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Present: Wood Renton C.J.

THE ATTORNEY-GENERAL *v.* PUNCHIRALA

328—C. R. Anuradhapura, 7,520.

Chena lands in Kandyan Province—Prescriptive title cannot be established against the Crown.

Prescriptive title cannot be established against the Crown in the case of chena lands situated within the Kandyan Provinces.

THE facts appear from the judgment.

van Langenberg, K.C., S.-G., and *V. M. Fernando, C. C.*, for plaintiff appellant.—The Commissioner has found as a fact that the land in question is chena land. The only proof of its being private property is indicated in section 6 of Ordinance No. 12 of 1840. In the absence of such proof the land must be " deemed, " *i.e.*, taken conclusively to be the property of the Crown.

Counsel cited *5 N. L. R. 98;* 161—C. R. Kegalla, 5,024 (19-6-05); 333—D. C. Ratnapura, 1,309 (5-4-05); D. C. Kegalla, 3,129 (12-9-13).

The translation of deed D 2 is incorrect, and the defendant has not even paper title to the land in question.

According to the Kandyan law prescriptive title could not be set up against the King. 6,418—Agent's Court, Ratnapura (S. C. M. Nov. 1, 1833).

J. S. Jayewardene, for the defendant, respondent.—The finding of the Commissioner as to the nature of the land is not correct. The land is forest and not chena land. Even if it is chena land, it is not shown to be cultivable only after intervals of years. The word " deemed " means " presumed. "

Counsel relied on 268—C. R. Panwila, 273 (30-11-93); 295—C. R. Gampola, 1,094 (14-12-93); *4 N. L. R. 135; N. L. R. 226.* In the last-mentioned case it has been held that prescriptive title can be acquired in the Kandyan Provinces as against the Crown, thus over-ruling the judgment of Marshall C.J. It is too late now to question the correctness of the translation of deed D 2.

The Ordinance No. 12 of 1840 does not expressly take away the right to acquire a title by prescription as against the Crown.

Cur. adv. vult.

February 19, 1915. WOOD RENTON C.J.—

The plaintiff, the Attorney-General, sues in this case for a declaration of title to a land, Weeragahahena, in the district of Anuradhapura,

as the property of the Crown. The defendant claims it under a deed of transfer No. 2,142 dated July 24, 1875 (D 1), from Loku Bandara Mahatmaya, who purchased it by deed No. 370 dated December 23, 1867 (D 2), from Pinhamy, and also by prescriptive possession. At the original trial the learned Commissioner of Requests gave judgment in favour of the defendant, holding that the land was included in his deeds, and also that he had established title to it by prescription. The Attorney-General appealed. The appeal was argued before me on November 4, 1914, and I then sent the case back for further inquiry and adjudication on the questions: (1) whether the land in suit was chena or forest land; or (2) whether it was chena land that has become forest land, and if so, at what date? At the further inquiry Mr. Lushington and Mr. Sargent of the Forest Department, and Mr. Muttucumaru, the Chena Muhandiram, within whose district the land is situated, were examined on behalf of the Crown. No additional evidence was called for the defence. The Commissioner of Requests held that the land in question was chena, that it came, therefore, within the scope of section 6 of Ordinance No. 12 of 1840, and that under that section prescriptive title cannot be established against the Crown in the case of lands situated within the Kandyan Provinces. He, therefore, gave judgment in favour of the plaintiff with costs. The defendant appeals.

I shall dispose at once of several points of comparatively minor importance which were argued before me on the hearing of the appeal. I see no reason to differ from the findings of the learned Commissioner of Requests at the further inquiry. The land is therefore chena land. Some question was raised by counsel for the Crown as to the correctness of the English translation of the deed D 2. But the Sinhalese Interpreter Mudaliyar of the Supreme Court has compared it for me with the original, and assures me that the translation is correct, and that the deed purports to convey to Loku Bandara Mahatmaya, not merely the land particularly described in the latter part of the third paragraph, but the whole village mentioned in the earlier. The defendant has thus paper title to the land. I do not think that the evidence is strong enough to establish prescriptive title, although the fact that the paper title is in the defendant, of course, adds weight to the *viva voce* evidence of possession. But I will assume for the purposes of this judgment that the defendant and his predecessor in title have possessed the land in a sense which would ordinarily give them the benefit of the provisions of section 3 of the Prescription Ordinance, No. 22 of 1871. We are, therefore, brought face to face with the question whether by prescription a title under that section can be set up against the Crown in the case of chena lands within the Kandyan Provinces. Apart from authority, the answer to this question would appear to me clearly to be in the negative. Section 6 of

