1920.

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

UNNANSE *et al. v.* DE HOEDT *et al.*

113—D. C. Kandy, 25,911 F.

No prescription against Crown as to chena land in the Kandyan Provinces—May one person claim by prescription chena land in Kandyan Provinces as against another ?—Intermittent cultivation.

The plaintiff claimed a piece of land, which was originally chena land, situated in the Kandyan Provinces, relying on prescription.

Held, that the fact that there is no prescription against the Crown in the Kandyan Provinces is no answer to the plaintiff's claim as against the defendant, who was a private individual.

Where two parties are at issue on a question of prescription, the claim of the person relying on the prescriptive title cannot be ousted by showing that the real title is in a stranger, who is not a party to the action.

A person may acquire title to a chena by the intermittent cultivation, which is appropriate to a chena.

THE facts appear from the following judgment of the District Judge (F. R. Dias, Esq.) :—

The dispute in this case is as regards the title to the lot marked B in Mr. Keyt's plan H K, dated October 27, 1918. The plaintiff, who is the Buddhist priest of the Kaluwana Vihare in the neighbourhood of this land, claims it on behalf of his vihare as comprising three contiguous allotments of land (whose extent is not disclosed), which for the last seventy-five years had been in the continuous and undisturbed possession of himself and his predecessors in office. It is alleged that the second and third defendants, who in January, 1917, took the land for chena cultivation from the plaintiff, fraudulently joined the first defendant and gave him the landowner's share of the produce, and permitted the first defendant in October, 1917, to take possession of the land and plant it with rubber.

The first defendant claims the lot as part of his Kaluwana estate of some 60 odd acres which he bought from one Van Reyk in 1904, and the survey plan, annexed to his predecessor's title deeds, admittedly covers what is now in dispute. The third defendant supports him, but the second defendant admits the plaintiff's allegations, and says that the first defendant's conductor forcibly took away the landowner's share of the crop. It is not difficult to see that the second defendant is only a creature of the plaintiff, who had been designedly made a defendant in the case to support the plaintiff's claim by an admission of this kind. The third defendant disclaims title, and denies the right of the plaintiff and that he was ever his tenant.

Rightly or wrongly the first defendant is in possession, and it is for the plaintiff to prove a superior title. He commenced this action in his personal capacity, but, after answer was filed, a trustee was nominated for his vihare, and added as a party plaintiff.

The simple question we have to consider is whether this land ever formed part of the vihare property. The best evidence of that is the Government plan of lands claimed by temples and settled by the

Commissioners under the Ordinance No. 10 of 1856. The lands then in the possession of, or claimed by, the Kaluwana or Mullegama Vihare were so settled, and the plan No. 60,963 (D 2) of the year 1864 shows what they were. It is proved and admitted that the land now in claim is outside that plan.

What then is the plaintiff's title ? It is said that he and his predecessors in office for the last seventy-five years or more have been in continuous possession and enjoyment of the lots which had been dedicated to the vihare by its "dayakayas."

This is nothing but a bare statement, unsupported by any deed or other document. Who were these "dayakayas," and what right have such persons to make presents of chena lands which belong to the Crown, unless covered by a "Sannas" or grant ?

In order to support a title by prescription to any land, a person must hold it continuously for ten years or more, and do acts indicative of a permanent occupation by him, as, for instance, by making a permanent cultivation on it, or by building a house and living there. The plaintiff or his predecessors did no such things, and the utmost that can be said is that in 1862 the plaintiff's tutor gave these three lots on a planting agreement to one Arunasalam Kangany for a term of six years for the purpose of planting coffee, and dividing the lands equally between themselves at the end of the six years.

Arunasalam planted the coffee and possessed the lands for about twenty years and died, and one Muttu Karuppen had possession after him, paying plaintiff a small ground rent till about 1878. Coffee then died out, and the lands lapsed into jungle, and were only used for chena cultivation since then.

These lots are on the face of a big hill, and form parts of a vast tract. It seems impossible now to fix the identity of what the plaintiff's tutor professed to lease out to Arunasalam in 1862, and even if they really were the lands now in dispute, their subsequent abandonment made the plaintiff and his predecessor forfeit any rights that may have commenced to accrue to them in 1862.

