

Present: Bertram C.J. and Garvin J.

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45—D. C. Ratnapura, 3,725.

Action—Rights of added party—Claim based upon Fiscal's transfer issued after institution.

The rights of a party added to an action after its institution must be determined as at the date at which he was made a party. A claim made by such a person based on a Fiscal's transfer, issued after the institution of the action but before he was added as a party, may be entertained in such action.

THIS was an action for declaration of title to a land called Mahadeniya which formed part of the Kitulpe *nindagama*. It was established that a half share of the *nindagama* belonged to three brothers—Kiri Banda, Punchi Banda, and Tikiri Banda—in equal shares. The interests of Kiri Banda passed to his grandchildren who conveyed them to the plaintiff in 1920. The plaintiff, who was thus entitled to $\frac{1}{2}$, claimed $\frac{1}{2}$ more by right of purchase from one Punchi Banda, the son of Kitulpe Nilame, by the same deed as that by which he acquired title to $\frac{1}{2}$. It was alleged that in the year 1859, Punchi Banda and Tikiri Banda, two of the three original owners of the half share of the *nindagama*, conveyed their interests to Kitulpe Nilame and his wife Punchi Menika. They died leaving four children, through one of whom, Punchi Banda, plaintiff claimed $\frac{1}{2}$. The added-defendant opposed this claim, alleging that the interests of Kitulpe Nilame were seized and sold against him under a writ issued against him and purchased by Vidanelage Appuhamy in 1869. He claimed this $\frac{1}{2}$ upon a Fiscal's transfer dated December 20, 1921. This claim was resisted by the defendant appellant, and the plaintiff, on the ground that the Fiscal's transfer cannot be relied on this action, which was instituted on December 16, 1921, four days before the issue of the transfer.

Samarawickreme (with him *Soertsz* and *Mervyn Fonseka*), for defendant, appellant.

E. W. Jayewardene, K.C. (with him *H. V. Perera* and *R. C. Fonseka*), for plaintiff, respondent.

R. L. Pereira, for added-defendant, respondent.

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This appeal arises out of a contest as to the respective interests of the parties in a land called Mahadeniya. The District Judge decreed the plaintiff entitled to $\frac{1}{2}$ of this land, the added-defendant, for the heirs of Kuttikande Vidanelage Appuhamy, to $\frac{1}{3}$, and the defendant to $\frac{1}{3}$. The title to the remaining half share is admittedly in persons referred to in these proceedings as the Tillekeratne family. The defendant appeals.

Mahadeniya originally formed part of a considerable tract of land which formed the Kitulpe *nindagama*, depicted in plan No. 425 filed of record. It has been established that as to a half share of this *nindagama*, the title was in three brothers—Kiri Banda, Punchi Banda, and Tikiri Banda—in equal shares. The interests of Kiri Banda passed in due course to his grandchildren—Dingiri Menika, Dingiri Banda, and one Punchi Banda—who sold and conveyed the same to the plaintiff in 1920. The plaintiff has thus established his title to $\frac{1}{3}$ of all the lands in the *nindagama* which had not been alienated at the date of his purchase. Mahadeniya was such a land.

But the plaintiff claimed $\frac{1}{2}$ more by right of purchase from another Punchi Banda, the son of Kitulpe Nilame, who conveyed these interests by the same deed as that by which the plaintiff acquired the $\frac{1}{3}$ to which he is admittedly entitled.

