1926.

Present: Branch C.J. and Akbar A.J.

RATWATTE BASNAIKE NILAME *v.* DE SILVA *et al.*

179—D. C. Kegalla, 5,089.

Action for declaration of title to bandara *land—Burden of proof—Probative value of extent entered in Service Tenures Register—Ordinance No. 4 of 1870.*

In an action by the Basnaike Nilame of a temple for a declaration that a portion of a land, in a Dewalagama, in the possession of a *paraveni nilakaraya* was the absolute property of the temple,—

Held, that the burden was on the plaintiff to prove that the land was *muttetu*.

Held further, that the extent assigned to a *pangu* in the Service Tenures Register was not conclusive on a question relating to the area of the *pangu*.

APPEAL from a judgment of the District Judge of Kegalla.

Hayley (with *Navaratnam*), for added defendant, appellant.

H. V. Perera, for plaintiff, respondent.

December 21, 1925. AKBAR A.J.—

The plaintiff in this action, who is the Basnaike Nilame of the Mahadewala temple of Kandy, claims that the temple be declared entitled to three lots of land marked as lots A, B, and C in plan P3 filed in the action and for ejectment of the added defendant and damages.

The added defendant, on the other hand, asserts that these lots are part of the *paraveni* land called Illuktennehena, to which he claims title on deeds produced by him, and in the alternative claims compensation for improvements effected by him in case it is held that he is not entitled to these lots.

The District Judge has in his judgment decreed that plaintiff be declared entitled as trustee to lots A and B, and he has allotted lot C to the added defendant.

In the view that I have taken of this case I need only mention the first two issues tried by the District Judge. They were as follows:—

(1) Is the whole of the village of Galpatha a Dewalagama ?

(2) Are the portions in dispute (lots A, B, and C) *muttetu* alias *bandara* lands or are they *paraveni* lands ?

At the very beginning of the trial it was admitted by Counsel for the added defendant that the portion of the Galpatha village depicted in plan P1 (of which plan P3 is an enlarged copy) was a

Dewalagama and that the Dewala was the overlord. So that the only issue which is at all material for the purposes of this appeal is the second issue.

Now, this case had come up in appeal once before, and De Sampayo J. in sending back the case for a new trial clearly stated that the plan P1 proved nothing, and that the burden of proving the title of the temple was on the plaintiff. The admission by the added defendant, that the portion of the Galpatha village depicted in plan P1 and therefore that lots A, B, and C in plan P3 were a Dewalagama and that the Dewala was the overlord does not displace the burden of proof, and therefore does not carry the case any further so far as the plaintiff's claim is concerned. I say so for this reason. A Dewalagama area, as De Sampayo J. himself indicated in his judgment referred to above, may well include *paraveni* tenants' holdings as well as *muttetu* or *bandara* lands.

The admission of the added defendant only amounts to an admission that the lots in question are either *bandara* lands or *paraveni* lands. The added defendant is now in possession, and the plaintiff himself has put his claim on the footing that these lots are *bandara* lands; and further, it is admitted that if these lots are *paraveni* lots, the plaintiff cannot succeed in this case. That being so, it seems to me that the burden of proof can only shift to the added defendant to prove his title as *paraveni* tenant on his deeds, when and only when the plaintiff has proved the further fact that the lots in question are *bandara* lands. The Supreme Court came to a similar conclusion in an old case reported in Volume 2 of *Perera's Collection of Kandyan Law Cases, p. 313.* The District Judge, if one may judge from his judgment, appears to have thought otherwise, for his judgment is concerned mainly with an examination of the question whether the added defendant has proved his title to the lots in question; and he has assumed that if the added defendant fails to prove his title then judgment should be given in favour of the plaintiff.

Counsel for the respondent ingeniously argues on this part of the case that he has led sufficient evidence apart from the admission of the added defendant to shift the burden of proof from plaintiff's shoulders. But has he? The evidence of the temple vidane is very meagre, and he appears to be speaking of an event that took place when he was a boy ten years old. His readiness so glibly to testify to an episode of his childhood assumes a sinister aspect when we take into account the insinuation that is made against him by the defence. Then there is the evidence of the extent bought by the added defendant, which has been stressed by the District Judge. It is true that according to the Service Tenures Register (P2) the land called Illuktennehena, which added defendant says includes lots A, B, and C, is stated to be one amunam

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and 2 pelas paddy sowing extent, which is equivalent to 7½ acres in English measure. It is, therefore, argued that added defendant's claim, which comprehends an extent of nearly 25 acres, cannot possibly include the lots A, B, and C.

But section 10 of Ordinance No. 4 of 1870 nowhere says that the entry is conclusive evidence, or even of any probative value, so far as the extent of the *pangu* is concerned. To show how uncertain this measure of amunams and pelas is, I need only quote an example from this very case. It is admitted by the plaintiff himself that added defendant is entitled to lot D in P3, which is shown as nearly 11 acres, whereas according to P2 it should be no more than 7½ acres. Further, the District Judge has allotted lot C also to the added defendant as part of Illuktennehena, which brings the acreage up to nearly 13 acres. I have mentioned this example to show that where the law omits deliberately to state that the register is to be evidence of the extent of a *pangu*, it did so because it was recognized that the extent stated in the register was uncertain, and that it was not calculated on a proper survey, but on mere vague conjectures of the parties concerned.

There is a further point that the added defendant's earliest deed D5 gives the eastern boundary as the Galatula of Bandarahena, and that in the later deed D3 this selfsame eastern boundary is given as the rubber estate and Udumahagalenda. It is argued that these two facts show that the added defendant's claim has been exaggerated purposely to include a larger area since the date of the earlier deed. This argument, however, makes two assumptions: first, that this rubber estate, which is shown as Dunedin estate in D1 and D2, was a rubber estate in 1908, the date of D5; and secondly, that Illuktennehena in P2 was lot D and not lot B, which is the very point which has to be decided in this case, for it may well be that Dunedin estate itself was unplanted in 1908, and that that portion of it at the spot where it touches lot B was regarded as *bandara* lands at the time. The District Judge has, as I have stated, reversed the proper order on the question of burden of proof, but as he makes a point of discussing the position of certain rocks in plan P3, I think I must state that it seems to me to be highly unsafe to assume as the District Judge has done in this case, without verification by observations on the spot, that the rocks mentioned in added defendant's deeds are or are not identical with those in P3, merely from their names. One example will, I think, be ample to show why I think this line of reasoning is bound to lead to serious difficulties. The temple vidane says that a portion of Illuktenne forms the northern boundary of Navgalla rock. The northern boundary of Navgalla rock as shown in P3 appears to be lot B. If so, lot B must be a part of Illuktennehena.

To sum up my conclusions, the burden of proof was on the plaintiff to prove his title to lots A, B, and C, and he has failed to discharge this burden. The evidence that he has led is of the most flimsy character, and at the end of his case there was really no case for the added defendant to meet. Even if we take the latter's deeds into consideration as admissions against himself, owing to the uncertainty of the Sinhalese measure of extent and the positions and names of rocks shown as boundaries, it seems to be unsafe to hold that the mere production of these deeds by the added defendant has the effect of shifting the onus to him to prove his title.

I would allow the appeal, and dismiss the plaintiff's action with costs in both Courts.

BRANCH C.J. concurred in a separate judgment.

Appeal allowed.