1957 *Present :* **Gunasekara, J., and T. S. Fernando, J.**

S. MURUGAPPEN, Appellant, *and* P. I. CANAGASABEY, Respondent

S. C. 5—D. C. (Inty.) Batticaloa, 686/L

Deed—Rectification sought in the course of an action rei vindicatio*—Addition of parties for that purpose—Permissibility.*

Where, in an action for declaration of title to a land, the plaintiff claimed title to the land upon a deed executed by A and the defendant claimed title upon a deed executed by B, and it was not shown that the plaintiff had any kind of connection or concern with the attempt by the defendant at rectification of his deed—

Held, that the defendant was not entitled to have B added as a party to the case so as to enable him to claim a rectification of his deed in respect of the land conveyed to him by B.

APPEAL from a order of the District Court, Batticaloa.

C. Ranganathan, with *P. Naguleswaran*, for the defendant-appellant.

Walter Jayawardene, with *L. Mututantri*, for the plaintiff-respondent.

Cur. adv. vult.

March 21, 1957. T. S. FERNANDO, J.—

This is the second appeal to the Supreme Court in this case and it will be useful to set out a short history of the case before dealing with the points arising on the present appeal.

The plaintiff instituted this action on 21st June 1951 claiming a declaration of title as against the defendant to a piece of land described in the plaint as a garden containing in extent from North to South 31 fathoms and East to West 43 fathoms but according to survey 1 acre and 30 perches. It is common ground that the original owner of the land was one Marimuthu Sinnathamby. The plaintiff claimed that the land was seized and sold against Sinnathamby on 11th November 1915 in execution of a writ issued in C. R. Kalmunai Case No. 8,329 and purchased by one Marimuthu Nagammai (the plaintiff in the Court of Requests case and the sister of Sinnathamby), and that the latter had sold the land to him (the plaintiff) by a deed of transfer executed on 1st October 1950. It must be noted that at the time of this purchase by the plaintiff no Fiscal's conveyance had been executed in favour of

Nagammai. Such a conveyance was in fact executed only on 7th May 1951, more than 35 years after the Fiscal's sale and about six weeks prior to the institution of the present action.

The defendant contended in his answer that the original owner Marimuthu Sinnathamby died instestate leaving behind him a widow and three children ; that the widow died some years ago and that two of the children also died leaving no issue ; that the remaining child of Sinnathamby, one Varnakulasingham, thereupon became the sole owner of the land ; and that Varnakulasingham by deed No. 5,210 of 1st October 1950 sold the land to him (the defendant). He claimed that his predecessor-in-title had acquired a title to the land by prescription long before the execution of the Fiscal's conveyance in favour of Nagammai. It may be noted at this stage that the deed No. 5,210 purports to convey to the defendant a land in extent only 1 rood and 31 perches.

The case proceeded to trial in the District Court substantially on the issue of the prescriptive rights of the parties, and the then District Judge delivered judgment on 19th December 1952 answering the issue relating to prescriptive rights in favour of the defendant and dismissing the plaintiff's action with costs. The plaintiff appealed to the Supreme Court against this judgment, and we were informed in the course of the argument before us that the disparity in the extents of land conveyed by the respective deeds of transfer in favour of the plaintiff and the defendant was discovered only at the stage of the appeal. The Supreme Court on 12th July 1954 set aside the judgment and remitted the case to the District Court " for the determination of the plaintiff's paper title and, assuming that to be proved, for the consideration of the prescriptive rights of parties, having particular reference to the fact that it has been brought to our notice that the deed of transfer on which the defendant relies as enabling him to step into the shoes of his transferor for the purpose of prescription refers to a piece of land which is in extent very considerably less than the land which is the subject of this action".

