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Present: Bertram C.J. and De Sampayo J.

HAMID *et al. v.* SPECIAL OFFICER.

71—D. C. (Inty.) Kurunegala, 6,737/7,197.

Chena land fit for coconut cultivation—Land which can be only cultivated after intervals of several years—Presumption in favour of Crown—Ordinance No. 12 of 1840, s. 6—Waste Lands Ordinance, No. 1 of 1897, s. 24—Partition decree—Crown not bound.

The presumption that chenas within the Kandyan Provinces belong to the Crown is not limited to such chenas as can only be cultivated after intervals of several years. The presumption was held to apply to a chena land which was capable of continuous cultivation with coconuts.

BERTRAM C.J.—"The words 'which can only be cultivated after intervals of several years' are not so much words of definition as words of description. The intention was neither to define chenas, nor to select a supposed particular type of chenas . . . . When the Ordinance referred to chenas as being only cultivable after intervals of several years, it meant cultivable as chenas."

A decree in a partition case to which the Crown is not a party does not bind the Crown.

THE facts are set out in the judgment.

A. St. V. Jayawardene, for defendants, appellants.—The lands in dispute are not chena lands as defined in the Waste Lands Ordinance. It has been proved that these lands have been regularly cultivated during the last ten years with coconut, and they ceased to be chenas.

[BERTRAM C.J.—By Ordinance No. 12 of 1840, section 6, and the Waste Lands Ordinance, No. 1 of 1897, section 24, chena lands are presumed to be the property of the Crown.]

In order to bring it under this presumption, the Crown must prove that it is chena land, or other land which is, in the same sense as chena is, incapable of being cultivated otherwise than after interval of several years. *The Queen's Advocate v. Appuhamy et al.*,[1] *Corea v. Anderala*,[2] *Amerasekara v. Baiyya*.[3] A land does not become chena by the mere fact that it is cultivated only after intervals of several years. *Kirihamy v. Appuhamy*.[4]

The burden of proving that the land is chena or other land which can only be cultivated after intervals of several years is on the Crown. *The Attorney-General v. Samarasinghe*.[5]

[1] *(1878) 1 S. C. C. 26.*
[2] *(1900) 3 Br. 159.*
[3] *(1900) 3 Br. 161.*
[4] *(1879) 2 S. C. C. 88.*
[5] *(1900) 1 Br. 220.*

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There must be actual evidence that it is chena. The Proclamation by the Government Agent under section 1 of Ordinance No. 1 of 1897 is not evidence in the case. Evidence has been given by the appellants that there is a tank with its bund indicating that the land was regularly cultivated at one time. Now it is not cultivated as chena.

The appellants have a partition decree in their favour, and the Crown is bound by that decree. Section 14 of the Interpretation Ordinance, No. 21 of 1901, which says that the Crown is not bound by any enactment where it is not mentioned, has no retrospective effect. Whenever the rights of the Crown may be affected, they are expressly reserved in Ordinances passed before 1901, *e.g.*, Prescription Ordinance. The Crown is bound by the decree in the Partition Ordinance, as its rights are not specially reserved. Under the Roman-Dutch law the Crown is bound by statutes, and if it claims exemption, it must be proved by the Crown. Under the English law the Crown is bound by an Act made for the public good and for the prevention of injury to the public (*27 Hals., p. 165*). The Partition Ordinance has been enacted for the public good.

The Solicitor-General, for the Crown.—Under the corresponding section of the old Wills Ordinance, No. 21 of 1844, it has been decided by the Collective Court that the Crown is not bound by the provisions relating to the partition of land, though it may avail itself of the provisions therein. *Buller v. Koelman et al.*[1] It was held even before the passing of the Interpretation Ordinance that the Crown is not bound by any statute if it be not expressly so stated. *Horsfall v. The Queen's Advocate.*[2]

The Crown is not bound by the provisions of the Insolvency Ordinance, as it is not expressly named therein. *The Queen's Advocate v. Silva;*[3] *Selby v. Fernando.*[4]

The words " chenas and other lands which can be only cultivated after intervals of several years " in section 6 of Ordinance No. 12 of 1840 mean lands which were so cultivated at the date of the passing of the Ordinance, and may include lands fit for the cultivation of tea and coconut. *Corea Mudaliyar v. Punchirala.*[5]

When it is shown that the land in dispute is subjected to " chena cultivation," it is not necessary to show that it is such land as can be cultivated only after intervals of several years. *Cooke v. Freeman.*[6]

A. St. V. Jayawardene, in reply.

Cur. adv. vult.

