case reported in the IXth volume of the Circular was that the person producing the deed showed that it was for the interest of the holder between 1886–75 to withhold the deed from registration ; if he had registered it, his right would have been plainly a limited right under a *fidei commissum*, whereas he pretended to be absolute owner, and as such he executed the mortgage which was the subject of that action.

That, then, was a good cause why the deed was not registered, and the defendants' minority was a good reason why he did not force the registration by the procedure of the 6th section of Ordinance No. 6 of 1866.

In the case of these present defendants, who, I understand, were alive and of full age during the years from October, 1866, to February, 1875, they had to show reasons why the sannas was not registered, and they have (in my opinion) shown none.

The Ordinance applies only to deeds in private hands ; it does not effect public records, thombus, &c., in the public archives, nor the decrees of courts, and the like. Further, it affects deeds as titles to property : a deed, however old, may be produced to prove paternity or relationship, or marriage, or to prove any other fact than the creation, transfer, or extinguishment of title to property. I am of the opinion that as the defendants tendered in evidence this sannas for the purpose of proving that two hundred and fifty years ago the King of Kandy divested the Crown of the land in question, and that he created a right of property in one or more of his subjects, that sannas may not be received, because it was not registered and no cause was shown for the omission.

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The Attorney-General has rested the claim of the Crown on the presumption that this being a forest is the property of the Crown. Has that presumption been rebutted by the evidence led by the defendants ?

It is proved that these 41 acres (for that is the extent now in dispute) are in a populous village, that close at hand are the fields and the houses and the gardens of these defendants and their brother villagers. It is proved that from time immemorial the villagers have gradually cut down the forest, of which these 41 acres are the remnant, and have chenaëd and possessed ; that from the forest they have taken such timber and firewood as they needed. It is a bit of land which is indispensable to the prosperity, nay, even to the existence of a village, for who can live without firewood ? Is such a bit of land a forest within the meaning of the Ordinance ?

If there had been only one defendant who had proved the same acts of possession by himself and his predecessors in title for a third of a century, would he have rebutted the presumption in favour of the Crown ? Does it make a material difference that these defendants do not claim the forest as their own, to the exclusion of the rest of the village, but that they meet the claim of the Crown by proving the immemorial exercise of rights of many others than themselves, which they say is relevant evidence that this land is not Crown land.

Ordinance No. 12 of 1840 is too strong for me. I am obliged to answer all these questions in favour of the plaintiff. The property is in the Crown, and it is right to save the forest from being entirely destroyed.

WITHERS, J.—

This is an action by the Attorney-General to recover from ten persons a piece of Crown forest land, which it is alleged they have unlawfully cleared and taken possession of.

It was a part of the defence that the land cleared does not belong to the Crown, and to meet this part of the case a sannas was pleaded. The case came up first of all before Mr. Browne, A.J., and myself. We could not quite agree as to the effect of Ordinance No. 6 of 1866 with respect to this sannas, so we thought it better to have the case re-argued before the Full Court.

The sannas in question purports to bear date before the 1st day of February, 1840, and it was enacted by the 7th section of the Ordinance referred to that, from and after the expiry of the extended time for the registration of old instruments of title, no deed, sannas, ola, or other instrument on which title to land or

other immovable property is founded, which bears date on or before 1st February, 1840, shall be received in evidence in any civil proceeding in any Court of Justice for the purposes of creating, transferring, or extinguishing any right or obligation, unless such deed, sannas, ola, or other instrument shall have been previously registered in the manner heretofore directed.

It was not, as I understood, proposed to put this sannas forward as a document of the defendants' title to this land. It was spoken of as a royal grant to people for military services against the Portuguese. It was intended to show that the grantees were overlords of the tracts of land including this forest, and that the defendants were part of the village community, the descendants of those who originally held parcels of this land under the original grantees. Hence, this sannas was to be used rather to rebut the Crown's presumptive title to this forest land than to create a title in the defendants.

Looking, however, to the scope of the Ordinance which was to provide against the production in evidence in Court of Justice, and therefore against the manufacture of false deeds, &c., purporting to bear old dates, I take it that we must give the words of the 7th section which I have cited the most ample construction which they can reasonably bear, so that I interpret the section to mean that no unregistered document of a certain age shall be admitted as evidence of the creation, transmission, or extinguishment of any right or obligation in any one regarding immovable property. Thus, this document, as evidencing a title in the original grantees, though not in the defendants' predecessors in title, cannot, unless it comes within the proviso of the 7th section, be used to rebut the presumptive title of the Crown. Then comes the question, Is the sannas saved by that proviso ? The Judge finds, and I think he is justified in finding, that one Hapuwa was the holder of this sannas during the time fixed by the Ordinance for the registration of these old deeds. He further finds that Hapuwa died in the early seventies, and before his death committed this sannas to his son Tambiya.

