1945 *Present:* **Soertsz A.C.J., Wijeyewardene, Cannon, Rose and Canekeratne JJ.**

APPUHAMY, Appellant, *and* MARTIN *et al.*, Respondents.

251—D. C. Matara, 8,950.

Ordinance relating to Claims to Forest, Chena, Waste and Unoccupied Lands, No. 1 of 1897, s. 4 (2)—Order of Special Officer—Binding in rem—Meaning of words " final and conclusive ".

Held by Soertsz A.C.J., Cannon, Rose, and Canekeratne J.J. (Wijeyewardene J. dissenting):—

Proceedings under the Ordinance relating to Claims to Forest, Chena, Waste and Unoccupied Lands, No. 1 of 1897, are proceedings *in rem*, and an order embodying an agreement or admission and falling under section 4 (2) of that Ordinance gives to the claimants mentioned in the order a title good against all others, including the claimants who failed to appear before the Special Officer.

The ruling in *Kiri Menika v. Appuhamy* (1916) 19 N. L. R. 298, followed, and the modification of it in *Gunasekera v. Silva* (1917) 4 C. W. R. 226 and *Dingiri Banda v. Podi Bandara* (1927) 29 N. L. R. 357, not followed.

THIS was a case referred by Howard C.J. to a Bench of five Judges under section 51 of the Courts Ordinance.

A tract of land, 207 acres and 1 rood in extent, was the subject of a notice under section 1 of Ordinance No. 1 of 1897. Seven claimants came forward and preferred a claim to the lands involved in the notice. The Special Officer held an inquiry and, under section 4 of the Ordinance, entered into an agreement with the seven claimants by which he admitted their claim to an extent of 133 acres, and the remainder was declared to be the property of the Crown. This agreement was embodied in Orders P 3 and P 4 of October 12, 1900, which were duly published in the *Government Gazette*. The plaintiff in this action sued for the partition of the 133 acre extent in respect of which the claim of the seven claimants was admitted by the Special Officer. He contended that the seven claimants alone were entitled to the land in consequence of Orders P 3 and P 4, whereas some of the defendants maintained that not only the seven claimants but also all the others who had been co-owners with them prior to the admission of the claim of the seven claimants should be regarded as entitled to this land although they themselves did not appear before the Special Officer.

H. V. Perera, K.C. (with him *S. R. Wijetileke*), for plaintiff, appellant.—The question for determination is whether an order embodying an agreement or admission under section 4 (2) of the Waste Lands Ordinance, No. 1 of 1897, gives to the claimants mentioned in the Order a title good against all others including the claimants who failed to appear before the Special Officer. The section contemplates an agreement or admission and an order embodying such agreement or admission, and declares such order to be " final and conclusive ". The finality and conclusiveness is attached to the adjudication. The Special Officer has the status and is given

the powers of a tribunal. The preamble to the Ordinance refers to " adjudication " of claims. The intention of the Ordinance is to shut out non-claimants. The agreement or admission when embodied in the Order not merely binds the parties but is conclusive as to title. If finality is only as regards the agreement then third parties are not bound. If finality is as regards the proceedings then third parties are bound. In *Kiri Menika v. Appuhamy*[1] de Sampayo J. held and Order under section 4 (2), based on proceedings that ended in an agreement between the Crown and the claimants, to be final and conclusive. In *Gunasekera v. Silva*[2] a distinction was drawn between an Order embodying a simple admission of a claim and an Order embodying an agreement, and de Sampayo J. held that his earlier decision as to conclusiveness and finality only applied to the latter type of Order. It is submitted that this distinction is logically unsound. Section 4 provides for the embodying of an " admission or agreement " in an Order and makes " every such order . . . . final and conclusive ". *Fernando v. Hendrick*[3] has no application to the facts of the present case as it dealt with a decree of Court. In *Dingiri Banda v. Podi Bandara*[4] two Orders were published separately and the Court erroneously considered and construed them separately, and followed the view of de Sampayo J. in *Gunasekera v. Silva (supra).*

N. E. Weerasooria, K.C. (with him *S. W. Jayasuriya*), for substituted 1st defendant, respondent.—There is no adjudication on the part of the Special Officer. The whole scope of the Ordinance up to the reference to Court is different from what follows after reference. The Special Officer can either admit a claim or refer to Court, but he has no power to reject a claim. A judicial decision must be one *inter partes*. It is submitted that the Special Officer acts in an executive capacity, merely as an agent of the Crown, and that an Order under section 4 (2) is not conclusive as to title.

L. A. Rajapakse, K.C. (with him *G. P. J. Kurukulasooriya*), for 4th defendant, 24th defendant, and 42nd to 46th defendants, respondents.—The whole scheme of the Ordinance is to decide what is Crown property and what is not. It was not intended to deal with private rights *inter partes*. In reality the first claimant is the Crown. The Special Officer acting on behalf of the Crown in an administrative capacity cannot therefore " adjudicate ". Further, the different phraseology used in sections 2 and 4 indicates that whereas an Order under section 2, being a declaratory order, is final and conclusive as to title, an Order under section 4 has not that effect. An Order under section 4 is merely final and conclusive in the sense that the property is not Crown but private. The words " final and conclusive " in section 4 indicate merely that the agreement or admission cannot be canvassed again by the Crown or private individuals who were parties to the agreement or admission; they do not indicate that the Order is intended to give an indefeasible title to the claimants. Section 16 deals with " adjudication " when the dispute is referred to Court. Up to this point the proceedings are administrative and not judicial in character. When indefeasible title is

[1] *(1916) 19 N. L. R. 298.*
[2] *(1917) 4 C. W. R. 226.*
[3] *(1920) 22 N. L. R. 370.*
[4] *(1927) 29 N. L. R. 357.*

sought to be conferred the Legislature does so in unmistakable terms. See, for example, section 9 of the Partition Ordinance, section 146 of the Municipal Councils Ordinance, and section 8 of the Land Settlement Ordinance. In any event, on the evidence it is quite clear that the 4th defendant has acquired prescriptive title to the lots he claims.

