1958 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

J. VANDER POORTEN *et al.*, Appellants, *and* GOVERNMENT AGENT, SABARAGAMUWA PROVINCE, Respondent

S. C. 631—D. C. Ratnapura, 6940/L

Chena land—Land Settlement Ordinance of 1931—Order made under sections 3 and 32—Declaration of property as belonging to Crown—Claim under section 20 of Ordinance No. 1 of 1897—Presumption arising from section 6 of Ordinance No. 12 of 1840 and section 24 of Ordinance No. 1 of 1897—Materiality of time of encroachment—Improvements made on Chena land—Can compensation be claimed ?—Ordinance No. 1 of 1897, ss. 3, 5, 20, 21—Appeal under section 18 of Ordinance No. 1 of 1897—Failure to lodge affidavit along with petition of appeal—Fatal irregularity.

The presumption created by section 6 of Ordinance No. 12 of 1840 that all chenas in the Kandyan provinces shall be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown except upon proof by such person of a Sannas or of payment of customary taxes has reference to the condition of the land neither at the time of the Ordinance, nor at the date of any action regarding the title, but at the time when an encroachment was made on the land. *Obiter :* The presumption created by section 24 (*a*) of Ordinance No. 1 of 1897 is equally strong though the section is worded differently.

Ordinance No. 1 of 1897 does not enable a claim to compensation to be made by any person, or to be granted by the Court, in respect of improvements.

An appeal based on section 18 of Ordinance No. 1 of 1897 will be rejected if the appellant fails to lodge an affidavit together with the petition of appeal.

APPEAL from a judgment of the District Court, Ratnapura.

L. G. Weeramantry, with *N. R. M. Daluwatte* and *K. L. de Silva*, for the Plaintiffs-Appellants.

E. R. de Fonseka, Crown Counsel, for the Defendant-Respondent.

Cur. adv. vult.

November 14, 1958. SANSONI, J.—

By an order dated 11th March 1940 published in the *Government Gazette* of 5th April 1940 an Assistant Settlement Officer acting under Sections 3 and 32 of the Land Settlement Ordinance of 1931 ordered that certain allotments of land should be settled as specified in the Schedule to the order. The land in dispute in this action was among those declared the property of the Crown. The plaintiffs, as the executors of one A. J. Vander Poorten, filed a petition in the District Court on 5th December 1940 praying that the Court should investigate the claim which had been made by A. J. Vander Poorten to that land, which they called Welamatiulla Estate situated in the village Embuldeniya, and order the Crown to transfer it to them. They also asked for their costs and for

2—J. N. E 2606—1,593 (6/59).

such other and further relief as to the Court shall seem meet. This petition has been treated by this Court on an earlier appeal[1] as a claim made under section 20, Ordinance No. 1 of 1897, and I shall so regard it.

The plaintiffs claimed that the land formed part of a larger extent of land called Embuldeniya Nindagama, situated at Pohorabawa (excluding the garden and paddy fields) and containing in extent 500 ammunams of paddy sowing, of which Vander Poorten became the owner by right of purchase on deed P11 of 19th March 1928 and another deed of 13th September 1929. It is not necessary to consider the latter deed any further, since the claim of the plaintiffs made under that deed was abandoned in the lower Court. By deed P11 J. H. Meedeniya Adigar purported to transfer the entire Nindagama to Vander Poorten, reciting title under deed P21 of 20th July 1927. There are certain unsatisfactory features about these deeds which need to be mentioned. Deed P21, which is a transfer by one Siriwardene to Meedeniya, is in respect of only an undivided 1/3 share of the Nindagama, and describes it as situated in the village of Gilimale. Further, the vendor on deed P21 does not recite his title in that deed. The District Judge has also pointed out that Meedeniya, when giving evidence at the inquiry in 1931, stated that Siriwardene had bought this land from 4 persons upon deed No. 12798 of 1st September 1926. That deed has not been produced in these proceedings, and it is therefore not possible to say whether Siriwardene had title by purchase at all. The District Judge has also pointed out another serious flaw in the title, in that deed No. 12798 is recited in deed P21 as the source of Siriwardene's title to another land called Kudadurugama Nindagama situated in Kudadurugama, and not to Embuldeniya Nindagama. It is not surprising then that deed No. 12798 was not produced before the Court. The earliest document produced with regard to Embuldeniya Nindagama is an extract from the Register kept under the Service Tenures Ordinance, 1870 (P38). Seven panguwas in the village of Embuldeniya have been registered and are described there as gardens, and M. J. Kiribandara and J. Lokuhamy are registered as the proprietors. The extent of each garden in less than a pela. These two persons, or rather Kiribandara alone, are now claimed as the source of Vander Poorten's title to the extent of 500 ammunams which he purported to buy on P11. In view of these matters it seems to me that there is no foundation whatever for the claim that title to 500 ammunams passed to Vander Poorten.

