1951 *Present:* **Dias S.P.J.**

UKKU BANDA, Appellant, *and* TIKIRI BANDA, Respondent

*S. C. 185—C. R. Panwila, 814*

**Anda *cultivation—Informal agreement—Quantum of proof necessary—Prevention of Frauds Ordinance (Cap. 57), Section 3 (1).***

**Plaintiff alleged that by an informal agreement he and the defendant agreed that the plaintiff was to cultivate a piece of land and that both of them were to share the produce.**

***Held*, that in order to obtain the benefits of section 3 (1) of the Prevention of Frauds Ordinance it had to be proved that the agreement was for a period not exceeding twelve months and that at the date of the agreement the land was chena.**

APPEAL from a judgment of the Court of Requests, Panwila.

*T. B. Dissanayake*, for the defendant appellant.

*P. Somatilakam*, for the plaintiff respondent.

*Cur. adv. vult.*

January 17, 1951. DIAS S.P.J.—

The defendant-appellant had obtained leave and licence from the superintendent of Hatale Estate to cultivate a piece of jungle land belonging to the estate. The appellant says it was "a little more than ¼ of an acre".

The plaintiff's case is that by an informal oral agreement he and the appellant agreed that the plaintiff was to cultivate this land and that he should appropriate ¾ of the produce and render to the appellant a ¼ share. The plaint does not state, nor does the evidence indicate, when this informal agreement was entered into or for what period it was to continue. These facts have a material bearing on this case.

Plaintiff's complaint is that the appellant on August 21, 1949, wrongfully appropriated the whole of the produce to the plaintiff's loss and damage of Rs. 500. The appellant's case is that there was no agreement between plaintiff and himself, and that the plaintiff was a labourer who was employed to clear half an acre of chena land, and that the plaintiff worked for about a week and was paid his wages.

The Commissioner of Requests has held, and his finding cannot be disturbed, that plaintiff was not a labourer, but that there was an informal agreement between the parties under which the plaintiff and the appellant were to share the produce.

The manner in which the issues have been framed and the evidence led have tended to mask the real issue which arose for decision. At the commencement of the trial the parties framed six issues. After the plaintiff had closed his case, and the appellant was in the witness box, the defence raised the real issue in the case, viz., No. 7, which the Commissioner noted as issue 1. On July 21, 1950, after the case was closed,

the Judge reserved his judgment until August 4, 1950. On that day the date was put off until August 11. On that day the Commissioner recorded " I am framing the following additional issues ", which he proceeded to number 5 to 8, overlooking the fact that there were already in existence the earlier issues 5 to 7. In his judgment he has answered issues 1 to 8 and has ignored the other three. Furthermore, both counsel and I found it difficult to ascertain what the issues were which he was dealing with.

The real question for decision is this: It being conceded that the informal oral agreement is one which is obnoxious to the provisions of s. 2 of the Prevention of Frauds Ordinance (Chapter 57), is it saved by the provisions of s. 3 (1) of that Ordinance ?

The onus on that issue lies on the plaintiff, but the evidence is far from clear. It is plain from the difficulties which the Commissioner encountered in writing his judgment, that it was the vague manner in which the plaintiff either deliberately, or inadvertently, led his proof that caused all the trouble.

S. 3 (1) of Chapter 57 reproduces the provisions of Ordinance No. 21 of 1887. This statute was enacted by reason of the decision of the Full Bench in *Sayatoo v. Kalinguwa* [1] where it was laid down that an agreement between parties for the cultivation of land in " *anda* " is a "contract or agreement for establishing an interest affecting land " within the meaning of s. 2 of the Prevention of Frauds Ordinance. Burnside C.J. said: " I do not think we should concern ourselves in interpreting the law whether our decisions would encourage or discourage agriculture, or impose hardships. We should not make law ". Clarence J. said: " If the operation of the enactment will be to inflict hardship, we must leave it to the Legislature to interpose; we are not at liberty on that account to legislate ourselves ". Dias J. was of the view that the provisions of s. 2 of the Prevention of Frauds Ordinance was " to do away with *anda* cultivation ". Naturally, this was a severe blow to the peasants who from time immemorial had given their paddy fields and chenas for cultivation in consideration of the cultivators being paid for their labour by a share of the produce. The Legislature therefore intervened.

