1952 *Present :* **Pulle J. and L. M. D. de Silva J.**

V. APPU NAIDE *et al.*, Appellants, *and* V. DINGIRI NAIDE *et al.*, Respondents

S. C. 42—D. C. Matale, P. 206 (271)

Co-owners—Advantage gained by some at the expense of the others—Trusts Ordinance (Cap. 72), s. 92.

Where certain co-owners obtained a Crown grant in their favour to the exclusion of the other co-owners by wilfully suppressing at the "settlement" inquiry the fact that the latter were entitled to shares—

Held, that, by operation of section 92 of the Trusts Ordinance, the title of the holders of the Crown grant was subject to a trust in respect of the shares of those co-owners whose rights had not been disclosed.

APPEAL from a judgment of the District Court, Matale.

L. G. Weeramantry, for the defendants appellants.

B. S. C. Ratwatte, for the plaintiffs respondents.

Cur. adv. vult.

December 29, 1952. PULLE J.—

The principal question which arises for determination on this appeal is whether the learned District Judge was right in holding that the corpus to be partitioned should be restricted to lot A shown on Plan P1 or whether, as contended for by the appellants, it should be both lot A and the contiguous lot B.

By a series of deeds commencing from 1902 one Kapuru Naide and his sister Menikhamy became owners in equal shares of a land called Miriskuttawe Hena which admittedly is the land comprising lots A and B referred to above. Menikhamy was married to Dingiri Naide, the 1st plaintiff, and after her death in 1909, the 1st plaintiff married Punchihamy, who is the 2nd plaintiff. By a deed of 1917 Kapuru Naide transferred his half share to the 1st and 2nd plaintiffs and in 1945 they gifted, subject to their life interest, a half share of the land which can now be identified as lot A to their daughter the 3rd plaintiff.

The 1st defendant is the son of the 1st plaintiff by Menikhamy and the 2nd defendant is a granddaughter of the 1st plaintiff and Menikhamy. The case for these defendants is that, according to Kandyan law, upon the death of Menikhamy her half share devolved equally on the 1st defendant and his brother Kirihamy, the deceased father of the 2nd defendant, and that they are entitled to this half share not only out of lot A but out of lot B as well. The claim of the defendants to have lot B included in the corpus sought to be partitioned and to be declared entitled to their shares therein would be incontrovertible but for a transaction which took place on the 27th April, 1933. On this date, for a consideration of Rs. 8 paid by the 1st and 2nd plaintiffs, the Crown executed a grant in their favour of an allotment of land which is identifiable with lot B.

In regard to this Crown grant the contention which has prevailed is that lot B became the absolute property of the Crown as a result of proceedings taken under the Waste Lands Ordinances and that the transferees under the grant succeeded to an indefeasible title. In other words, the title on which the defendants based their claim could not avail them as against the Crown grant. In our opinion there is no evidence to warrant the finding that after an inquiry duly held under the Waste Lands Ordinance lot B had been declared the property of the Crown. (The nominal consideration of Rs. 8 rather indicates that lot B was sold preferentially to the 1st and 2nd plaintiffs because they claimed to be in possession under what is commonly known as village title.) As there is no proof that the Crown was in a position to convey an indefeasible title to lot B the claim of the defendants as against the 1st and 2nd plaintiffs to a $\frac{1}{4}$ share each in lot B has been made out beyond any doubt.

There is yet another reason why the defendants are entitled to succeed. It would appear that the 1st plaintiff claimed lot B at what is called a "settlement" inquiry. While disclosing that he and his wife, the 2nd plaintiff, held shares he wilfully suppressed the fact that the defendants too were entitled to shares as successors in title of his first wife, Menikhamy, and thereby obtained the advantage of a Crown grant in favour of only himself and the 2nd plaintiff. The 1st plaintiff explained his conduct by

stating that it was his intention to give to the defendants, in due course, their shares in lot B. His evidence leaves no room for doubting that, if the claims of the defendants had been disclosed by him, the Crown grant would have been made out in the joint names of the defendants and the two plaintiffs. In the circumstances, by operation of section 92 of the Trusts Ordinance, the two plaintiffs must hold their title to a half share in trust for the defendants.

In the result the appeal succeeds to the extent that lot B must be included in the corpus and that the defendants must be declared entitled each to a ¼ share of that lot. The appellants do not press their claims to the house which has been allotted exclusively to the 1st plaintiff. The interlocutory decree will be modified to give effect to our decision. The 1st and 2nd plaintiffs will pay to the defendants the costs of appeal. The costs of contest in the Court below will, as already provided, be divided.

L. M. D. DE SILVA J.—I agree.

Appeal allowed.