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Ordinance No. 12 of 1840 provides that "all chena and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan Provinces (wherein no thombo registers have been heretofore established), be deemed *to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by* such person of a sannas or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues, or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts."

The natural interpretation of this language is that no title can be set up against the Crown to lands of the class dealt with in the section save a title by sannas, or by grant, or by payment of customary taxes, dues, or services within the prescribed period. The word "deemed," as has often been pointed out by this Court, has not an invariable meaning. Sometimes it signifies "presumed," at other times it means "shall be taken conclusively to be." But the force of the clause in section 6, which I have italicized, depends not solely nor mainly on the use of the word "deemed," but on the express limitation of the kinds of title that can be set up to chena lands within the Kandyan Provinces which is introduced by the words "except upon proof only," and also on the mere presumption created by the rest of section 6 as regards forest, waste, unoccupied, or uncultivated lands, and chena lands in all other districts in the Colony.

Considerable light is thrown on the interpretation of section 6 of Ordinance No. 12 of 1840 by an unreported decision, unearthed by the industry of the Solicitor-General and Mr. V. M. Fernando, of Sir Charles Marshall C.J. in the case of *Chandereseke Mudianselay Mudalihamy v. Molligodda Adigar* [1] in 1833. The facts are not stated in the judgment itself, and the record cannot be found. But a copy of the proceedings has been incorporated in the record next in number (No. 6,419) of the same tribunal, viz., the Agent's Court, Ratnapura. From this record it appears that the property in dispute, a village Mililleweitiya, had originally been the paraveni property of the plaintiff's family, had in great part been acquired by the Megastenna Adigar, either, as the plaintiff alleged, by force, or, according to the defendant, by purchase, had been confiscated by the last King of Kandy, and after his deposition had been forfeited to the Crown, through whom the defendant claimed. The Agent's Court dismissed the plaintiff's action, and this judgment was affirmed by the Supreme Court on appeal. "Any title by prescription," said Sir Charles Marshall, "which the defendant could set up must be against the Government, all confiscated property having

[1] *(1833) S. C. Mins., November 1, 1833; No. 6,418, Agent's Court, Ratnapura.*

devol ed on the Crown. But no prescription runs against the King either as regards his general prerogative or as respects the Kandyan Proclamation of Prescription. Whatever part, therefore, of the village still remains unconceded is the property of Government, and to the Government consequently must the plaintiff's application be made."

This decision perhaps explains the distinction drawn by section 6 of Ordinance No. 12 of 1840 between lands in the Kandyan Provinces and those situated in other districts, on the ground that the former had been the property of the Kings of Kandy, from whom all tenures were derived, and to whose rights the British Sovereign succeeded.

The authorities on the point before us are not, however, unanimous, and if I had found it necessary to do so, I should have referred the matter to a bench of three Judges in order to have the rule of law settled once and for all. It appears to me, however, that the balance of judicial opinion, including two decisions by two judges, is on the side of the interpretation which I have already put on section 6 of Ordinance No. 12 of 1840. I propose, therefore, to decide the question myself. If my decision be accepted as sound, the difficulty will be at an end. If it be regarded as doubtful, it will be quite a simple matter to secure an early opportunity of obtaining a binding decision on the point.