N. Nadarajah, K.C. (with him *N. M. de Silva*), for 11th defendant, respondent—Any advantage gained by those who came forward to claim is held in trust for those who did not come forward—section 90 of the Trusts Ordinance, *Abeyesundera v. Ceylon Exports Ltd.*[1], *Tillakaratne v. Dassanaike*[2], *Dias v. Wickremesinghe*[3]. The evidence indicates that this defendant has acquired a prescriptive title.

H. V. Perera, K.C., in reply.—The question of a trust does not arise. Facts raising a constructive trust do not exist. There is no evidence that the claim before the Special Officer was made on behalf of others. The sole question is whether the proceedings before the Special Officer are proceedings *in rem*. In proceedings *in rem* notice to the world is necessary. The Ordinance seeks to secure that such notice is given. On reference to Court the jurisdiction is changed but the proceedings continue to be *in rem*.

Cur. adv. vult.

November 6, 1945. SOERTSZ A.C.J.—

Although the order of the Chief Justice dated September 12, 1944, is that this case (that is the whole case) " shall be heard by five Judges of the Supreme Court ", the main question for decision is whether the interpretation given of the provisions of the Waste Lands Ordinance, No. 1 of 1897, particularly of sections 2, 3, and 4, in the case of *Kiri Menika v. Appuhamy*[4], is correct and should be followed, for, in this case as in that, the question is in regard to the meaning of the words " final and conclusive " in the opening sentence of section 4 (2):—" Every such Order shall be published in the *Government Gazette* and shall be final and conclusive ".

Briefly stated, the relevant facts on which that question arises here are as follows:—A tract of land, 207 acres and 1 rood in extent, was the subject of a notice under section 1 of the Waste Lands Ordinance, No. 1 of 1897. The Special Officer took all the steps section 1 of that Ordinance required him to take, and in response to the Notice duly published by him. seven claimants came forward and preferred a claim to the lands involved in the Notice. He, thereupon, held the inquiry prescribed by sections 3 and 4 (1) of the Ordinance, and, under section 4, he concluded the inquiry by entering into an agreement with the claimants by which he admitted their claim to an extent of 133 acres, and the remainder was declared to be the property of the Crown. This agreement was embodied in Orders P 3 and P 4 of October 12, 1900, and the Orders were published in the *Government Gazette* in compliance with the requirements of section 4 (1) and (2) of the Ordinance. In 1933, the plaintiff instituted this suit for the partition of the 133 acre extent in respect of which the claim of the seven claimants was admitted by the Special Officer and the

[1] (1936) 38 N. L. R. 117.
[2] (1939) 14 C. L. W. 7.
[3] (1945) 46 N. L. R. 346.
[4] 19 N. L. R. 298.

basis upon which his case proceeded is that only those parties who claim under the seven are entitled to share in the land, whereas the principal respondents to this appeal maintain that not only the seven claimants but also all the others who had been co-owners with them prior to the admission of the claim of the seven claimants are to be regarded as entitled to this land although they themselves did not appear before the Special Officer. This latter contention is advanced on an interpretation of the words " every such order shall be published in the *Government Gazette* and shall be final and conclusive " as meaning nothing more than that the order, on publication, shall be binding upon the actual parties to the agreement, and not as affecting the title of those others who claim to be shareholders of the land although they themselves preferred no claims to the Special Officer. In dealing with a similar contention advanced in *Kiri Menika v. Appuhamy*, de Sampayo J. said " In my opinion, the order embodying the agreement with the claimant is, subject to such relief as the above (i.e., the relief afforded by sections 20 and 26 of the Ordinance), final and conclusive, as section 4 (2) itself declares, even where the person with whom the agreement has been entered upon has claimed only an undivided share . . . . I do not think that the minority (i.e., in age) of persons, who ought to have claimed but did not, takes away the conclusive effect of the Ordinance ". In other words, de Sampayo J., with whom Wood Renton C.J. concurred, construed the words " final and conclusive " as binding everyone who is subject to the law, whether parties to the proceedings or not. The question then, really, is whether proceedings under the Waste Lands Ordinance are proceedings *in rem*. After a careful consideration of the purpose and provisions of the Ordinance, of the earlier cases bearing on this question, and of the submissions made to us in the course of the argument, I find myself compelled to the conclusion that they are proceedings *in rem*. The meticulously elaborate precautions taken by the Legislature to secure the widest possible publicity for proceedings intended to be taken under the Ordinance " for the speedy *adjudication* of claims " to lands of the description within the purview of the Ordinance, the requirement that all declarations and all orders made under sections 2 and 4 of the Ordinance shall be published in the *Government Gazette*, the powers conferred on the Special Officer to extend the period within which claims could be made when he is satisfied that there is occasion for such an extension, the provision for the intervention of the Court in a certain event, and for granting relief in appropriate cases within a period of one year (section 20), the further provision for the granting of compensation by the Governor, in certain cases, to persons adversely affected by any order (section 26), seem to me to proclaim that fact in no uncertain voice. Indeed nothing less than proceedings *in rem* would have served the purpose of the Legislature. As de Sampayo J. observed. " The primary object of the Ordinance is to settle once for all as between the Crown and private persons the title to lands of the description mentioned in the Ordinance, and if the rights of shareholders who did not come forward to claim are to remain intact, notwithstanding the proceedings taken under the Ordinance, that object will not be attained. Consequently, it seems to me that the Ordinance when it provided for an

agreement with the claimant meant that a complete settlement of the title might thereby be arrived at, whether there might or might not be possible claims on the part of other persons who have not chosen to come forward ". The method of interpretation implied in that observation is well established. It is popularly known as the " mischief rule ", which was laid down in a case dating back to the year 1584—*Haydon's* case—in which the Barons of the Exchequer ruled that " for the true interpretation of all statutes in general—be they penal or beneficial, restrictive or enlarging the common law, four rules are to be discerned and considered:—

