1919.

Present : De Sampayo J.

SOYSA *v.* PODI SINNO *et al.*

614-615—P. C. Ratnapura, 11,841.

Forest Ordinance, No. 16 of 1907—Felling timber without a permit—Criminal proceedings—Bona fide *claim of right—Liability of coolies.*

Where two coolies and the superintendent of an estate were charged under the Forest Ordinance with felling timber from Crown land without a permit, the proprietor of the estate claimed the land on a title dating from 1837—

Held, that as the claim of title was a *bona fide* one, the prosecution under the Forest Ordinance was not proper.

THE facts appear from the judgment.

Bawa, K.C. (with him *Abdul Cader*), for accused, appellants.—The first and the second accused were only coolies acting under the orders of the superintendent. They were under the *bona fide* belief that they were felling their master's timber. The third accused is the superintendent. The proprietor Usoof has not been charged. Usoof claims the land on an ancient and valid title, and his claim must be regarded as *bona fide*. The Crown cannot proceed criminally under the Forest Ordinance when there is a *bone fide* claim of title. *The Assistant Government Agent, Kegalla v. Siyadoris Mudalali;* [1] *P. C. Ratnapura*, 9,701 [2] *Cumberland v. Dewarakkita Unnanse;* [3] *Pahalaganhaya v. Andiris;* [4] *Chena Muhandiram v. Rawapper;* [5] *Silva v. Banda;* [6] *Chena Muhandiram v. Banda.* [7]

Dias, C.C., for the Crown.—If the lands are chena lands, the accused has no defence. Chenas in the Kandyan Provinces can be acquired only by a sannas, grant, or by proof of customary taxes having been paid. Usoof's deed conveys to him certain chenas, but contains no recital of any sannas by which it devolved on him. The accused have felled high forest, when the deed gave them only chenas.

Cur. adv. vult.

October 17, 1919. De Sampayo J.—

This is a prosecution for felling timber without a permit on a land alleged to belong to the Crown. The land is shown as lot No. 4 in the plan No. 366 made by C. M. Vanderstraaten, Surveyor,

[1] *(1916) 3 C. W. R. 53.*
[2] *S. C. M. Aug. 30, 1918.*
[3] *(1916) 3 C. W. R. 102.*
[4] *3 Bal. Notes 62.*
[5] *(1914) 17 N. L. R. 225.*
[6] *(1914) 17 N. L. R. 227.*
[7] *(1914) 17 N. L. R. 228.*

and consists of about 5 acres. It has been identified as part of the block of land bearing No. 122 in the Crown plan B. S. P. P. 15, which was made in 1897 and 1914, respectively. The Crown calls the entire block Batugedarakandamukalana, and the witnesses for the prosecution say that lot No. 4 in question was in fact high forest. There is no doubt that a large number of trees were felled in this lot in the process of clearing it for planting as part of Kotandola estate. The proceedings in the case are somewhat peculiar. The Forest Ranger of Pelmadulla charged the first and second accused, Podi Sinno and Girigoris, with the felling of the timber. They stated that they were only coolies employed by Mohamado Lebbe Marikar Slema Lebbe, the superintendent of Kotandola estate. This undoubtedly was the fact. The Magistrate accordingly ordered that Slema Lebbe and the proprietor of the estate should be added as accused. Slema Lebbe was then added as third accused, and was charged with having felled the timber; but the proprietor of the estate was not so added, and is not an accused person. Slema Lebbe's defence was that lot No. 4 was private property, and was part of Kotandola estate, of which his master W. M. Mohamadu Usoof, of Colombo, was the proprietor. It appears that the estate as claimed consists of lots Nos. 1 to 7 shown in the plan, and is over 100 acres in extent, which has been opened, and is being gradually planted. The greater portion of it is planted with rubber about 1½ years old. Lot No. 4 was being cleared for planting, when this prosecution was started. Mohamadu Usoof was called as a witness, and he produced his deed and claimed all the lots. He admitted that the clearing was done on his orders, and in these circumstances; when the owner of the estate is found to have authorized the first and second accused to fell the timber, it is difficult to hold the first and second accused guilty of the offence, inasmuch as they acted quite *bona fide* in the belief that lot No. 4 was their master's property. The same remark applies to Slema Lebbe, the third accused. At all events, any *bona fide* claim of title on the part of Mohamadu Usoof ought to benefit them. As regards that question, there is, I think, very little doubt. His deed discloses a very ancient title. The late Doloswala Dissawa, a Kandyan Chief, who died in 1839 possessed of many *nindagamas* and other extensive and numerous lands, made his last will in 1837, by which he devised "Vitanegey Panguwa" to his grandson and adopted son Muttettuwegama Loku Banda. The will was proved in case No. 15, D. C. Ratnapura. The devisee died intestate, leaving as heir his brother M. Kiri Bandara, who in turn died intestate, leaving two sons Madduma Bandara and Punchi Bandara. These two divided Vitanagey Panguwa into two portions, as shown in the plan made by C. D. Subasinghe, Surveyor, the southern portion being assigned to Madduma Bandara, who in 1917 sold the same to Mohamadu Usoof by deed No. 3, which was confirmed by

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Punchi Bandara by his deed No. 12. To this latter deed is attached Mr. Subasinghe's survey. The southern portion of Vitanagey Panguwa is identical with lots Nos. 1 to 7 in Mr. Vanderstraaten's plan. The panguwa appears to have consisted of several chenas, and Punchi Bandara, in giving evidence in this case, said: " My brother and I claim only chena lands, and no mukalana or forest. " This statement is seized upon by the Police Magistrate, and as the documents relating to Mohamadu Usoof speak of chenas, the Police Magistrate says that Mohamadu Usoof's deed did not transfer to him lot No. 4, which is high forest. This inference is not legally correct. In the first place, the deed, as a matter of fact, conveyed lot No. 4 to Mohamadu Usoof, whether it be called mukalana or chena. In the next place, a period of seventy years has elapsed since the time of Doloswala Dissawa's death, and it is no matter for surprise if lands, which were then, and continued to be, called chenas, have grown into forest. In my opinion the question as between the Crown and Mohamadu Usoof must be decided on other grounds. The name " panguwa " indicates to me that the lands were probably part of a *nindagama*, and if so, they must be the subject of a Kandyan grant. Again, of the lots in question, lot No 1, which is called Weevehena *alias* Kotaligam Weevehena, is not claimed by the Crown, and is admitted to be part of Kotandola estate, and yet it is included in the Crown plan. Some of the other lots contain 1½ years old rubber, and have been in the possession of Mohamadu Usoof. In these circumstances, I think Mohamadu Usoof had good grounds for believing that he was entitled to lot No. 4, and his claim of right must be regarded as quite *bona fide*. A criminal prosecution such as this is wholly unsuitable for determining the question of title. This will appear obvious from one circumstance alone. Mohamadu Usoof is not an accused in this case, nor in any sense a party to the proceedings. He was only a witness, and as such could not be expected to go fully into his claim as though he were a party. All this shows that the question between the Crown and Mohamadu Usoof, proprietor of Kotandola estate, should properly be fought out in a civil action. As regards the conviction in this case, though a person acting on the orders of another may not generally be free from liability for breach of the rule, I think the accused have shown sufficient ground for exemption.

The conviction is set aside.

Set aside.