

1947

*Present : Howard C.J. and Wijewardene :*THE ATTORNEY-GENERAL, Appellant, and  
KRISHNAPILLAI, Respondent.

122—D. C. Batticaloa, 206.

*Crown Lands Encroachments Ordinance (Cap. 321), s. 7—Presumption under.*

Where, in an action instituted by the Crown for declaration of title to certain property, the Crown establishes the right to the presumption arising under section 7 of the Crown Lands Encroachments Ordinance the burden is on the defendant to rebut such presumption.

**A** PPEAL from a judgment of the District Judge of Batticaloa.

M. F. S. Pulle, C.C., for the plaintiff, appellant.

E. B. Wikramanayake (with him G. Thomas), for the defendant, respondent.

*Cur. adv. vult.*

March 13, 1947. WIJEWARDENE J.—

The Crown instituted this action asking for declaration of title to lots Z to 20 depicted in Preliminary Plan No. 749. These lots are situated in the village of Malwattai and are of the extent of 113 acres and 9 perches. It was alleged in the plaint that the defendant entered upon, and took possession of those lots in March, 1942. The defendant filed answer disputing the claim of the Crown. At the trial the defendant admitted the title of the Crown to lots 11, 12, 17 and 18 of the extent of 1 acre and 17 perches. The District Judge held that the defendant was entitled to "such portions of lots 2 to 10, 13 to 16, 19 and 20 as fell within lots Z 134 and A 135 in Preliminary Plan No. 378". The lots Z 134 and A 135 are of the extent of 61 acres, 2 roods, 24 perches and 23 acres, 2 roods, 12 perches respectively.

At the trial the Crown produced several documents and adduced the evidence of a number of witnesses with regard to the condition of the property at the time of the encroachment in 1942, in support of the claim that the property should be presumed to be the property of the Crown under section 7 of the Crown Lands Encroachments Ordinance. The defence produced a series of documents dating from 1858 to show that Z 134 and A 135 were treated as private lands and led oral evidence to prove that those lots had been possessed as private lands for about forty years.

The District Judge was not impressed by the evidence of possession given by the defendant and his witnesses, but he held in favour of the defendant, as he thought (1) that the Crown had failed to show that it was entitled to the presumption under section 7 of the Crown Lands Encroachments Ordinance (2) that the defendant's deeds dealt with Avaranai Kulam and some part of Uripiddy and (3) that Mr. Abdul Majeed, the witness for the Crown, admitted that the Western portion of Avaranai Kulam showed signs of paddy cultivation in 1920.

I shall consider first the documentary evidence of the Crown. A survey of lands in Malwattai and adjoining villages was made by Crown Surveyors in 1867 for the Preliminary Plan No. 378. The tenement list P3 made in connection with that survey describes Z 134 as Avarana Kulam and A 135 as Malevilli. According to that description, Z 134 was a tank and A 135, an open stretch of land. An extract, P5, from Field Book 3410 of a Crown Survey made in 1889 shows Z 134 described as "Avaran Kulam Crown Tank". Z 134 and A 135 appear as Crown lands in P4, the register of Crown lands, kept at the local Kachcheri for purposes of reference.

The oral evidence called by the Crown was briefly as follows:—

- (a) Mr. K. Iyaru, the Assistant Superintendent of Surveys, said that he was in the locality from February to November, 1938, as he was then in charge of the Engineering Survey which covered Avarana Kulam also. During that period he visited the tank "very frequently". The bund was "in existence" then, though the tank was not "in working order". The tank showed "no signs of any previous cultivation" and the rest

of the disputed property was in jungle which he estimated to be nearly 100 years old. He inspected the property again in 1943 in connection with the Preliminary Plan No. A 749 made for the purposes of this case. He found the bund "in existence" as before, but some lots which were uncultivated in 1938, had been cultivated subsequently as stated in the Tenement List P3 of 1943. According to P3 lots 7 and 8 were "paddy fields one to two years old" and lot 15, "an abandoned paddy field about four years old".

- (b) Mr. Abdul Majeed, a retired Government Servant, was Cultivation Officer from 1927 to 1932 and Vanniah from 1936 to 1943 of the division where this property is situated. During those periods he visited the lands 4 or 5 times a year. Earlier he was working as a Surveyor in this area in 1919 and 1920. He said that several people got their fields irrigated by Avarana Kulam before the Pattipalai Aru Irrigation Scheme came into operation about forty-five years ago and that it was regarded as a Government tank by the people of the division. In more recent times there was no water in the tank during the dry season, but the bund was still "in existence", though it had been breached in some places. The tank was not cultivated during the time he knew it, and it was "surrounded" by jungle.

I may add that the learned District Judge has interpreted wrongly the evidence of this witness, "there were (in 1920) traces of ridges of paddy fields on the Western side of the tank, i.e., between the tank and the jungle" to mean that a Western portion of the tank showed signs of cultivation.

- (c) Mr. Tambanadapillai, the retired Udayar, said that he knew the property for twenty or twenty-five years and the tank was not cultivated during that time. When he knew the property first, the jungle round the tank was thirty to forty years old.

I think that the documents produced by the Crown and the evidence of the Crown witnesses establish the right of the Crown to the presumption under the Crown Lands Encroachment Ordinance. The District Judge has laid too much stress on the fact that at the time of the Crown Survey "some claim" seems to have been made to the Surveyor by a private person in respect of Z 134 and A 135. The fact that such a claim was made to a Crown Surveyor cannot be regarded by itself as an act requiring the Crown to take action under the Crown Lands Encroachment Ordinance.