(1) What was the law before the passing of the act;
(2) What the *mischief* and defect for which the law did not provide;
(3) What remedy the Parliament hath resolved and appointed for the cure of the disease;
(4) The true reason for the remedy ".

And then, the Barons go on to say:—" the office of the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo,* and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico* ". It is abundantly clear that in the Waste Lands Ordinance the Legislature was concerned to eliminate as far as possible the mischief that must attend upon title to waste lands so long as it rested merely upon the presumption in favour of the Crown in respect of such lands. The Legislature contemplated, by means of this Ordinance, the attainment of certainty in regard to the title to them by ascertaining what valid claims, unknown to the Crown owing to the absence of the usual *indicia* of private ownership, third parties might have to them. But it is contended that an investigation aimed at ascertaining merely what lands belonged to the Crown on the one hand, and what was private property, on the other, was sufficient for the purpose of the Crown and that that was all the Ordinance provided for and not for " probing any further into the title of such lands as appeared to be private ". I must confess that, at a certain stage of the discussion, this contention proved attractive for there were many instances in which the Special Officer proceeding under the Waste Lands Ordinance was content with the simple admission that lands to which claims were made were *private.* But on further consideration, I am satisfied that, in a good many cases, it would not be sufficient for the Special Officer to be content with such a finding for it is clear that the Legislature contemplates his entering into agreements for the " admission, rejection of the whole or any portion of the claim or for the purchase of the whole or any portion of the land which is the subject of such claim ". In order to do that with desirable assurance and safety it is essential that he should be satisfied that the parties with whom he enters into such agreements are the parties with the ultimate right to act in that behalf with conclusive effect. If it were otherwise, if it were competent for third parties to reopen these agreements the mischief the Legislature set out to cure would endure, for *ex hypothesi,* not only the title of the claimants but also that of the Crown acquired

by agreement would be liable to attack. The main arguments addressed to us in attempted refutation of the view taken in *Kiri Menika v. Appuhamy* were—

(*a*) that the ruling in *Kiri Menika v. Appuhamy* is undermined by the view taken in two later cases by de Sampayo J. who wrote the judgment in the case just mentioned, namely, in the cases of *Gunasekara v. Silva* [1], and *Fernando v. Hendrick* [2], and by the judgment of Fisher C.J. and Drieberg J. in *Dingiri Banda v. Podi Bandaras* [3] and that we should follow the ruling in the last named case.

(*b*) that the Special Officer in acting under section 4 of the Ordinance was acting in an administrative or executive and not in a judicial capacity and that, for that reason, the Legislature could not have intended to give the Orders made by him so far-reaching an effect as contended for on behalf of the seven claimants;

(*c*) that whereas section 2 (2) provides that every order made in the event of no claim being preferred, shall, on publication in the *Government Gazette* be " conclusive proof that the land or lands mentioned in the Order was or were, at the date of such Order, the property of the Crown," section 4 (2) only says that the Order made under section 4 (1) " shall be final and conclusive ";

(*d*) that section 16 provides that, on a dispute being referred to a Commissioner or to a Court for adjudication, the tribunal shall proceed to try the question *as between the claimant and the Crown* and shall adjudicate as between them;

(*e*) that if it had been intended by the Legislature to bind the wo at large by proceedings under this Ordinance, it would have enacted in terms similar to the terms of section 8 of the Land Settlement Ordinance which, admittedly gives a conclusive effect to the Order, similar to the order made under section 4 (2) of the Waste Lands Ordinance, made under it.

I will deal with these in the order in which I have set them forth :—

In regard to (*a*), this case falls exactly within the principle in *Kiri Menika v. Appuhamy* for here too we are dealing with proceedings that ended in an agreement between the Crown and the claimants, and an order based thereon. In *Gunasekara v. Silva*, de Sampayo J. while affirming that principle in the case of agreements, introduced a modification of it when he said that " the *admission* of the claim by the Settlement Officer does not conclude the other owners of the land for the case of *Kiri Menika v. Appuhamy* to which I have been referred does not apply. That was a case of an agreement on the footing of mutual concession between the claimant and the Crown ". To speak with all the deference due to so learned a Judge, it seems to me that the effect of an admission cannot, logically, be any less than that of an agreement. Section 4 provides for the embodying of " such *admission* or *agreement* in an order " and makes " every such order final and conclusive "; it seems to follow inevitably from these words that whatever the finality or conclusiveness contemplated by the Legislature, it applied in the same degree to both