In the year 1859 Punchi Banda and Tikiri Banda referred to earlier as two of the three original owners of the half share of the Kitulpe *nindagama*, with which this action is concerned, sold and conveyed their interests to Kitulpe Nilame and his wife Punchi Menika. These persons died leaving four children—Loku Banda, Medduma Banda, Dingiri Banda, and Punchi Banda—through whom the plaintiff claims $\frac{1}{2}$. If Kitulpe Nilame and his wife died, seized, and possessed of the $\frac{2}{3}$ acquired by them, Punchi Banda clearly became entitled on their death to $\frac{1}{2}$ of the *nindagama*. But the added-defendant alleges that the interests of Kitulpe Nilame were seized and sold against him under a writ issued in case No. 5,703 of the Court of Requests of Ratnapura, and purchased at the sale by Kuttikande Vidanelage Appuhamy in 1869. He claims this $\frac{1}{2}$ upon a Fiscal's transfer dated December 20, 1921. This claim is resisted by the defendant appellant, and by the plaintiff who is a respondent to this appeal.

It is argued in the first place that the title on the Fiscal's transfer of December 20, 1921, cannot be relied on in this action, which was instituted on December 16, 1921, four days before the issue of that transfer. There is ample authority for the principle that the rights of parties to an action must be determined as at the date of the institution of the action. In this instance the added-defendant came into the action some time after the Fiscal's transfer had been obtained. No action had been instituted, nor was an action pending

against him till he was added as a party defendant. It is contended, nevertheless, that the action as against a party added after institution must be deemed to have been instituted as against him on the date of the institution of the action against the original defendant. This is a fiction for which no authority was cited.

In the case of *Hamido Aratchy v. Lucihamy*,¹ it was held that an intervenient in a pending partition action who pleaded a title by prescription was entitled to count the period of his adverse possession since the institution of the action against the original defendants and up to the date of the intervention which is the date when the action was "brought" as against him. It is argued that this decision proceeds upon the construction of certain words in a positive enactment, and, in the next place, that the position of the parties to a proceeding under the Partition Ordinance is not exactly similar to that of the parties to any other action. Without embarking upon a critical examination of these arguments, it is sufficient that we have here at least one instance in which the rights of an added party to an action have to be ascertained as at the date when he was made a party. As I have observed, no authority was cited for the proposition that an action must be deemed to have been brought as against added parties as from the date of its original institution. In the absence of authority I am not prepared to accept counsel's contention.

In this view of the law it was competent for the added-defendant to rely on the Fiscal's transfer.

It was then sought to impeach this transfer on the ground that the order of the Court directing the Fiscal to issue it to the heirs of Appuhamy had been irregularly made. The extracts from the record of this case show that certain of the heirs of Appuhamy had been endeavouring from 1918 to perfect their title, and finally succeeded in obtaining the necessary order on December 15, 1921. These proceedings and the order in question appear on the face of them to be regular and in accordance with law.

We were, however, invited to set aside these proceedings for the following reasons:—

- (1) That the motion was made by some only of the heirs of Appuhamy.
- (2) That certain of the heirs of the defendant Kitulpe Nilame were not noticed.
- (3) That no order should in any event have been made after so considerable an interval had elapsed since the actual sale by Fiscal.

There is no reason to suppose that the interests of any of the heirs of Appuhamy who still have any rights in this land have been imperilled by the order in this case. They may be left to conserve their own interests. As to the second of these objections it is

¹ (1923) *Times Law Reports*, vol. II Part 2. p. 112.

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sufficient to say that of itself it is not an irregularity of such gravity as to entitle the appellant to the special remedy he seeks. Where a long period has elapsed since the original sale, a Court may in certain circumstances be justified in refusing to order the issue of a Fiscal's transfer to the heirs of the purchaser, but in this instance there is ample evidence to show that the added-defendant and his predecessor Appuhamy did enter into possession after the sale, and have from time to time thereafter exercised rights as co-owners and were in point of fact recognized as such, at least, in respect of other parts of this *nindagama* which they claim to have purchased at this very sale.

There is therefore no good reason why this Fiscal's transfer should not have been issued.

