1935

Present : **Koch J.**

PIYARATNE UNANSE *v.* NANDINA.

116—C. R. Kandy, 15,023.

Evidence—Document not produced at trial—Existence unknown to party—admission in appeal—Buddhist Temporalities Ordinance, No. 19 of 1931, ss. 26 and 27.

An official document the existence of which was not known to a party during the trial may be admitted in appeal.

Section 27 (1) of the Buddhist Temporalities Ordinance does not apply to the lease of a paraveni pangu tenant's interest in temple land.

APPEAL from a judgment of the Commissioner of Requests, Kandy.

C. V. Ranawake (with him *Mackenzie Perera*), for plaintiff, appellant.

N. E. Weerasooria, for second defendant, respondent.

July 12, 1935. KOCH J.—

The only question that arises in this appeal is whether the land Piliangewatte of about 2 pelas and 5 lahas is a maruwena or a paraveni pangua belonging to the Uda Aludeniya Vihare.

If it is maruwena pangua, then the lease by the first defendant to the second defendant of this land will, under section 26 of Ordinance No. 19 of 1931, be invalid and of no avail in law. If it is a paraveni pangua, then the lease would hold good.

It was argued in the lower Court that even if the land was a paraveni pangua, under section 27 of this Ordinance there were certain obligations on the part of the obligee which, not having been fulfilled, rendered the lease void.

The learned Commissioner is right in holding that this section only applies to transfers and does not extend to leases, and second defendant's counsel would also appear to be right when he argued that a breach of the obligations would only result in a prosecution and would not necessarily affect the validity of the transaction.

No oral evidence for the defence has been called. The decision must turn on the documents relied on by both parties, coupled with the evidence of the plaintiff.

It is true that the plaintiff in his evidence does say that the land is maruwena, but if the documents prove that the land was not, the oral

evidence is valueless. If on the other hand the documents are not conclusive, weight may rightly be given to his evidence. Section 10 of Ordinance No. 4 of 1870 gives a final and conclusive effect to the findings of the Commissioner appointed under that Ordinance to inquire. The record of these findings is to be found in the documents P 1 and D 1, which are really one.

The plaintiff depended on P 1 on the entry No. 4, which gives the name of the pangua as *hewisi* and the description as maruwena. He also stated that the first defendant was his tenant and performed services by playing the tom-tom which is *hewisi*. The evidence already recorded on his behalf is not sufficient to show that the Piliangewatte described in his schedule comes within the *hewisi*. On the other hand, the Piliangewatte which is mentioned overleaf and described as paraveni is 2 pelas in extent, and not 2 pelas and 5 lahas. The latter entry is what is depended on by the second defendant.

The burden was on the plaintiff, and on the evidence placed before the learned Commissioner, the Commissioner perhaps could not come to any other conclusion than he did.

The appellant, however, in appeal has filed an affidavit with a document annexed and has moved that this document be taken into consideration. His counsel has argued that the effect of this document is to turn the scale completely in favour of the plaintiff, as this document has reference to two Pilangewattes, one of which is described as paraveni being 2 pelas in extent only, and the other which comes within the *hewisi* being maruwena and is 2 pelas and 5 lahas in extent, and it is the latter which is the land in dispute in this case. The plaintiff in this affidavit has stated that he discovered this document after the trial but before the judgment, and that he brought this fact to the notice of the learned Commissioner just before judgment was delivered. There appears to be truth in this statement as there is a note by the learned Commissioner relevant to this point immediately after the entry "judgment read in open Court".

I think the Commissioner was right in not interrupting the delivery of his judgment that was already ready, merely because this fact was immediately before brought to his notice, but it is a different matter when properly presented to this Court in appeal. There was objection on the part of the second defendant's counsel to this application being entertained. He relied on the decision in *1 Balasingham's Notes, p. 74 (S. C. M. of May 8, 1913)*. Plaintiff's counsel relied on the cases of *Senadarage Appu v. De Silva* [1] and *Jandiris v. Deve Renta* [2].

In the latter case His Lordship Macdonell C.J. laid down that the power of this Court to entertain such an application must be exercised with caution, but where the fresh evidence discovered was documentary and not oral, and particularly where it came from a record of a Court, the danger of accepting such a document at a late stage was reduced to a minimum.

[1] *1 Times Law Report 139.*

[2] *33 N. L. R. 200.*

The document now relied on is a Government document, and I am satisfied that its existence was not known to the plaintiff during the trial. In these circumstances I think his application should be allowed on terms.

The judgment of the learned Commissioner is *pro forma* set aside and the case sent back for further consideration of the identity of the land described in the plaintiff's schedule in reference to the new document. The Commissioner will give this document its appropriate weight and consider its effect with reference to P 1 or D 1 and other documents produced. Both parties will be entitled to call further evidence to explain this new document. If the second defendant has also discovered fresh documentary evidence since the trial, he will be entitled to lead such evidence. The Commissioner after this will deliver his judgment. The second defendant will be entitled to all costs incurred in the lower Court up to date. Costs of appeal and further trial will abide the final event.

Sent back.