There is another equally good answer to the plaintiffs' claim of title which the Crown put forward, and that is the presumption arising from section 6 of Ordinance No. 12 of 1840 and Section 24 of Ordinance No. 1 of 1897. There can be no doubt that the Crown is entitled to rely in these proceedings on this presumption, as was done in the case of *Hameed v. The Special Officer appointed under the Waste Lands Ordinance*[2]. It was also held by the Full Bench in *Mudalihamy v. Kirihamy*[3] that

[1] *(1947) 48 N. L. R. 361.*

[2] *(1921) 23 N. L. R. 150.*

[3] *(1922) 24 N. L. R. 1.*

section 6 of the Ordinance No. 12 of 1840 was intended to declare or define the general law, and to lay down once for all what kind of lands shall be considered the property of the Crown; it is declaratory of the rights of the Crown, which are to be presumed upon the proof of certain facts. Under Section 6 all chenas in the Kandyan provinces shall be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown except upon proof by such person of a Sannas or of payment of customary taxes. The question which the Full Bench in *Mudalihamy v. Kirihamy* [3] had to decide was the time at which the presumption in favour of the Crown arose, and the judges held that the presumption has reference to the condition of the land neither at the date of the Ordinance, nor at the date of any action regarding the title, but at the time when an encroachment was made on the land. To say that the presumption does not apply where the land has been already cleared, cultivated, planted and otherwise improved was, in the opinion of Bertram C. J.," to say that it can only apply when the trespasser is caught *flagrante delicto* and before he has done anything in pursuance of his entry upon the land. But this does not happen. In all countries it is the essence of the position of the squatter that he should for some time have escaped notice ".

The presumption created by section 24 (*a*) of Ordinance No. 1 of 1897 is equally strong though the section is worded differently. The Crown is entitled to rely upon the provisions of both sections. Having regard to the purpose and the provisions of Ordinance No. 1 of 1897, which deals in section 24 with lands of almost the same nature as those referred to in Ordinance No. 12 of 1840, it seems to me that even in proceedings under the former Ordinance the condition of the land has to be considered, and the presumption should be applied, as at the time of encroachment. It seems to me unreasonable to apply the presumption created by the two sections in two different ways, since the subject matter of the presumption is the same. With great respect, I am unable to agree with the dictum of Bertram C.J. that the material time in proceedings under Ordinance No. 1 of 1897 is the date of the issue of the notice under section 1. Of course this question arises only incidentally, since I have already held that the presumption under section 6, Ordinance No. 12 of 1840, can be relied upon by the Crown in these proceedings.

Now it is quite clear, and the plaintiffs' counsel at the appeal did not dispute it, that the land claimed by the plaintiffs was chena until the early part of 1928; being chena in the Kandyan provinces it must necessarily be held to be the property of the Crown, since no attempt has been made to prove either a sannas or the payment of customary taxes. When the land was surveyed in 1927 along with other lands in that area by Government Surveyors for the purpose of Ordinance No. 1 of 1897, it was chena. But it is argued, and the only support for that argument is the *obiter dictum* of Bertram C.J. to which I have referred, that at the time the settlement notice was published in the *Government Gazette* of 21st September 1928, a part of the land had been planted in tea and the

presumption would not apply. In the view I take of the relevant date it does not matter when the land was planted, but I shall refer to the salient facts shortly.

