1950 *Present :* **Jayetileke C.J. and Swan J.**

WADUGANATHAN CHETTIYAR, Appellant, *and*
GUNASENA, Respondent

S. C. 457—D. C. Kandy, 1938 L

Sale—Two portions of same land—Sale of one portion together with its appurtenances—Meaning of "appurtenances"—Effect on the rights of the owner of the other portion.

If a person erects a house and sinks a well thereto in another portion of his land and conveys water by pipes to his house, and afterwards sells the house with the appurtenants, excepting the land, or sells the land to another reserving to himself the house, then, the pumps, machinery, pipes and buildings installed at the well pass with the house because they are necessary and quasi-appurtenant thereto.

APPEAL from a judgment of the District Court, Kandy.

Lot A and lot B were two portions within a rubber, tea and cocoa estate. Lot A contained the factory and lot B contained the bungalow. To provide the factory with a constant supply of water a well was sunk two miles away and pumps, machinery, pipes and buildings were installed at the well to take the water up to the bungalow and from the bungalow, through pipes, to the factory. There was no doubt that the pumps, machinery, pipes and buildings were installed in order to get water to work the factory during drought.

When the estate was sold by the owners, the purchaser transferred several portions of it to different persons. Lot A, which contained the factory, was sold to the defendant along with "the machinery used for or in the working of the factory" and "the appurtenances belonging to or appertaining or said to belong or appurtenant to the factory block". Lot B, which contained the bungalow, was sold to the plaintiffs together with "the machinery, pipes, sheds and other buildings made or used in connection with the water supply to the bungalow".

The plaintiffs instituted this action against the defendant to be declared the owners of the pumps, machinery, pipes and buildings installed at the well.

H. V. Perera, K.C., with *C. Thiagalingam* and *V. Arulambalam*, for the plaintiffs appellants.

N. E. Weerasooria, K.C., with *C. E. S. Perera*, *H. W. Jayewardene*, *J. W. Subasinghe* and *Izadeen Mohamed*, for the defendant respondent.

Cur. adv. vult.

November 7, 1950. JAYETILEKE C.J.—

The plaintiffs instituted this action against the defendant to be declared the owners of the pumps, machinery, pipes and buildings at B in the plan (P7) dated February 9, 1948, made by E. R. Claasz, licensed surveyor, and for the recovery of damages.

The Land and Produce Co. Ltd. (hereinafter referred to as the Company) owned the following estates which were planted with rubber, tea and cocoa:—

(*a*) Maha Levakanda, containing in extent 885 acres 3 roods 6 perches.
(*b*) Sunderland Estate, containing in extent 209 acres 1 rood 35 perches.
(*c*) North Matale Estate, containing in extent 823 acres 2 roods 33 perches.

All the estates were situated in the Matale District which was subject to very severe droughts for about six months in the year.

By an indenture bearing No. 5237/1047 dated August 28, 1943, attested by S. A. Wijetilake and Neil de Saram, Notaries Public, (P1), the Company agreed to sell the said estates to Habeebu Mohamadu, Rasamma Ramasamy, and E. M. Geddes for a sum of one million one hundred thousand rupees (Rs. 1,100,000).

The recitals in the indenture bearing No. 5264 dated November 1, 1943, attested by S. A. Wijetilake, Notary Public, (P2), show that Habeebu Mohamadu, Rasamma Ramasamy, and E. M. Geddes had entered into the following agreements among themselves at the time they entered into the indenture P1:—

(*a*) That Habeebu Mohamadu should pay the Company a sum of Rs. 352,000 and take a transfer of Maha Levakanda Estate.

(*b*) That Rasamma Ramasamy should pay the Company a sum of Rs. 192,500 and take a transfer of Sunderland Estate.

(*c*) That E. M. Geddes should pay the Company Rs. 555,000 and take a transfer of North Matale Estate.

By the indenture P2 the Company transferred Maha Levakanda Estate to Habeebu Mohamadu, Sunderland Estate to Rasamma Ramasamy, and North Matale Estate to E. M. Geddes.

The factories for manufacturing rubber, tea and cocoa stood on North Matale Estate and they were all included in the transfer to Geddes. The evidence given at the trial by Geddes shows that, when he entered into the indenture P1, he had agreed to transfer to the defendant all the factories together with an extent of thirteen acres surrounding them for a sum of Rs. 130,000, and that the defendant paid him a sum of Rs. 12,500 to enable him to pay his share of the deposit that was given to the Company when P1 was executed, and the balance sum of Rs. 117,500 direct to the Company. He said further that, from the start, the defendant was interested in buying the factory and the block of land on which the factory stood and nothing else, and that he was "merely the nominee of the defendant for the factory block".

The defendant lived quite close to North Matale Estate for many years, and the probability is that he was aware that the pump and machinery at B in P7 were essential to work the factory.