I shall deal now with the defence. According to the defendant's claim of title, Somanader Mudaliyar who claimed to hold a Fiscal's receipt of 1830 transferred by D4 of 1858 to Nallatamby and Sinnatamby a land known as Nendilapallavelly or Avuranaipallavelly lying within certain boundaries and 280 fathoms long and 190 fathoms broad, "together with the Avaranai Kulam and Urpiddy that belongs to this vely". Neither the Fiscal's receipt nor the original of D4 has been produced. The document marked D4 is a certified copy obtained from the Land Registry in 1943. It may be noted at this stage that the

extent as given in D4 will be about 44 acres. By deed D5 of 1872 Nallatamby transferred to Mohamed Ali his undivided half share of Nendilapallavelly *alias* Avuranaipallavelly, 280 fathoms by 190 fathoms, "together with the Avaranai Kulam and Urpiddy". Mohamed Ali retransferred his interest to Nallatamby by D6 of 1874. After Nallatamby's death his daughter Kanagammai and her husband Manikapody Vanniah Sinnathurai got the shares of the widow and the other children of Nallatamby by deed of gift D7 of 1896. That deed refers to Nendilapallavelly *alias* Avuranaipallavelly, "together with the Avaranai Kulam belonging to it".

Sinnetamby's half share was sold by the Fiscal in 1890 to Sinnathuraipodi Manikapodi Vanniah who obtained Fiscal's conveyance D1 of 1908. That conveyance deals with "a half share of a field of paddy called Nendilapallavelly *alias* Avuranaipallavelly with share of tank and Urpiddy" of the extent of 280 fathoms by 190 fathoms as depicted in Fiscal's plan D1A of 1908. By deed D8 of 1901 Sinnathuraipodi Manikapodi Vanniah gifted that half share to his son Manikapody Vanniah Sinnathurai (one of the donees under D7), and the latter by D3 of 1915 gifted a half share to his daughter Tangamma and her husband Arulappapillai. Arulappapillai died in 1918 leaving his wife Tangamma and a son Sinnaturai who is still alive. Arulappapillai's estate was administered in D. C. Batticaloa (Testy) 260, and P13 is a copy of the inventory filed in that case. The parents of Tangamma, Manikapody Vanniah Sinnaturai and Kanagammai (donees under D7), died in 1918 and 1941 respectively, and the half share gifted by D7 was inherited by Tangamma. Manikapody Vanniah Sinnathurai's estate was administered in D. C. Batticaloa (Testy) 1041, and P12 is a copy of the inventory filed in that case. Kanagamma's estate was not administered.

Tangamma married the defendant in 1927. By deed D2 of October 1941 Tangamma purported to gift to the defendant the entirety of the property including the share of Sinnaturai—her son by the first bed. That deed refers to the property as Avaranai Kulam and Urpiddy and gives the extent as 110 acres.

What is the land to which the defendant became entitled by this series of deeds? The Fiscal's plan D1A of 1908 shows that the land conveyed by the Fiscal's conveyance D1 was "Nendilapallavelly or Avuranaipallavelly" of the extent of 47 acres and 2 roods. The figure of survey refers to the land as K 135 and we know from P10 (the 16 chain diagram) that K 135 is a distinct lot not forming part of Z 134 or of A 135 and is at some distance from them. The tenement list P3 of 1867 gives the extent of K 135 as 48 acres 2 roods. This would be approximately the extent given in D1, D3, D4, D5, D6, D7 and D8. If the Fiscal purported to convey by his conveyance, D1, Avaranai Kulam or any land other than K 135, it would have been obligatory on him under section 286 of the Civil Procedure Code to annex to the conveyance "a sufficient map" of such lands. I think therefore, that, though the conveyance D1 referred to "an undivided half share of a paddy field called Nendilapallavelly *alias* Avuranaipallavelly . . . . with the share of tank and Urpiddy", it did not, in fact, convey or

purport to convey a share of the tank and Urpiddy but only certain rights in them, *e.g.*, the right to use the water of the tank for irrigation and a right for the cultivators to live on the high land, Urpiddy. The name, description and extent of property given in D4, D5 and D6 are the same as in D1; D7, D8 and D3 refer to the land by the same names as D1 while giving the extent as 47 acres 2 roods as the Fiscal's plan D1A. It is only the deed D2 of 1941 that describes the property as Avaranai Kulam and Urpiddy and gives so large an extent as 110 acres. Moreover, the inventories, P12 and P13, do not include Avarana Kulam or Urpiddy while they include the smaller land Avuranaipallevly. A study of the various documents mentioned above leads me to the conclusion that the deeds in the defendant's chain of title, except D2 of 1941, dealt only with shares in lot K 135 in P3 and the rights of the owners of such shares to have their fields irrigated by the channels leading from Avaranai Kulam and to permit their cultivators to occupy the high land during the period of cultivation.

For the reasons given by me I hold that the defendant has failed to rebut the presumption arising under section 7 of the Crown Lands Encroachment Ordinance.

I set aside the judgment of the District Court and direct judgment to be entered for the plaintiff in terms of clauses (a), (b) and (c) of the prayer in the plaint. The plaintiff will also be entitled to costs here and in the Court below.

HOWARD C.J.—I agree.

*Judgment set aside.*

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