[1] (*1848*) *Ram. 1843-55, 141.*
[2] (*1883*) *5 S. C. C. 101.*
[3] (*1890*) *9 S. C. C. 78.*
[4] (*1853*) *Ram. 1843–55, 47.*
[5] (*1899*) *4 N. L. R. 135.*
[6] (*1905*) *8 N. L. R. 265.*

February 3, 1920. BERTRAM C.J.—

Despite the formidable argument of Mr. Jayawardene, it is impossible to feel that there is any substance whatever in either the facts or the law of this appeal.

The facts are as follows. In 1910 Mr. J. Marambe, now a Korala, and son of the then Ratemahatmaya of the district, and at the time a young man of nineteen years of age, purported to purchase (by P 5) from three villagers bearing the *ge* name of Aratchilage for Rs. 300 a tract of land, which on survey turns out to comprise no less than 278 acres. No title was produced by these villagers. There was no evidence in the way of sales, mortgages, or leases. The lands were said to belong to the villagers, partly by paternal, partly by maternal inheritance. So great was the extent of the land purported to be sold, and so little did the parties understand what they were doing, that on the occasion of the sale the Ratemahatmaya executed a document (D 2), in which he recited that he had paid a sum of Rs. 120 on behalf of his son for the land bought by him from the three villagers, and that " after a survey of the whole land is made by a surveyor, an extent of 60 acres will be considered as having been purchased for the sum of Rs. 120, and for whatever extent that is over and above 60 acres, I promise to pay to the vendors of the land at the rate of Rs. 2 per acre for such excess of acreage found on behalf of the purchaser." After he had purchased the land in this way he waited a short time. Various other villagers then came forward with shadowy claims. Mr. Marambe bought them out, paying to them sums of Rs. 20, Rs. 30, and so on, taking no deeds from any of them. Mr. Marambe, having thus purchased this large area of coconut land for a little more than Re. 1 an acre, sold one-third of it five months later, and the balance of two-thirds some eighteen months after that to the plaintiffs for a total of Rs. 450.

The next step was that the purchasers commenced a partition action No. 6,103 in the District Court of Kurunegala, not with any real view of dividing the lands, but rather with a view to obtain the absolute title which is given by a partition decree, and thus to clear out any claims that might subsequently be made by other private parties. The land itself, with the exception of two tanks, from which certain fields are watered, was undoubtedly waste land, but extensive chena cultivation appears to have taken place without any hindrance. There were certain inconsiderable traces of ordinary cultivation. There was at one point a depression in the ground with a ridge at one end, and the learned District Judge is of opinion, and no doubt rightly, that this was a small tank with its bund. But, however, that may be, the surrounding area is now undoubtedly chena. At the trial the plaintiffs did not produce a scrap of title other than the deed of the three villagers, and they did not call any

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of the three villagers. The only excuse was that one of the three had obtained a settlement of a small piece of land from the Crown in an adjoining area, and it was alleged that pressure had been brought upon him not to give evidence.

Nor is the law of the case more impressive. Practically the only point raised is as to the meaning of the expression " chenas and other lands, &c.," as used in section 6 of Ordinance No. 12 of 1840 and section 24 of the Waste Lands Ordinance of 1897. Both these enactments establish a presumption in favour of the ownership of the Crown as to these categories of lands. Mr. Jayawardene contends that a chena is not a chena within the applicability of the presumption, unless it is positively proved that it can only be cultivated after intervals of several years. The lands found to be chenas in this case are admittedly excellent coconut lands capable of continuous cultivation in that character. He claims, therefore, that they are not within the presumption.