[1] *(1917) 4 C. W. R. 226.* [2] *(1920) 22 N. L. R. 370.* [3] *(1927) 29 N. L. R.*

admission and agreement. The second case of *Fernando v. Hendrick* has, really, no direct application to the present question. It dealt with a decree of Court based upon an agreement and the decree only directed that a part of the property be declared that of the Crown, and that the remainder be *private* property. There was no direction admitting the claim of the claimants in respect of that remainder. The third case *Dingiri Banda v. Podi Bandara* raised substantially the same question as arose in *Kiri Menika v. Appuhamy* and as arises here, but Drieberg J. relying upon the modification of the rule introduced by *Gunasekara v. Silva* held that as the Order made on January 18, 1918, contained only an admission of the claim of the claimant to the land in dispute in the case before him, and as it was only the Order made on February 8, 1918, that " set out the agreements with the several claimants including the respondent ", the two orders had to be considered and construed separately and that it was not possible to import into the simple admission of claim in the earlier order the fact of the agreement (referred to in the later order). He said that for that reason *Kiri Menika v. Appuhamy* did not apply. If I may presume to say so, to my mind this reasoning is far from satisfactory. I have always understood that when there is a question as to what the real agreement between parties is, and when, in fact, the complete agreement is in more than one document, all the documents must be read together (see *Jacobs v. Batavia Trust, Ltd.*[1] and the local case of *de Soysa v. Attorney General*[2]). I would, therefore, hold that *Kiri Menika v. Appuhamy* states the law correctly, that the modification made by *Gunasekara v. Silva* is unsound, and that *Dingiri Banda v. Podi Bandara* was not correctly decided on this point.

In regard to (*b*), the proposition that the Special Officer is acting in an administrative or executive and not in a judicial capacity is hardly tenable. It is refuted by the very words of the preamble itself: " whereas it is expedient to make special provision for the speedy *adjudication* of claims to forest, chena, waste and unoccupied lands ". The terms of sections 2, 3, and 4 of the Ordinance clinch the point. The proceedings before the Special Officer may not be as elaborate as proceedings in Courts of law generally are, but it must be borne in mind that the Legislature was expressly concerned to have *speedy adjudication*, and was, therefore, content to entrust the investigation into all claims, up to a certain point, to the judgment of the Special Officer. The words used in section 3 make it clear as already observed that the matter entrusted to the Special Officer was not merely to consider and determine the broad question whether the lands involved in the Notice were the property of the Crown or of private persons but also to investigate the validity of the actual claims made. If " final and conclusive " in section 4 (2) meant nothing more than that the order bound the immediate parties to it, if that was what the Legislature intended, it was, surely, not so artless as not to be able to say so. It could hardly be, as was darkly suggested, that the Legislature was attracted by the euphony of the well-known words " final and conclusive " and so preferred them when all they meant to say was that the order was binding on the parties. Besides, if it was only a matter of binding the parties to the agreement

[1] *(1924) 2 Ch. 329.*

[2] *19 N. L. R. 493.*

they were bound by the very force of the agreement itself, and there was no occasion for proclaiming that fact, nor was there occasion for proclaiming from the house tops, as it were, an agreement that could hardly concern even an insatiate public.

(*c*) Stress was next laid on the difference in phraseology between sections 2 (2) and 4 (2). Section 2 (1) says that where there is no claim, an order shall be made declaring the land or lands the property of the Crown, and section 2 (2) provides that such order, on publication, shall be final and conclusive and " the *Gazette* containing . . . shall be conclusive proof *that the land or lands mentioned in the order was or were at the date of such order the property of the Crown*" whereas section 4 (2) does not contain the concluding words. It provides that " every such order, on publication, shall be final and conclusive . . . . . proof of the admission or agreement entered into under sub-section (1) ". This difference in phraseology appears to me to be quite appropriate to each of the contingencies contemplated in the two sections. When no claim has been made, the simple result is that the lands which were *deemed* in section 1 (1) to be the property of the Crown, become so in fact, and notice is given to the world by an order published in the *Gazette* declaring that those lands are, from the date of the Order, the property of the Crown, and that declaration is final and conclusive to that effect. But the scope of an agreement is wide and variable. There is no such thing as an inevitable agreement, and the logical method of dealing with the contingency of the agreement is to say that the order which embodies it is final and to make provision for the agreement being admitted in evidence for the ascertainment of the area of conclusiveness and finality.

In regard to point (*d*) as I understood it, the argument was that section 16 indicates that the investigation held under that section relates to a question in dispute between the Crown and the claimant, and that, therefore, the finding binds only those parties, and upon that submission it is asked whether the adjudication by the Special Officer could be more far-reaching. But the fallacy of the argument is surely that of begging the question by assuming that because only a claimant or some claimants are before the Court on the one side and the Crown on the other, the proceedings are necessarily *inter partes*. But, as I have already ventured to observe for the reasons I have given, there can be no doubt that the proceedings are proceedings *in rem* and so they must remain to the end. Their nature cannot change with a change of the Tribunal.

Finally, there is point (*e*), and to that the short answer is, I think, as submitted by Mr. H. V. Perera, that in the light of the experience gathered in the interval of a third of a century, the Legislature thought it prudent to make explicit what was implicitly contained in the earlier Ordinance. It is hardly probable that, as was contended, the Land Settlement Ordinance resulted from a complete change of policy in regard to the effect to be given to orders made in proceedings for the settlement of titles to forest, chena, waste or unoccupied lands. It is a small circumstance but still worthy of some notice that on page 335 *et seq.* of Balasingham's *Laws of Ceylon, Vol. I.*, is published the Report by the Land

Settlement Officers to which Canekeratne J. referred in the course of the argument, and it is worthy of notice that it is therein stated in paragraph 3 (1) (pp. 339-40). " He (the Special Officer) may forthwith order that a lot be admitted as private property . . . . The admission as private property is in favour of no particular party, and in such cases no inquiry is made into claims " . . . And on page 342 (*c*) " He (the Special Officer) may compromise the claim by settling the whole part of the land claimed upon the claimant at a certain rate of payment per acre, or in some cases free of any payment. Such compromise is embodied in a written agreement signed by the claimant and the Special Officer. In such cases a Final Order and Title Plan are issued which confer absolute title upon the claimants, and prevent dispute *inter se.* " That certainly has been the view consistently taken by this Court in many decisions which lay down that a Grant from the Crown under the Waste Lands Ordinance confers an indefeasible title. This too does not conclude the question but it is a matter which may properly be taken into account in interpreting a statute.

