

Present: De Sampayo J.

HELLINGS v. JAYASEKERA *et al.*

396 to 398—P. C. Galle, 10,221.

Ordinance No. 6 of 1866—Thombus.

Ordinance No. 6 of 1866 applies only to deeds in private hands. The Ordinance does not contemplate the registration of a *thombu*, nor need an extract issued by the Crown itself be registered as proof of its truth.

*Attorney-General v. Kiriya*<sup>1</sup> followed.

THE facts appear from the judgment.

*Bawa, K.C.* (with him *Amarasekera*), for appellant.

*Obeyesekere, C.C.*, for the Crown.

July 23, 1919. DE SAMPAYO J.—

The accused have been charged with having cleared without a permit a land which the prosecution calls *Miriswattamukalana*, and claims as property belonging to the Crown. The land is high land, and is of the description which raises the presumption in favour of the Crown. The first accused claims it as part of the land called *Kalubinihala* upon a Dutch *thombu* extract of 1891 in favour of his ancestor. The extract includes a field of that name, and the first accused appears to claim the high land as an appurtenant. The Police Magistrate rightly considered that the questions for determination were whether the first accused had shown *prima facie* title to the land, and, if not, whether in giving the land to the other accused for chena cultivation he acted *bona fide*.

The reception of the Dutch *thombu* extract was objected to on behalf of the prosecution, on the ground that it had not been registered in pursuance of the Ordinance No. 6 of 1866. The Police Magistrate upheld the objection and rejected the document, and accordingly he held that the first accused had failed to upset the presumption in favour of the Crown by proof of his own title. The ruling of the Police Magistrate on this point appears to me to be erroneous. In *Attorney-General v. Kiriya*<sup>1</sup> Lawrie A.C.J. observed: "The Ordinance applies only to deeds in private hands; it does not affect public records, *thombus*, &c., in the public archives, nor the decree of Court, and the like." I am in entire accord with this view. The preamble of the Ordinance states its object to be to provide

<sup>1</sup> (1897) 3 N. L. R. 81.

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against false deeds, sannases, and olas purporting to bear old dates, which are not uncommonly produced in evidence in Courts of justice. Now, the *thombu* was a register made by the Dutch Government itself, and was in its sole custody, and this fact at once takes it out of the category of instruments aimed at by the Ordinance. An extract is only a copy issued to the private property, the *thombu* itself being the basis of the title. It is obvious that the Ordinance does not contemplate the registration of the *thombu*, nor need an extract which is issued by the Crown itself be registered as proof of its truth. I think the Police Magistrate wrongly rejected the document produced by the first accused, and his decision of the question of title is therefore vitiated.

The extract, however, will not prove title unless the identity of the land is also established. Here the accused failed to satisfy the Police Magistrate. The nature, situation, and extent of the land appear to militate against the assertion that it is included in or is an appurtenant of the field which is referred to in the extract as Kalubinihala. The accused may, nevertheless, have a *bone fide* belief that it is so. Here, again, the Police Magistrate has expressed a strong opinion against him. I may note that the first accused's claim is not based on mere descent from the original *thombu* holder, but on a deed of gift dated June 3, 1917, and in this deed the amunams and kurunies which are mentioned in the extent are stated without any justification to be amunams and kurunies of "fine grain" sowing. This misdescription, for which, in the circumstances of the case, the first accused must be taken to be responsible, affects the question of *bona fides*. It is true that in a number of cases with reference to some other lands included in the same *thombu* extract the first accused was successful, but the Police Magistrate considers that he took advantage of these very successes and set up an unconscionable claim to this land. I am not in a position to characterize that conclusion as untenable. Nor do the replies of the Government Agent to certain petitions of the first accused, upon which so much reliance is placed, afford good ground for any mistaken belief on the part of the first accused. These replies acknowledged the right of the first accused to the lands mentioned in the *thombu* extract, but stated that it was necessary to make a survey, for which instructions had been given to the Surveyor-General in order to separate them from the Crown lands, and one of the replies concluded with the assurance that "if the lands are within the scope of the *thombu* extract, he will not be interfered with, pending settlement by the Settlement Officer." It appears that no survey has yet been made or settlement proceedings taken, and it is argued, on behalf of the first accused, that by these replies the Government Agent himself permitted him to do such acts as he has now been prosecuted for. But it is plain that the replies in question are very guarded, and expressly referred to lands "within the scope of the *thombu*

extracts," and, in my opinion, there were not such as to mislead the first accused. I am, therefore, unable to dissent from the Police Magistrate's opinion on the question of *bona fides*. But it should be clearly understood, as the Ordinance itself provides, that the Police Magistrate's findings are good only as regards the criminal prosecution, and are in no way to prejudice the first accused in any question of title that may arise between the first accused and the Crown in any civil proceedings.

The appeal is dismissed.

*Appeal dismissed.*

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