The most that can be urged by the plaintiffs as to the time the planting began was that it began a few months before the publication of the settlement notice, and it is most unlikely that it would have begun before 19th March 1928 when Vander Poorten purported to purchase the land from Meedeniya on deed P11. The evidence led by the petitioners on this part of their case is not satisfactory. They called a witness Sayakkara who produced the ledger P13 for the period January 1928 to December 1929 and pointed to the accounts for Embuldeniya Estate. He then stated that, according to page 286, from December 1928 to April 1929 money had been spent on planting the estate. Under cross-examination he again stated that Vander Poorten started planting in about December 1928 after he got the transfer P11. This witness was the chief clerk under Vander Poorten and purported to speak from the knowledge he had gained while he was in Vander Poorten's service from 1920. At a much later date he was recalled by the plaintiffs and he then stated that Vander Poorten first began spending money on planting tea in February 1928, and that up to December 1929 he had spent Rs. 11,414/74. Now the details of the amounts spent do not appear in the ledger P13; they would apparently have appeared in monthly statements sent to him by the Superintendent of the estate. But those monthly statements for the relevant period have not been produced. The witness said that the statements relating to the period prior to 1932 have been misplaced by him. It seems to me, therefore, that it would be unsafe to act on his evidence as to when the planting really began, particularly as another witness Sumathipala called by the plaintiffs said that as far as he could remember the land was planted in 1929.

The last point which I wish to deal with on the question of title is the objection taken by the Crown under section 4 of the Waste Lands Ordinance No. 8 of 1927. Section 2 defines the "appointed day" as the 10th of August 1927. Under section 4 any alienation of unsettled land made after the appointed day is invalid unless it was made with the written consent of the Government Agent. No such consent has been obtained in respect of deed P11 which was executed on 19th March 1928. The plaintiffs have sought to claim exemption from this prohibition against alienation under section 2 (*f*), which excludes from the definition of "alienation" a disposition giving effect to a notarially executed agreement made before the appointed day. The agreement they rely on is deed P44 of 8th August 1927 executed between Vander Poorten, Meedeniya and one Chelliah. It is an agreement by which certain lands referred to in the deed as having been purchased by Meedeniya are admitted to be the property of Vander Poorten, and Vander Poorten agrees to advance further sums of money in order that Meedeniya and Chelliah may acquire further lands for him. The land in dispute was already in the name of Meedeniya who purported to acquire 1/3 share of it, P21 of 20th July 1927,

yet it is not mentioned in any of the Schedules to P44. It is therefore not possible to hold that the transfer P11 gave effect to the agreement P44.

I have dealt at length with the question of title and I fear I have rather laboured the point that the plaintiffs have no title to the land in dispute, inasmuch as counsel for the plaintiffs virtually conceded before us that the plaintiffs had no title to the land in view of the various defects of title which I have pointed out. The relief he really pressed for was the claim to compensation for the improvements effected to the land by Vander Poorten who planted it in tea. The District Judge has considered this claim and rejected it, both because it was not made in the petition, and even if equitable considerations could be taken into account by the Court, because the plaintiffs have been amply repaid by the profit derived from the tea plantation. It would certainly seem that the plaintiffs in their petition only claimed a transfer of the land to them by the Crown and no claim for compensation was made in the petition. The claim to compensation however, fails in any event, because I do not think that Ordinance No. 1 of 1897 enables such a claim to be made by any person or to be granted by the Court. The Ordinance, as its preamble shows, was enacted in order to make special provision for the speedy adjudication of claims to forest, chena, waste and unoccupied lands. By section 3 a claim made should be one to a land specified in the notice published under section 1 or to any interest in it. A claim to compensation is neither. It may be that the Government Agent or Assistant Government Agent after inquiry is empowered by administrative regulations to settle a claim for compensation if one is made by a claimant, but once the matter comes before the Court under section 5 or section 20 the District Judge has no jurisdiction to grant compensation for improvements nor has this Court. The only order the Court can make is that the claim to the land or any interest in it has been established or not. Section 21 puts the matter beyond doubt. Under that section, if the claim is established the Judge must order that the claimant be placed in possession of the land, unless the land has been sold. In the latter event the claimant will not be awarded possession of the land, but he will receive instead by way of compensation a sum equal to the price at which the land was sold. In *Hamine Etena v. The Assistant Government Agent, Puttalam*[1] this Court held that where the plaintiff has failed to establish a legal claim the Court cannot grant relief on equitable grounds. Such relief can only be obtained by appealing to authorities other than the Courts.