These are some of the reasons which lead me to the conclusion that the land in suit must be partitioned on the footing that the seven claimants alone were entitled to the land in consequence of Orders P 3 and P 4.

As I observed at the commencement of this judgment the whole case is before us, and for that reason, and also because this case has been before the Courts since 1933, I think, now that we are in full possession of all the facts in the case, we ought to give as complete a judgment as possible.

The questions that remain to be considered are two. It is said that the trial Judge has found that the seven claimants claimed on behalf of their co-owners as well and that, therefore, this case is within the principle enunciated by Fisher C.J. in *Dingiri Banda v. Podi Bandara.* Fisher C.J. said " There is nothing in the Waste Lands Ordinance to make it unlawful or improper for one of several co-owners to make a claim on behalf of himself and his co-owners, and when he does so I think the co-owners must be regarded as persons making claim under the Ordinance ". But the question is whether the co-owners' claims even if regarded as made in that way, continue notwithstanding the fact that the Special Officer's order and the agreement take no notice of them. It seems to me that the most that can be said is that in such circumstances a trust results. But it is not necessary to go into that question here, for in view of the length of time that has elapsed and the number of persons through whose hands shares of this land have passed, there is no material upon which we can, satisfactorily, consider that question. The only other matter is that in regard to the acquisition of prescriptive titles in the long interval that has elapsed since 1900. The learned trial Judge found in effect that the 4th defendant had acquired a prescriptive title to lots 1, 5, 6 and 7. That finding is strongly supported by the evidence and I would direct that those lots be excluded from the partition. Similarly, in the case of the 11th defendant, he has made out a prescriptive title to lots 26 and 27 and those lots must also be excluded. The remainder of the land will be partitioned on the basis that the seven claimants were entitled to the land. Let the case go back for that to be done.

In regard to the costs of appeal the 4th and 11th defendants succeed on the question of prescriptive title but fail on the question of original ownership, on which the plaintiff succeeds. Those parties will, therefore, bear their own costs *inter se*. Those who failed on the question of original ownership will pay the plaintiff's costs of appeal in respect of that contest. The costs of the trial Court will be considered by the trial Judge when he makes his final order on the lines indicated. It would be very convenient if the same trial Judge could hear the rest of this case.

CANNON J.—I agree.

ROSE J.—I agree.

CANEKERATNE J.—I agree.

WIJEYEWARDENE J.—

This is an action for the partition of lot U $1\frac{1}{4}$ in sheets O. $\frac{15}{3, 4, 11, 13}$ and $\frac{10}{52, 60}$

That lot U $1\frac{1}{4}$ and lot U $1\frac{1}{2}$ shown also in the sheets mentioned above were included in a notice duly published under section 1 (1) of Ordinance No. 1 of 1897 as amended by Ordinance No. 1 of 1899 and Ordinance No. 5 of 1900. In response to that notice seven persons made a claim to the two lots under section 3 (1) of the Ordinance. In terms of section 4 (1) of the Ordinance the claimants withdrew their claim to U $1\frac{1}{2}$ and agreed to " take " U $1\frac{1}{4}$. Thereafter, the Special Officer appointed under section 28 of the Ordinance made two orders under section 4 (1)—the order P3 embodying the " admission " of the claim of the seven claimants to U $1\frac{1}{4}$ and the order P4 declaring U $1\frac{1}{2}$ to be the property of the Crown. The former order P3 shows that the Governor consented to its publication in the *Government Gazette* and it was duly published.

In the present action the plaintiff and some of the defendants take up the position that only those deriving title from the seven claimants referred to in P3 are entitled to shares in lot $1\frac{1}{4}$. The contesting defendants urge, on the other hand, that all claiming title from one Gamage Dingi Appu are entitled to shares in this lot, as the seven claimants preferred their claim in the proceedings before the Special Officer on the footing that they were entitled to the two lots U $1\frac{1}{2}$ and U $1\frac{1}{4}$ as the heirs of Gamage Dingi Hamy.

On the evidence led before him the District Judge held that the seven claimants who were descendants of Gamage Dingi Hamy made their claim before the Special Officer " on behalf of themselves and the members of their families ". He held further that all those tracing title from Gamage Dingi Hamy would be entitled to shares in lot U $1\frac{1}{4}$, on the ground that the present case was governed by *Dingiri Banda et al. v. Podi Bandara*,[1]

[1] *(1927) 29 N. L. R. 357.*

as the order P3 was a simple admission of the claim and did not contain any reference to an agreement. It may be stated here that *Dingiri Banda et al. v. Podi Bandara* (*supra*) adopted the view of de Sampayo J. in *Kiri Menika et al. v. Appuhamy et al.*,[1] as explained by him in his later judgment *Gunasekere v. Silva et al.*[2]

The present appeal preferred by the plaintiff against the judgment of the District Judge came at first before a Bench of two Judges. At the hearing of the appeal before that Bench the Counsel for the respondents appear to have thought it necessary to question the correctness of the view of de Sampayo J. in *Kiri Menika et al. v. Appuhamy et al.* (*supra*) as explained in *Gunasekere v. Silva et al.* (*supra*) to the effect " that when an agreement is reached under section 4 on the footing of mutual concession between the claimant and the Crown and such agreement is embodied in an order and published in the *Government Gazette*, the order is conclusive of the title not only of the Crown but also of the claimants ". That question was referred to this Bench under section 51 of the Courts Ordinance. In spite of the terms of this reference the point of law argued by the appellant's Counsel before us was the wider question whether an order embodying an agreement or admission and falling under section 4 (2) gives to the claimants mentioned in the order a title good against all others including the claimants who failed to appear before the Special Officer.