On the same day that P2 was executed Geddes executed several deeds whereby the transferred several portions of North Matale Estate reserving to himself the bungalow block in extent about 400 acres. He transferred,

(*a*) to the defendant by deed 5265, attested by S. A. Wijetilake, Notary Public (P3), a divided allotment of land called and known as "the North Matale Factory Block" containing

in extent 13 acres together with the rubber, tea and cocoa factories, stores, teamaker's, clerk's and engine driver's quarters, office rooms, cooly lines and all other buildings thereon and all the machinery, tools and implements used for or in the working of the said factories, together with all the furniture, fittings and fixtures thereon, and all the appurtenances whatsoever to the said North Matale Factory block belonging or appertaining or be said to belong or be appurtenant thereto and all rights, privileges, easements, servitudes, rights of way and appurtenances whatsoever to the said premises belonging or used or enjoyed therewith or reputed or known as part and parcel thereof.

(*b*) to one Wimalasena and another by deed No. 5267 attested by S. A. Wijetilake, Notary Public (P4), an extent of 152 acres called the North Matale Madawela block "excepting and reserving unto the vendor and his aforementioned owner or owners for the time being of all that Estate called and known as North Matale Estate the full and free right and liberty and licence at all times of using the water from the well or spring situated on the said premises for supplying water to the bungalows on the said North Matale Estate for all purposes as heretobefore used or enjoyed and all pumps, machinery, pipes, sheds and other buildings made or used in such connection which shall belong to and remain the property of the said vendor".

The defendant said that the deeds were executed at the same time but there is no evidence that he was aware of the contents of P4. Ten months later, Geddes transferred to one Stevenson about 235 acres out of the bungalow block, and he was left with 165 acres of tea with the bungalow, which he transferred to the plaintiffs by deed No. 2973 dated November 19, 1945, attested by Nigel I. Lee, Notary Public (P6), together with the pumps, machinery, pipes, sheds and other buildings made or used in connection with the water supply to the said bungalow standing on the North Matale Madawela Block, and the full and free right and licence at all times of abstracting water through the existing pipe line from the well or spring marked L in inset of plan No. 363 dated October 12, 1943, made by E. R. Claasz, licensed surveyor, for the use of the bungalows on the said premises, and to enter upon and pass and repass on and along the said North Matale Madawela Block for the purpose of repairing the said well or spring and repairing and replacing the said pumps, machinery, pipes, sheds and other buildings with labourers or workmen or requisite materials and all rights, privileges, easements, servitudes, and appurtenances whatsoever to the said premises belonging.

The plaintiffs alleged that the pumps, machinery, pipes, and buildings at B in the plan passed to them on deed P6, and the defendant alleged that they passed to him on deed P3. Each party conceded to the other the right to take water from the well, if necessary, by installing a separate pump and an engine.

The evidence of Mr. Midelmiss, an Engineer employed at Messrs. Brown and Company, shows that up to the year 1939 there was a well near the factory from which water used to be pumped for use in the factory, bungalow, and lines by the engine in the factory. The water was pumped from the well into an overhead tank in the factory, and conducted by pipes into the factory and to a cistern near the bungalow from which the pipes were laid to the bungalow and to the labourers' lines. In 1939, owing to the drought, work in the factory had to be stopped, at times during the day, for want of sufficient water, and the Company requested Messrs. Brown and Company to inspect the Estate and devise some means of providing the factory with sufficient water to work it throughout the year. Mr. Midelmiss proceeded to the Estate in July, 1939, and, after an inspection, decided that the only way of providing the factory with a constant supply of water was by installing a pump and an engine to pump the water from the stream two miles away. He, accordingly, sank a well at B in the sketch, built a shed, and installed a pump and a five-horse-power diesel engine in it. He thought that it would be too expensive to have a direct pipe line from B to the factory, and he decided, for the sake of economy, to take the water up to the bungalow tanks and from there through gravitation through the existing pipes to the factory. Mr. Midelmiss' evidence leaves no room for doubt that the pump and the engine were installed at B in order to get water to work the factory during the drought. The factory Machinery and Insurance book D 1 which was in the factory when the defendant took it over from the Superintendent shows that the engine installed at B was regarded by the Company as part of the machinery belonging to the factory. There is a sharp conflict of evidence between Geddes and the defendant as to whether the key of the shed at B was with Geddes or with the man in charge of the shed. Geddes said that he had the key, and he gave it to Martin, the factory engine driver, and requested him to pump the water to the bungalow, as he did before, promising to pay him something for his trouble. Martin pumped the water for a few days, whereupon, the defendant offered to pump the water from the factory well on payment of a nominal sum. He accepted the offer, and the defendant supplied the bungalow with water from the factory well from November, 1943, up to November, 1945, and charged him Rs. 15 a month at the commencement and Rs. 30 to Rs. 40 a month later. About four or five months after November, 1943, a dispute arose between him and the defendant about the key, but he was unable to take any action in regard to it for want of funds. He did not say how the key came into his possession. The defendant denied that the key was at any time with Geddes. He said that when he took over the factory the Superintendent sent for the key which was with the watcher of the shed at B and gave it to him. The learned District Judge has not specifically dealt with this point in his judgment but there are indications in the judgment that he preferred the evidence of the defendant to that of Geddes. He has said " The evidence of the defendant irresistibly leads one to the conclusion that it was always intended that this particular source of water, the engine, the pump, &c., were considered part and parcel of the appurtenances of the factory ". The probabilities also seem to support the