In 268—C. R. Panwila, 273,[1] and in 295—C. R. Gampola, 1,094,[2] Lawrie J., while regretting that the state of the business of the Court made it impossible to obtain a Full Court judgment on the point, held that the defendant in each case could establish, and had established, prescriptive title against the Crown to the land in suit. In *Corea Mudaliyar v. Punchirala* [3] he expressed the same view *obiter*. It may be noted in passing that the judgment in this case does not seem to warrant the statement in the headnote that the words "chenas and other lands which can only be cultivated after intervals of several years" in section 6 of Ordinance No. 12 of 1840 mean lands which were so cultivated at the date of the passing of the Ordinance. The passage on which this portion of the headnote is based is as follows: "It was argued that this was not, properly speaking, a chena, because chenas are defined in the Ordinance No. 12 of 1840 to be land which can only be cultivated after intervals of several years, and that there was evidence here that the soil is fertile, and that coconuts and other permanent food-producing trees might be planted. The words 'can only be cultivated after intervals of several years' mean (I think) have hitherto been so cultivated."

It is obvious that Lawrie J. here used the word "hitherto" only for the purpose of rebutting the contention that the land could not

[1] *S. C. Mins., November 30, 1893.* [2] *S. C. Mins., December 14, 1893.*
[3] *(1899) 4 N. L. R. 135.*

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be chena because there was evidence that it was fertile, and not with any reference to the point of time at which its cultivation commenced. In *Ran Menika v. Appuhamy* [1] Lawrie A.C.J. and Moncreiff J. held that possession of lands in districts formerly within the Kandyan Provinces for one-third of a century gives an absolute title to the possessor. This decision is, of course, the sheet anchor on which the defendant in the present case relies. But its authority is greatly weakened by the facts that in *Attorney-General v. Wanduragala* [2] the same two Judges held that, in the case of such lands, the presumption in favour of the Crown is rebuttable only by proof of a grant by the Crown or by payment of taxes, and that Lawrie A.C.J. in *Ran Menika v. Appuhamy* [1] refers to this decision with approval. The weight of subsequent decisions, so far as they go, favours the view taken by Lawrie A.C.J. and Moncreiff J. in *Attorney-General v. Wanduragala.*[2] In 161—C. R. Kegalla, 5,024, [3] Pereira J., citing *Attorney-General v. Wanduragala* [2] with approval, observed that in the case of chena lands in the Maritime Provinces section 6 of Ordinance No. 12 of 1840 creates a mere presumption, but that chena lands in the Kandyan Provinces are to be deemed to belong to the Crown, unless a sannas is produced, or the customary taxes have been paid. In 333—D. C. Ratnapura, 1,309 [4] Sir Alfred Lascelles A.C.J. and Sir John Middleton J. raised the question how far the decisions of Lawrie J. in 268—C. R. Panwila, 273,[5] and 295—C. R. Gampola, 1,094 [6] are consistent with later authorities.

In D. C. Kegalla, No. 3,129,[7] Pereira J., with whom Ennis J. concurred, gave what I cannot but regard as an express ruling in the same sense as that of Lawrie A.C.J. and Moncreiff J. in *Attorney-General v. Wanduragala.*[2] We have therefore two decisions, each of two Judges, on the side of what I hold to be the natural and proper interpretation of section 6 of Ordinance No. 12 of 1840. On the other side there are various decisions of Sir Archibald Lawrie alone, and the decision of Moncreiff J. and himself in *Ran Menika v. Appuhamy,*[1] in which case, however, Sir Archibald Lawrie expresses the view that *Attorney-General v. Wanduragala* [2] was rightly decided. In that state of things, and holding as I do that the meaning of the section in question is unambiguous, I think that I am at liberty to construe it for myself. I hold that prescriptive title to chena land within the Kandyan Province cannot be set up against the Crown.

The appeal is dismissed with costs.

Appeal dismissed.

[1] *(1901) 5 N. L. R. 226.*
[2] *(1901) 5 N. L. R. 98.*
[3] *S. C. Mins., June 19, 1905.*
[4] *S. C. Mins., April 5, 1906.*
[5] *S. C. Mins., November 30, 1893.*
[6] *S. C. Mins., December 14, 1893.*
[7] *S. C. Mins., September 12, 1913.*