Section 4 empowered the Special Officer to make an order embodying an admission or agreement mentioned in that section and then enacted:—

> " Every such order shall be published in the *Gazette* and shall be final and conclusive and the *Government Gazette* containing such order shall be received in all Courts . . . as conclusive proof of the admission or agreement . . . . ".

Does that provision justify the view that such an order gives to claimants named in that order a title good against the whole world? It will be noted that the words " final and conclusive " mentioned above are followed immediately afterwards by the words " and the *Government Gazette* containing such order shall be received in all Courts . . . . as conclusive proof of the admission or agreement . . . . ". Do not those last mentioned words show that the words " final and conclusive " in the earlier part of the sub-section are used to indicate merely that the agreement or admission cannot be canvassed again by the Crown or the private individuals? If it was intended to give an indefeasible title to the claimants, would not the Legislature have adopted the language used in section 2 when referring to an order declaring the land to be the property of the Crown? Section 2 of the Ordinance stated that where no claim was made within a certain time the Special Officer should make an order declaring the land to be the property of the Crown and proceeded then to say that:

> " Every such order shall be published in the *Gazette* and shall be final and conslusive . . . . and the *Government Gazette* containing

[1] *(1916) 19 N. L. R. 298.*

[2] *(1917) 4 C. W. R. 226.*

such order shall be . . . . received in all Courts . . . . as conclusive proof that the land . . . . was . . . . at the date of such order the property of the Crown ".

The different phraseology used in the two sections appears to me to militate against the appellant's argument.

In the course of the argument reference was made to section 9 of the Partition Ordinance, section 146 of the Municipal Ordinance and section 8 of the Land Settlement Ordinance, 1931. Section 9 of the Partition Ordinance says that " the decree . . . . shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property . . . . and shall be good and sufficient evidence of the title of the parties . . . . ". Section 146 of the Municipal Councils Ordinance says the certificate " shall vest the property sold absolutely in the Council free from all encumbrances " while section 8 of the Settlement Ordinance says the Settlement Order " shall be conclusive proof . . . . that such person is entitled to such land . . . . and that such land vests absolutely . . . . in such person to the exclusion of all unspecified interests of whatsoever nature . . . . ". It will thus be seen that where the Legislature intended in other Ordinances to give a person absolute title in a property, it used language which expressed that intention in clear and unmistakable terms.

The view contended for by the appellant is sought to be supported by the argument that this Ordinance was passed in order to settle the disputes of private individuals *inter se*. I am unable to entertain that argument. This Ordinance was enacted to make special provision for the speedy adjudication of the claims of the Crown to Forest, Chena, Waste and Unoccupied Lands where such claims were disputed by private individuals. The Legislature was not concerned with disputes between private individuals. The Legislature wished to bring to a speedy conclusion the disputes raised by private individuals to lands regarded as, or presumed to be, the property of the Crown. The Crown has, no doubt, a right to institute an action in a Court to recover lands which it claims. This right is referred to and reserved under section 29. But the Legislature proceeded under this Ordinance to provide a speedier method of giving an indefeasible title to the Crown. A study of a few sections of this Ordinance shows this clearly. Section 1 of the Ordinance empowered the Special Officer to issue a notice with regard to lands which appeared to him to be Forest, Chena, Waste or Unoccupied Land and the effect of that notice was that the failure of any claimant to make a claim within three months enabled the Special Officer to make a declaration that the land was the property of the Crown. Section 2 (2) made such an order when published in the *Gazette* conclusive proof of the title of the Crown to the land. Section 3 dealt with the case where a claimant appeared before the Special Officer and made a claim. That section provided the machinery for the Special Officer to ascertain the soundness of the claim of the private individual in order to reach a decision whether it would be advisable for him to come to an agreement with the claimant.

with regard to the whole or part of his claim or he could confidently compel the claimant to prove his claim against the Crown in a Court of Law. Sub-section (2) of section 3 was necessary as without such a provision the Special Officer would not have had the necessary material to decide which course of action he should follow. It enabled the Crown to examine the title of the claimant before taking proceedings in Court. Section 12 shows that when the Special Officer referred the matter to a Court of Law because he was unable to reach an agreement with the claimants, the Crown was placed in the advantageous position of a defendant and the claimants were required to prove their claim as plaintiffs against the Crown. Section 14 provided that generally cases under this Ordinance should be given precedence over other cases. These and other provisions of the Ordinance make it abundantly clear that the object of the Ordinance was merely the speedy settlement of the Crown title to lands.

It was also argued for the appellant that we should take into consideration the provisions of section 8 of the Land Settlement Ordinance, 1931, which repealed Ordinance, No. 1 of 1897. That section enacts that a settlement order made under that Ordinance affords conclusive proof of the absolute ownership of the claimant. That was an Ordinance which amended and consolidated the law relating to settlement of land unlike the Ordinance No. 1 of 1897 which aimed at making " *Special provision* for the *speedy adjudication* of claim to Forest Chena, Waste and Unoccupied Lands ". The scheme of one Ordinance differs largely from the scheme of the other and the two Ordinances show that the land policy of the Government had undergone a great change during the intervening period of 1897 to 1931. I do not think that we could say that section 4 (2) of Ordinance No. 1 of 1897 gave an absolute title to a claimant because the Legislature gave an absolute title to claimants in proceedings under the Land Settlement Ordinance of 1931 (*vide* Craies on Statute Law, Third Edition, pages 134 and 135).