When the record was returned to the District Court, the defendant sought to amend his answer by stating that " the real extent of the land conveyed by Varnakulasingham is in extent 1 acre and 36 perches of which he had been in prescriptive possession for a period of over ten years " and that it is necessary for him to make the transferor to him, Varnakulasingham, a party to the case " in order that he might claim the prescriptive title " of Varnakulasingham. As Varnakulasingham had died he sought to make the former's heirs added-parties defendant to the case. The plaintiff objected to this amendment as being superfluous and, after argument, the learned District Judge upheld the objection and refused to permit the amendment of the answer. The present appeal is against this order of refusal. In upholding the plaintiff's objection to the amendment of the answer, the learned District Judge states :—" A party can always prove the prescription of his predecessors-in-title and only a party cannot prove the prescription of a party who is not a party to the action." The question however is whether Varnakulasingham is a predecessor-in-title of the defendant for any extent in excess of the 1 rood and 31 perches specified in deed No. 5,210 referred to above.

Learned counsel for the defendant-appellant has contended that it is necessary to have the heirs of Varnakulasingham brought in as parties to this case on two grounds :—

(1) that it is necessary to obtain a rectification of deed No. 5,210 in so far as the extent of land conveyed thereby is concerned :

(2) that in respect of so much of the land as is in excess of 1 rood and 31 perches the defendant is entitled to prove that the plaintiff has no title by proving that the title is in Varnakulasingham's heirs.

In support of the first of these two grounds, we were referred to the case of *Meerasaibu v. Theivanayagampillai* [1]. In that case the administrator of a deceased person's estate sold a certain land to the defendant, but by mistake did not include in the deed of transfer a block of 64 acres which formed a recognised part of the land. Sometime later the adjoining land also belonging to the deceased person was sold by the administrator to the plaintiffs, and the block of 64 acres was by mistake included in the deed in favour of the plaintiffs. On the plaintiffs suing the defendant for his ejectment from the 64 acre block, the defendant prayed that the plaintiffs' deed in so far as it purports to transfer to them the block of 64 acres should be cancelled ; he also claimed a rectification of his own deed and moved to add the administrator as a party. It was held that the administrator should be added as a party.

This decision has in my opinion no application to the facts of the case before us. The decision itself has been distinguished in the later case of *Olagappa Chettiar v. Reith* [2]. As Soertsz J. pointed out in the later case, in *Meerasaibu's* case the defendant's claim for rectification was really against the plaintiff because the rectification of the plaintiff's deed was involved in the rectification he sought of his own, and the party proposed to be added was necessary for the rectification of the two deeds, for he was the vendor both to the plaintiffs and to the defendant. In *Olagappa Chettiar's* case the plaintiff had no kind of connection or concern with the parties sought to be added. In the case before us too the plaintiff has no kind of connection or concern with the attempt by the defendant at rectification of his deed. Moreover, the defendant did not at any stage of this case apply in the District Court for a rectification of his deed. Even the petition of appeal is devoid of any reference to a rectification of his title deed. The question of a rectification was raised for the first time in the argument of defendant's counsel at the hearing of this appeal. If the defendant really desires to obtain a rectification of his deed it is for the defendant to advise himself on the question whether he should—following the procedure that commended itself to the Supreme Court in *Olagappa Chettiar v. Reith* (supra)—apply to the District Court to be granted an opportunity to have this case laid by to enable him to obtain such rectification.

In regard to the second ground of appeal, while it is good law that it is always open to the defendant in an action *rei vindicatio* to show that the ownership is not in the plaintiff but in a third party, the position

[1] *(1922) 24 N. L. R. 453.*

[2] *(1941) 43 N. L. R. 92.*

taken up by the appellant even in the proposed amendment of the answer was not that Varnakulasingham's heirs are entitled to that portion of the land in question in excess of the extent of 1 rood and 31 perches covered by deed No. 5,210. His case is and always has been that he himself is entitled to the whole land. In paragraph 7 of the amendment of the answer referred to above the appellant relies on Varnakulasingham's possession of the extent in excess of 1 rood and 31 perches (as well as his own possession of this extent) as enuring to his own benefit and not as enuring to the benefit of Varnakulasingham's heirs. This position he maintains even in his petition of appeal to this Court. In these circumstances, even if the learned District Judge has misdirected himself when he appears to have assumed without qualification that the defendant is the successor-in-title of Varnakulasingham, I am unable to say that in the state of the pleadings the refusal to permit the proposed amendment of the answer was wrong.

I would therefore dismiss this appeal with costs.

GUNASEKARA, J.—I agree.

Appeal dismissed.