The added-defendant has established that the title to the $\frac{1}{4}$ share of this land which once belonged to the Kitulpe Nilame passed to his predecessor Appuhamy. I therefore hold that it has been established that the plaintiff is the owner of the $\frac{1}{4}$ which originally belonged to Kiri Banda, and that the heirs of Appuhamy have good title to $\frac{1}{8}$ out of the $\frac{3}{8}$ conveyed by Tikiri Banda and the original Punchi Banda to Kitulpe Nilame and his wife.

From this determination it follows that the four children of Kitulpe Nilame and his wife together inherited $\frac{1}{4}$ of this land or $\frac{1}{8}$ each. It appears to have been assumed that either by reason of the predecease of their two brothers intestate and without issue, or by reason of adverse possession for the required period, Punchi Banda and Medduma Banda took this $\frac{1}{4}$ between them. Of this there is no proof. Since, however, this is the assumption upon which the contest between the plaintiff and the defendant proceeded, I shall proceed to dispose of the remaining issues between them on the same assumption. It is admitted that the defendant has acquired the interests of Medduma Banda, whether those interests amounted to $\frac{1}{2}$ or to $\frac{3}{4}$.

The contest relates to the interests of his brother Puuchi Banda. Both the plaintiff and the defendant hold transfers from this Punchi Banda. A perusal of those transfers discloses the fact that to the defendant Punchi Banda transferred the Kokmote Mudiyansele *panguwa*, and thereafter transferred to the plaintiff what remained to him of the Kitulpe *nindagama*. The plaintiff and the defendant claim that Mahadeniya which is the subject of this action falls within the portions assigned to each of them. The decisive factor must be the boundary between the Kokmote Mudiyansele *panguwa* and so much of the Kitulpe *nindagama* as lies to the south of that *panguwa*. This is a question of fact upon which the District Judge has found. He has come to the conclusion that the boundary is the line A B C D marked by him on the plan 425. If this is the correct boundary, Mahadeniya is clearly not a part

of the Kokmote Mudiyansele *panguwa*, and it is the plaintiff and not the defendant to whom the interests of Punci Banda, the son of Kitulpe Nilame, have passed.

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Now Punci Banda through whom both the contestants make title is clearly indicated as the person best able to identify this boundary. He has given evidence and has stated that the boundary is the line A B C D. This evidence has been accepted by the District Judge, and I am not satisfied that sufficient reason has been shown why he should be disbelieved. But Punci Banda's evidence appears to be strictly in accordance with the description of the boundaries set out in the deed under which the defendant claims. The southern boundary in that deed is given as the Rukmale Inniyara and the Kitulpe *nindagama*; while the western boundary is described as the Gansabhawa road and the Halpe Gammaima. That the position of the Rukmale Inniyara is the line B C D is established by the evidence of Punci Banda, which on this point is strongly corroborated by that of the surveyor. Proceeding westward the next physical feature referred to as a boundary is the Gansabhawa road, and there is such a road at the point A. These circumstances indicate that the boundary between the Kokmote Mudiyansele *panguwa* and the remainder of so much of the Kitulpe *nindagama* as lies to the south of it is the line A B C D. It follows therefore that the plaintiff is right in his contention that Mahadeniya does not form part of what was conveyed to the defendant by Punci Banda. The plaintiff is entitled to the interests of Punci Banda in Mahadeniya, whether those interests amount to $\frac{1}{2}$ or only to $\frac{1}{4}$.

For these reasons I would affirm the judgment of the Court below and dismiss this appeal with costs. But to save any further dispute between the parties to this action, I would direct that the decree be amended so as to identify the particular interests which have passed to the parties to the action. The plaintiff should be decreed entitled to $\frac{1}{8}$ being the share which belonged to Kiri Banda and to $\frac{1}{2}$ being the interests of Punci Banda, the added defendant to the $\frac{1}{8}$ share which belonged to the Kitulpe Nilame, and the defendant to the interests of Medduma Banda, which as in the case of Punci Banda are said to amount to $\frac{1}{2}$ and not $\frac{1}{4}$.

BERTRAM C.J.—I agree.

Appeal dismissed.