It was then sought to support the appellant's contention by an argument which was put more or less as follows:—If there were two claimants A and B to a land and they did not appear before the Special Officer, they lost all rights in the land. If B alone appeared and got a portion of the land, why should A be allowed to claim a share in that portion? To concede such a right to A, it is said, would be to give him an advantage which he would not have had, if B also failed to appear before the Commisioner. There is a short answer to this. The fact of B appearing before the Special Officer and leading some evidence before him operated to prevent the Crown from adopting the summary procedure of having the land declared Crown property under an order made under section 2 (2). Once the land was removed from the operation of such an order that land remained the property of the various persons who had an interest in the property before the proceedings were taken under the Ordinance. The position is made clear by section 6 which required the Special Officer to mention in his reference to Court not only the claimants who appeared before him but also " any other persons whom he has reason to think interested in such land ". The Legislature would

not have required the Special Officer to mention as parties the claimants who did not appear before him but were in his opinion interested in the land, if their non-appearance before the Special Officer had the effect contended for by the appellant.

It was finally argued that the proceedings before the Special Officer under sections 3 and 4 were "proceedings *in rem*" before a person who acted in a judicial or quasi-judicial capacity. I do not think that is a correct view of the proceedings. As stated earlier by me, the object of section 3 was to enable the Special Officer to find out the strength of the disputing claimant's case and to decide whether he should come to an agreement with the claimant or allow the dispute to be adjudicated upon in a Court of law.

Section 4 (1) contemplated a number of contingencies. If the claimant appeared but produced *no* evidence whatever, then in spite of his mere physical appearance before the Special Officer he was in no better position than a claimant who did not appear and an order could be made against him declaring the land to be the property of the Crown. Such an order could also be made if he withdrew the claim even after leading some evidence. But the position was different where he led some evidence, however scanty, and did not withdraw his claim. The Special Officer who was acting on behalf of the Crown could not act in a judicial or semi-judicial capacity and give a decision on that evidence in a dispute between the private individual and the Crown, his employer, on whose behalf he issued the notice under section 1. In such a case the Legislature gave him authority to enter into an agreement on behalf of the Crown. Acting on behalf of the Crown he could admit the claim or enter into an agreement for the admission or rejection of the whole or part of the claim or for the purchase of the whole or part of the land. He had no right then to make an order unless the claimant agreed to it. This shows clearly that the Special Officer did not act in a judicial capacity. Moreover, the requirement under section 4 (2) that the Governor's consent should be obtained for the validity of an order embodying such an agreement or admission in the case of lands of more than ten acres emphasises the fact that the Special Officer was not acting in a judicial capacity under section 4 but as an administrative officer of Government. If the Special Officer was unable to reach an agreement under section 4, he had to bring the matter before a Court. The " speedy adjudication " mentioned in the preamble was achieved by the Special Officer bringing the disputing claimants to Court without waiting until the claimants brought an action and by the special provisions made for the expeditious hearing of such cases in a Court of Law. The administrative proceedings before the Special Officer were merely a preparation for the " speedy adjudication " in a Court of Law, if the claimants and the Crown were unable to agree.

It was suggested during the course of the argument that the Ordinance required the Order to be published in the *Gazette* because the Order was binding on the whole world and the Legislature thought it therefore necessary to give a general notice of the Order. I think that the correct

explanation, if an explanation is needed for this provision, lies in the fact that we are dealing here with an Order made by a Government Servant disposing of land presumed to be the property of the Crown. Such an order cannot be put on the same footing as any other administrative act of the Government Agent. The right to sell Crown land is one of the few important matters dealt with in the Letters Patent constituting the office of Governor. Article VI of the Letters Patent reads:—

"The Governor, in Our name and on Our behalf, may make and execute, under the Public Seal of the Island, grants and dispositions of any lands which may lawfully be granted or disposed of by Us within the Island: Provided that every such grant or disposition be made in conformity either with some law in force in the Island or with some Instructions addressed to the Governor under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, or with some regulation in force in the Island".

We find an indication of the importance attached to acts of administrative officials in regard to disposal of Crown lands in this very section when it required that an order in respect of lands in excess of ten acres should receive the assent of the Governor for its validity. The Orders were required to be published in the *Gazette*, because it was thought necessary that the fact of a Government Servant disposing of lands presumed to be the property of the Crown should be a matter of public knowledge and not because it was thought necessary that the title of a private individual should be made public.

I may add that the enactment of sections 20 and 21 show also by implication the difference between the scope of an order under section 2 (2) and that of an order under section 4 (2).

The Ordinance provided for the making of an Order giving to the Crown good title against all persons—

(1) where no claimant appeared before the Special Officer.

(2) where the claimant appeared but placed no evidence.

(3) where the claimant appeared and withdrew his claim.

The Legislature then proceeded to give relief in case (1) by giving him the right under sections 20 and 21 to claim the land or compensation if he showed good reason for his failure to prefer his claim. That right was given to him because otherwise, owing to the conclusive nature of the Order, he would have no relief. But no such right was reserved to the absent claimant where the Special Officer made an Order under section 4 (2). I think that fact too tends to show that the absent claimant did not lose his right to the land referred to in that order and it was for that reason that the Legislature did not give him a right to any relief in those circumstances even if he showed good and sufficient reason for his absence.

On an examination of the provisions of the Ordinance I have formed the opinion that the Order referred to in section 4 (2) did not give an indefeasible title to the claimants named in the Order.