The preamble to Ordinance No. 21 of 1887 says: " Whereas it is expedient to exempt certain contracts for the cultivation of paddy fields and chena lands from the operation " of Ordinance No. 7 of 1840 (Chapter 57). Section 1 of the Ordinance enacts:—

> " The provisions of section 2 of the Ordinance No. 7 of 1840 shall not be taken to apply to any contract or agreement for the cultivation of paddy fields or chena lands for any period not exceeding twelve months, if the consideration for such contract or agreement shall be that the cultivator shall give the owner of such fields or land any share or shares of the crop or produce thereof."

This section with a few immaterial amendments has been reproduced as s. 3 (1) of Chapter 57 in the Revised Edition of the Ordinances.

[1] *(1887) 8 S. C. C. 67.*

It is therefore clear that in order to obtain the benefits of this provision, it must be proved:—

(*a*) that the land is a paddy field, *or a chena land ;*

(*b*) that the informal contract or agreement must be for a period *not exceeding twelve months;* and

(*c*) the consideration for such contract or agreement must be that the cultivator is to give the owner a share of the crop or produce.

Should the proof fail on any one of these points, s. 3 (1) will not apply, and the case will be caught up by the general rule in s. 2 which makes the informal agreement of no force or avail.

In *de Silva v. Thelenis* [1], referring to s. (3) de Sampayo J. said: " When an exception is introduced into the general law, the rule I think is to construe the exception strictly, so that the general law may have full operation, subject only to the particular exception ". Therefore, the onus lay upon the plaintiff in this case to bring his case fairly and squarely within the exception, and not leave it, as he has done, in a nebulous state.

This land is not a paddy field. The plaintiff has not satisfied the Commissioner that it is a chena, for the Judge says that " the nature of the crop suggests that this land was *more a chena land* and not a regularly cultivated land ". S. 3 (1) does not apply to a land which is " more a chena than a regularly cultivated land ". It was the duty of the plaintiff to have proved to the Judge's satisfaction that it was a chena at the date he took it for cultivation. There is, however, a more serious obstacle in the way of the plaintiff. It was his duty also to prove that his agreement with the defendant was for a period " not exceeding twelve months ". If it was for a longer period, the provisions of s. 3 (1) will not apply.

The case of *Eliyas v. Savunhamy* [2] is in point. The informal agreement in that case was for an indefinite period of future cultivation, and it established in effect a kind of partnership in the land. The facts also disclosed that this partnership had continued for seven years prior to the action being filed. Therefore, de Sampayo J. held that the case fell under s. 2 and not under s. 3 (1). I respectfully agree.

I set aside the judgment and decree appealed against and send the case for a new trial on the following specific issues:—

(*a*) On what date was the informal agreement entered into between the plaintiff and the defendant ?

(*b*) Was the said agreement for a period not exceeding twelve months ?

(*c*) Was the said land a " chena " land within the meaning of s. 3 (1) of Chapter 57 at the date of the agreement ?

Plaintiff will be entitled to succeed only if he proves that the agreement was for a period not exceeding twelve months, and that at the date of the agreement the land was a chena. The new trial shall take place before another Commissioner. The parties shall not be at liberty to canvass the question that plaintiff was a cultivator and not a labourer.

Each party will bear their costs of the first trial and of this appeal. All other costs will be in the discretion of the Commissioner of Requests.

*Sent back for new trial.*

[1] *(1916) 3 C. W. R. 130.*

[2] *(1914) 18 N. L. R. 82.*