This suggestion, which implies that the Crown must in every case when it claims a chena on the basis of the presumption give evidence as to the qualities of the soil or the peculiarities of the local climate, admittedly renders the presumption an illusory one, but Mr. Jayawardene says, nevertheless, that effect must be given to what he maintains is the only possible interpretation of the words of the Ordinances. If, however, there are two possible interpretations, one literal but illusory and the other natural and effectual, the latter is to be preferred.

The construction imputed to this formula by Mr. Jayawardene was, in fact, imputed to it by Browne J., sitting as a single Judge, in three decisions reported in *1 Browne 220*, *3 Browne 159*, *3 Browne 161* (two of them in the course of the same week). But no Court, and, indeed, no other Judge, has followed Browne J. in this view.

Withers J., in *Corea Mudaliyar v. Punchirala*,[1] has expressed the opinion that the formula contains a definition of the word " chena." Pereira J., on the other hand, with the tacit concurrence of Wendt J., has apparently expressed the opinion that it does not. In expressing this opinion, Pereira J. observes that he " has already shown " this, but an examination of his judgment discloses the fact that this statement is an oversight, and that he had not.

How, then, is the formula " chenas and other lands, &c.," to be interpreted? For myself I was at first disposed to think that the words in section 6 of Ordinance No. 12 of 1840, " which can be only cultivated after intervals of several years," were grammatically dependent only on the word " lands," and not also on the word " chenas," and that the effect of these words upon the interpretation of the word " chenas " was consequently only indirect and secondary. I now see, however, that this is erroneous. What

[1] *(1899) 4 N. L. R. 135.*

has convinced me is the fact that later in the section, towards the end, the word " chena " in the same combination is by a caprice of drafting used adjectivally. The phrase is there " chena and other lands which can only be cultivated after intervals of several years. " The relative clause, therefore, was intended to apply to both " chenas " and " lands ".

What, therefore, is its meaning? The words are, in my opinion, not so much words of definition as words of description. The intention was neither to define " chenas," nor to select a supposed particular type of chenas. It was to indicate by a reference to the most characteristic feature of chena cultivation what was the nature of the " other lands " which were classed under the same head. When the Ordinance referred to chenas as being only cultivable after intervals of several years, it meant " cultivable as chenas," and in this sense the description is an exact one. It is an essential of chena cultivation that it should take place with the aid of the ash of the burnt-down growth, and this can only happen after intervals of several years, because such intervals are necessary to enable the growth to arise. Similarly, with regard to the " other lands " (if, indeed, there are any " other lands " for no one in the whole history of the subject has been able to make a suggestion as to what " other lands " were intended), the phrase means " other lands, " which in their special character (whatever that special character may be) can only be cultivated after intervals of several years.

This is not a form, either of definition or of description which any one would now adopt for the purpose of explaining the characteristics of a chena, but the formula has to be read in the light of contemporary conceptions at a time when the modern developments of agriculture were not contemplated. At that time it would not have occurred to any one that lands in the situation of chena lands could be cultivated by any other method than that of intermittent crops, or that they could be converted into permanent plantations; it was, therefore, appropriate to describe them by reference not so much to the actual method of their cultivation as to their supposed capabilities of cultivation. (See the argument of the Solicitor-General in the case of *Corea Mudaliyar v. Punchirala.*[1]

The above explanation, viz., that the word " cultivated " used in reference to chenas means " cultivated as chenas," seems to me what was intended by Phear J., when in *The Queen's Advocate v. Appuhamy* [2] he said that the Crown must prove that the land in question was " either chena or land which is, in the same sense as chena is, incapable of being cultivated otherwise than after an interval of several years." I prefer this explanation to that suggested by Lawrie J. in *Corea Mudaliyar v. Punchirala,* [1] that " which

[1] *(1899) 4 N. L. R. 135.*

[2] *(1878) 1 S. C. C. 26.*

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can only be cultivated, &c.," means " which have hitherto been so cultivated " (*i.e.*, as I take it, " up to action brought," and not as stated in the headnote " at the date of the passing of the Ordinance "). Pereira J., in the *Addipola Sannas Case*,[1] *p. 290*, endorses this suggestion, and puts it as follows: " Chena land is land which, in fact, is so cultivated and reserved as explained above to be so cultivated," but this seems to be hardly justified by the words of the section.