I shall now consider the previous decisions of this Court.

In *Kiri Menika et al. v. Appuhamy et al.* (*supra*) the Special Officer entered into an agreement with the claimant that the claimant should be declared the owner of one lot A and should be allowed to purchase another lot B and that the claimant should withdraw his claim to other lots. Two orders were published—one Order with respect to lot A and reciting the agreement to purchase and the other Order with respect to lot B without any reference to the agreement. De Sampayo J. (Wood Renton C.J. agreeing) held that the claimant got title to both the lots. He stated the reason for his decision as follows:—

"The primary object of the Ordinance is to settle once for all, as between the Crown and private persons, the title to the lands of the description mentioned in the Ordinance, and if the rights of shareholders who do not come forward to claim are to remain intact, notwithstanding the proceedings taken under the Ordinance, that object will not be attained".

I fail to see how the fact that the shareholders who do not come forwar may claim a share of a land mentioned in an Order under section 4 (2), could possibly affect the rights of the Crown to lands declared to be the property of the Crown by the conclusive Order referred to in 2 (2). In the subsequent judgment *Gunasekere v. Silva et al.* (*supra*) de Sampayo J. held that an Order embodying an admission did not give indefeasible title and distinguished it from the Order considered in the earlier case which he said was an Order embodying "an agreement on the footing of mutual concession between the claimant and the Crown".

In *Fernando v. Hendrick et al.*[1] the Government Agent had made a reference to Court under section 5. In the course of the proceedings a settlement was arrived at between the claimants and the Government Agent, the terms being that certain lots should be declared the property of the Crown and the rest of the land, private property. A decree was accordingly entered by the District Judge under section 16 of the Ordinance. De Sampayo J. (Schneider A.J. agreeing) said in that case:—

"The real effect of the decree was to declare the Crown entitled to certain portions, and that the balance of the land belonged to private parties. The title of the private parties *inter se* must be determined by other considerations and upon evidence heard with regard to it. In reality the decree in favour of the claimants in the waste lands case must be held to enure to the benefit of those to whom they transferred their rights previously".

[1] *(1920) 22 N. L. R. 370.*

If the proceedings before the Special Officer were in the nature of proceedings *in rem* it is difficult to say that the proceedings altered their nature when they were transferred to the District Court or that the Legislature intended such a change. It is difficult to understand how a consent decree can be entered in the District Court with regard to title to land in proceedings *in rem*. It would be just as wrong as to enter a consent decree in a partition action. These considerations show that the view taken in *Fernando v. Hendrick et al.* (*supra*) is inconsistent with the decision in *Kiri Menika et al. v. Appuhamy et al.* (*supra*).

In *Dingiri Banda et al. v. Podi Bandara et al.* (*supra*) Drieberg J. (Fisher C.J. agreeing) found it possible to consider the Order 6D5 in that case as an Order embodying a simple admission and then held that the Order did not give an indefeasible title to the claimant. Referring to the question as to the correctness of the decision in *Kiri Menika et al. v. Appuhamy et al.* (*supra*) he said:—

> " It is not necessary to go into that question, for assuming the correctness of the principle in that case as explained in the later case of *Gunasekere v. Silva et al.* viz.:—that it applied only to where the admission of a claim proceeds upon an agreement of mutual concession between claimant and Crown, the admission in 6D5 cannot be treated as one of that nature ".

I am unable to appreciate how the distinction drawn in *Gunasekere v. Silva et al.* (*supra*) and *Dingiri Banda et al. v. Podi Bandara et al.* (*supra*), between the two Orders falling under section 4 (2) could lead to different results when both the Orders come under section 4 (2) and are " final and conclusive " within the meaning of that section.

I think the decision in *Kiri Menika et al. v. Appuhamy et al.* (*supra*) is erroneous and the efforts made subsequently to distinguish that case from the later cases serve only to show the unsoundness of that judgment.

It has been suggested that, even if we are of opinion that the view expressed in *Kiri Menika et al. v. Appuhamy et al.* (*supra*) is incorrect, we should not overrule it as the present case should be regarded as " one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb "—vide *Pate v. Pate* [1]. Now the judgment in *Kiri Menika et al. v. Appuhamy et al.* (*supra*) was delivered on November 15, 1916, and within nine months the same Judge delivered his judgment in *Gunasekere v. Silva et al.* (*supra*) on August 10, 1917. It is difficult to believe that any prudent person would have purchased any lands after the later judgment relying on the decision in the earlier case because the unreality of the distinction sought to be drawn by the learned Judge between these two cases should have been a sufficient warning to anyone as to the correctness of the view expressed in the earlier case. The later judgments referred to by me involved in serious doubt the correctness of that decision. I am therefore unable to agree that there is any

[1] *(1915) 18 N. L. R. 289 and 293.*

reason for not overruling that decision though it was given twenty-eight years ago. (*Vide* Craies on Statute Law, Third Edition, page 143.) I may add that it is not necessary for the purpose of this appeal to overrule the decision in *Kiri Menika et al. v. Appuhamy et al.* (*supra*). It is sufficient to adopt the view taken of that judgment in the subsequent cases. Adopting the line of reasoning of Drieberg J. in *Dingiri Banda et al. v. Podi Bandara et al.* (*supra*) the District Judge has construed the Order P 3 as an admission of claim. On that finding of fact the present appeal must fail unless we reject the explanation given by de Sampayo J. in *Gunasekere v. Silva et al.* (*supra*) of his earlier judgment in *Kiri Menika et al. v. Appuhamy et al.* (*supra*).

I answer in the negative the question argued by appellant's Counsel before this Bench.

Case sent back.