Now it is not proved that Hapuwa and Tambiya were under any legal disability at the time, such as infancy or lunacy, and so not compellable to bring in the document for registration. If both those persons were in the Island at the time and were under no legal disability, then the omission to have this sannas registered shuts this document out. Apart from this sannas, it appears to me that the evidence led by the defendant has not displaced the Crown's presumptive title to the soil of the forest from which the defendants have cleared and appropriated ten cres. At the

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most there is some evidence that the residents of the village in which this piece of forest is situate, including the defendants and their ancestors before them, have practised chena cultivation in the neighbourhood of this forest, and have taken the produce of this forest for domestic and agricultural requirements. If those rights exist, the Crown will no doubt recognize them in a suitable way. But as between the Crown and the present defendants, the Crown is entitled to judgment.

BROWNE, A.J.—

I regret that in this case I am not able to agree with the views expressed by my Lord the Chief Justice and my brother, whose judgments I have had the opportunity of perusing. It appears to me, especially after the decision in *9 S. C. C. 102*, that as great stress should be laid upon the enabling proviso to the section as upon the debarring enactment in the commencement of it, that the Legislature intended to be perfectly just in the matter, and as such to recognize and legislate for the case of the innocent subsequent claimant just as fully as that of the apathetic original possessor, and to see that the sins of omission of the latter were not visited on the head of the former, unless he was a privy in estate or consenting to the original fatal apathy. I venture to differ from my Lord the Chief Justice, who holds the defendants concluded simply because they have not shown why the sannas was not registered within the 8½ years, and to suggest that it is sufficient that they can show they are not only not responsible for the omission, but even did their best to have the requirements of the law fulfilled. My brother, too, holds merely that the document is excluded by the omission to register it made by Hapuwa and Tambiya, and he has not adjudicated upon the claim of the defendants that they are deserving to have this omission not visited upon them.

If CLARENCE, J., was right in holding that to give effect to the proviso would nullify the enactment, my fears would be exactly the converse; that to construe the enactment of restraint too strongly would nullify the proviso and the purpose it indicated; that the case of every claimant should be dealt with on its own individual merits.

When the time came that the sannas here tendered in evidence by these defendants should be registered, it was in the possession of others who did not register it. It is sufficient, so far as regards the first part of clause 7, merely to say that they did not. The cause is possibly unknown to these defendants. It may be suggested it was out of some greed on the part of Hapuwa that it

might enrich him or his family hereafter. Nothing certain is known beyond two things: he did not do it; and he so abstained, when, defendants say (and I see no reason why they should be disbelieved), they were doing their best to discover where the sannas was and have it registered.

In this case the first part of section 7 may be dismissed from consideration. The second part, the rights under the proviso, has alone to be adjudicated upon.

The Legislature was careful to be perfectly just in its enactments, and to prevent the sins of omission of a miserly or apathetic possessor at the time when registration should not be made being visited on the head of one who was in nowise to blame by his own acts therefor, or, as privy in estate, legally liable for the conduct of his predecessor.

This Court in construing the Ordinance has recognized this purpose of Legislature. It has considered in *9 S. C. C. 102*, whether one producing it should be held entitled to the benefit of the proviso with the result that he ultimately was allowed it on the ground of his minority. In another unreported case (89,838, D. C., Colombo) it did not allow my contention as counsel for a purchaser to be allowed its benefits when his vendor had not registered. Each case was to be dealt with on its own merits, and I venture to differ from my Lord the Chief Justice and my brother, for that in my judgment the claimant here has sufficiently brought himself within the benefit of this proviso, and that their judgments do not show wherein he is disentitled thereto.

What more could one interested do than inquire where the sannas was in order to have it registered? Not knowing who had it, he could not act under section 6. He is met with a sedulous concealment of its existence, and when, on his rights being first assailed, he discovers it and puts it forward, I find no reason advanced why he should not be held free to adduce it.

In the case I have quoted, CLARENCE, J., feared that to give effect to the proviso would nullify the enactment; my fear in this instance is that in looking too closely at the deliberate omission of another we may lose sight of the rightful claim of the defendants.

In the absence of the sannas I agree that the alternative branch of the contention can be supported, for there is wanting a union of the several acts of possession, as taking firewood, creepers, &c., each of which would enure to the benefit of another by reason of the actors being members of a community. I would desire to concur in the hope expressed that the privilege hereto enjoyed may, however, be conceded out of the grace which previously Government desired to show towards the villagers.