I may add incidentally that in so far as Pereira J. suggests, if he does suggest, that there is any difference to be made between the interpretation of the word " chena " in section 1 of the Waste Lands Ordinance of 1897 and its interpretation in section 24 (*a*) of the same Ordinance, I do not feel myself in accord with that suggestion. Whether the formula " which can only be cultivated, &c.," is to be treated as an incidental definition, or only as an incidental description, it must apply to the word " chena " equally in section 1 and section 24, and the fact of its not occurring in section 1 appears to me immaterial.

Mr. Jayawardene's contention on this point therefore fails. He has, however, advanced yet another point, already concluded against him by authority, viz., that a decree in a partition suit binds the Crown, in spite of the fact that the Crown is not mentioned in the Partition Ordinance. The authority to the contrary is *Horsfall v. The Queen's Advocate*,[2] which was a decision of a Bench of two Judges, and which in the view my brother and myself take of the effect of the judgment of a Court so constituted is binding upon us. Mr. Jayawardene sought to re-open this question with a view at least to its reference to a Full Court, and to address to us an argument to show that the principle enacted in section 14 of the Interpretation Ordinance, No. 21 of 1901, was a principle new to the Colony; that it was not recognized by the Roman-Dutch law; that its application to Ceylon depended on the extent to which the Royal Prerogatives of the English Crown were in force in the Colony, and that the history of the law of prescription in this Colony indicated that the Royal Prerogative in this particular was not one of those prerogatives which are brought into effect automatically in a ceded country by the mere fact of cession. The Solicitor-General, however, whom we heard on this question, drew our attention to a series of cases in which the principle that the Crown is not bound by a statute unless therein named has been treated as part of the law of the Colony. These are *Selby v. Fernando*,[3] *Buller v. Koelman*,[4] *Horsfall v. The Queen's Advocate*,[2] *The Queen's Advocate v. Silva*.[5]

[1] *(1905) 8 N. L. R. 265.*
[2] *(1883) 5 S. C. C. 101.*
[3] *(1853) Ram. 1843-55, 47.*
[4] *(1848) Ram. 1843-55, 141.*
[5] *(1890) 9 S. C. C. 78.*

We decided, therefore, not to hear Mr. Jayawardene on the general question, but only on the question whether, assuming the principle to be in force, this case came within it. On that point he cited to us nothing substantial, and, indeed, it would be difficult to imagine a case more in point than the present.

With regard to the merits of the case I should not have said anything but for the observations of the learned District Judge. The learned Judge says that " many thousands of other lands of the same description and held under similar titles have been settled, and there is no conceivable reason why the Waste Lands Department did not settle the land in the ordinary way when the plaintiffs asked for a settlement. " If, indeed, it has been the custom to settle waste lands on claimants of this character, it seems to me a custom which is better honoured in the breach than in the observance. I can understand a strong feeling in favour of villagers, who without any very defined title have been allowed certain customary rights of user of waste lands in the past being confirmed in those rights, even though it may not be possible to frame their claim in a form nowadays recognized by the law. But I cannot understand any sentiment in favour of capitalist speculators, who for nominal sums buy from simple villagers shadowy titles to vast areas of waste land, and make this purchase the basis of a claim against the Crown. Waste lands in the Colony are held by the Crown in trust for the advantage of the inhabitants of the Colony, and, as it seems to me, should be dealt with from that point of view. To recognize the claim of the plaintiffs in this action would be to put a premium on such proceedings in the future.

In my opinion the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.