It is admitted by plaintiff that for the last forty years at least these lands have been jungles, and during the last thirty years they had been only chenaed for "kurakkan" at intervals of four or five years. Even if we assume that this evidence is true, and that the cultivations were made at the instance of the plaintiff, no title of prescription can arise therefrom. Except by prescription the plaintiff has no title whatever.

It is not necessary to consider the first defendant's title. It may be that he has no title at all, and that his old plan wrongly includes lands which did not belong to his predecessor.

Rightly or wrongly he claims all the land covered by that plan, and he is in possession, and, until some one can prove a better title to any portion, he is entitled to stay where he is. The plaintiff has certainly not proved any better title to the portion B now in dispute, and the fraudulent attempt he has now made in collusion with the second defendant is too transparent.

I dismiss the action of the plaintiff and added plaintiff with costs as regards the first and third defendants, and order the second defendant to pay his own costs.

Keuneman, for the appellants.

A. St. V. Jayawardene (with him *Croos-Dabrera*), for respondents.

1920. December 1, 1920. BERTRAM C.J.—

Unnanse v. De Hoedt

In this case we have come to the conclusion that the appeal should be allowed. The only point of any doubt was that of identity. I think that Mr. Keuneman has satisfied us that the land referred to in the survey made by Mr. de La Motte in 1918 is the land in dispute. I do not attach so much importance to the contentious boundaries mentioned by both sides and appearing on the plan as to the evidence of the witnesses, some of whom say that they knew the land all their lives. I do not think that any inquiry need be made on the subject. I cannot see that there is any room for any real doubt that everybody understands what the land is. Nor can I see that there is any doubt that this land is identical with the land mentioned in the document, which is the basis of the plaintiff's claim. According to the case put forward by the plaintiff, the temple has had control of this land in a greater or less degree from the year 1862. A planting voucher is produced for that year. The land was opened up in coffee, and down to the year 1878 was cultivated. After 1878 it lapsed into jungle, and, according to the evidence tendered by the plaintiff, it was cultivated at intervals of four or five years in chena cultivation. The learned District Judge seems to me to accept this account of the matter. Nor do I think that what he says is weakened by a subsequent expression in his judgment, where he says: "Even if we assume that the evidence is true." Accepting this evidence, we, then, must ask ourselves what is the effect of it. The learned Judge thinks that there is good reason to believe that the land was originally chena, and that if the Crown were to intervene and claim this land, there would be no answer to the claim of the Crown, inasmuch as there is no prescription against the Crown in the Kandyan Provinces. That may very well be. But the Crown is not a party in this case. We are trying a claim by one individual against another. The plaintiff, as plaintiff, is entitled to rely upon the second part of section 3 of the Prescription Ordinance, No. 2 of 1871. As against the defendants, I see no reason why he should not set up this prescriptive title. No case is cited to show that where two parties are at issue on a question of prescription, the claim of the person relying on the prescriptive title can be ousted by showing that the real title is in a stranger who is not a party to the action. That question has been discussed in the case of *Raki v. Lebbe*,[1] although the circumstances in that case are not very much akin to those of the present. Apart from that question, the only other question raised is as to whether a person may prescribe by virtue of the intermittent cultivation which is appropriate to chenas. I do not think that that can be seriously questioned. I may refer as authorities, justifying the view that, in the case of rights, which are in their nature periodical,

[1] *(1912) 16 N. L. R. 138.*

it is possible to prescribe by intermittent user, to *Appurala v. Dawson*,[1] and also to a recent judgment of my brother De Sampayo *Subramaniam v. Marimuttu*.[2] There is also an unreported case, D. C. Colombo, No. 23,517,[3] which supports the same contention. As we consider that the identification of the land is satisfactorily made out, and as the view expressed by the learned Judge on the law would appear not to be in accordance with the authorities I have referred to and the principles I have enunciated, I am of opinion that the appeal must be allowed, with costs, in both Courts.

DE SAMPAYO J.—I agree.

Appeal allowed.