The District Judge dismissed the claim of the plaintiffs, and when this appeal from the order came before us a preliminary objection was raised to the hearing of this appeal, based on Section 18 of the Ordinance. Logically that objection should have been dealt with at the commencement of this judgment, and if held to be a good one the appeal should have been rejected without further consideration. But in view of the history of this litigation which commenced in December 1940 we felt that all matters arising on the appeal should be dealt with, whatever order might be made on the preliminary objection.

[1] *(1922) 23 N. L. R. 289.*

Under section 18 a party who is dissatisfied with the decision of the District Judge may appeal to the Supreme Court by lodging within 30 days from the date of such decision a petition of appeal together with an affidavit setting out the value of the land with regard to which the decision has been given against him. Stamp duty is chargeable upon every such petition of appeal and upon every such affidavit at the rates specified in part 2 of the Schedule B to the Stamp Ordinance, 1890; and every such appeal shall be dealt with and disposed of in the same manner and subject to the same rules as appeals from the District Courts.

It is conceded that no affidavit was lodged together with the petition of appeal or at any time since. Thus there has been an omission on the part of the appellants to comply with the terms of the section, both in their failure to lodge an affidavit together with the petition, and their failure to supply the necessary stamps for the affidavit either then or subsequently.

A similar objection was raised when this case came up in appeal from a previous order of the District Judge and it was overruled [1]. There too the appellants had failed to lodge an affidavit and Keuneman A.C.J. said: "This objection has been raised at a very late stage, and I do not think there is substance in it. There was already in the record at the time an affidavit setting out the value of the land which was filed with the earlier papers, and I do not think we should accept this particular objection as valid." With all respect to the learned Judge, I do not think the failure to comply with the decision of the Stamp Ordinance can be overlooked in that way. It would also appear that an affidavit as to value is required at the time an appeal is lodged so that the necessary stamp duty for the petition of appeal and affidavit may be ascertained, since stamp duty is not leviable on any documents filed prior to the stage of appeal. If no affidavit is filed, then there is no means of verifying the stamp duty chargeable on either document. An affidavit filed at the commencement of the proceedings, in order to comply with a requirement of the Land Settlement Ordinance of 1931, is in no sense an affidavit lodged together with the petition of appeal as required by section 18 of Ordinance No. 1 of 1897.

There are numerous decisions of this Court which have laid down that where an appellant fails to deliver together with the petition of appeal stamps which he is required so to deliver, the appeal must be rejected. In *Attorney-General v. Karunaratne* [2] a Bench of three Judges held that they were bound by a decision of a Full Bench to that effect, and that stamps tendered one day after the filing of the petition of appeal were tendered too late. The words "together with" were there construed to mean "at the same time as". The position is much worse, of course, where the appellants, as in this case, have not tendered the affidavit or the stamps for the affidavit at all.

Another reason why it seems to me that the appeal should be rejected is that a right of appeal from the decision of the District Court is a right that would not have been available if it had not been expressly conferred

[1] *(1947) 48 N. L. R. 361.* [2] *(1935) 37 N. L. R. 57.*

by the Ordinance, since the Court was exercising a special jurisdiction. The exercise of this right must be strictly in accordance with the terms of section 18 which conferred that right.

Following these decisions, I consider that the preliminary objection is sound and the appeal should be rejected. I would dismiss the appeal with costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.