defendant's version. The following passage in the evidence of Geddes shows that he took very little interest when the Estate was handed over by the Superintendent :—

> " The day after the deeds were signed I went to the Estate. Mr. Pern was in the Estate bungalow when I went. Defendant also went to the Estate bungalow. Defendant was given possession of the factory by Mr. Pern but not in my presence. I remained in the compound of the factory but I did not go inside the factory when Mr. Pern went to deliver possession to the defendant. I was in the compound with other buyers. Mr. Pern and the defendant went inside the factory. I did not look to see what the two of them did inside the factory. If the defendant says that Mr. Pern delivered the inventory book to him I do not deny it ".

It seems to us that the question whether the defendant is entitled to the engine, pump, and pipes at B depends on what is meant by the words " the machinery used for or in the working of the factories " and " the appurtenances belonging or appertaining or said to belong or appurtenant to the factory block " in P3. It is clear from D1 that the engine was regarded by the Company as part of the factory machinery, and from the evidence of Mr. Midelmiss that the engine, pump, and pipes at B were used for and in the working of the factories purchased by the defendant. We are of opinion that the learned District Judge came to a correct conclusion when he held that the engine, pump, and pipes from one unit which comes within the words " machinery used for or in the working of the factory ".

Mr. Perera contended that P4 shows that Geddes did not intend to convey to the defendant the engine, pump and pipes. It is no doubt true that in P4 Geddes reserved to himself the engine, pump and pipes but the defendant cannot be affected by it. If, in fact, P3 conveys them to him, any secret intention Geddes may have had in his mind cannot prevent them from passing to him. Goddes said that the defendant knew that he was reserving them for the use of the bungalow, but his evidence does not seem to have been accepted by the learned Judge. It is certainly not supported by P3, for, if he had arranged with the defendant to make such a reservation, there is no reason why it should not have been inserted in P3. It is not at all likely that the defendant knew that Geddes was going to reserve to himself the pump and the engine because the factory would have been of no use to him during the drought without the pump and the engine.

Mr. Weerasooria argued that, in any event, the pump, engine, pipes and the shed at B must be regarded as appurtenants of the factory and he relied on two cases *Nicholas v. Chamberlain* [1] and *Watts v. Nelson* [2]. In *Nicholas v. Chamberlain* it was held that if one erects a house and builds a conduit thereto in another part of his land and conveys water by pipes to his house, and afterwards sells the house with the appurtenants excepting the land, or sells the land to another reserving to himself the house, the conduit and pipes pass with the house because it is necessary

[1] *Cro. Jac. 121*

[2] *24 L. T. 209*

and quasi-appurtenant thereto. In *Watts v. Nelson* the owner of two adjoining properties conveyed to the plaintiff one of them which consisted of a house, stalls for feeding cattle, and a yard and outbuildings and he so conveyed it with " all waters, watercourses, rights, &c., to the same hereditaments, belonging or with the same held, used, enjoyed or reputed as appurtenant thereto ". The defendant afterwards became the owner of the other property, from which there was a small natural water course flowing to the plaintiff's premises, and in this stream there was at the time of the conveyance to the plaintiff, a tank, which was on the other property which stopped the natural flow of the water, and an artificial culvert which conducted the water to another tank also in the latter property whence two pipes conducted it to the plaintiff's yard and cattle sheds for the purpose of supplying which the culvert had been expressly made. The plaintiff sought to restrain the defendant by an injunction from obstructing and diverting the watercourse. Referring to the judgment in *Nicholas v. Chamberlain* Lord Justice Mellish said " This case has always been cited with approval and is identical not only in principle but in its actual facts with the case now before us ". It seems to us that these two cases are on all fours with the present case. We do not think they can be distinguished on the ground that what was sold by P3 was not the factory but 13 acres of land including the factory. The evidence is very clear that the defendant was interested in the purchase of the factory only. Perhaps he had to purchase 13 acres of land because the stores, the office room, the clerk's, teamaker's and engine driver's quarters and the factory labourers' lines were spread over that area.

The judgment of the learned District Judge is, in our opinion, correct. We would, accordingly, dismiss the appeal with costs.

SWAN J.—I agree.

Appeal dismissed.