1901.
July 25 & 29.

RAM MENIKA *v.* APPUHAMY.

D. C., Kandy, 12,343.

Evidence of prescriptive possession—Ordinance No. 12 of 1840, s. 6—Evidence to rebut presumption in favour of Crown—Possession for a third of a century—In what class of cases such presumption arises.

The land in dispute between the parties was situated in a district formerly within the Kandyan territory. In an action brought by plaintiff against the defendant, who was a purchaser under the Crown, plaintiff led evidence to show that the land was an appurtenance to a field which she inherited from her ancestors. Though the land appeared to be a chena, and presumably the property of the Crown, under section 6 of the Ordinance No. 12 of 1840,—

Held, that the District Judge rightly allowed plaintiff as part of his case to lead evidence of title by prescriptive possession, and that defendant's counsel ought not to have refused to cross-examine the witness, who deposed to such possession.

Held, further, that, upon the defendant producing the Crown grant in his name, plaintiff had the right to rebut the presumption in favour of the Crown.

LAWRIE, A.C.J.—Possession of land in districts formerly within Kandyan Provinces for one-third of a century gives an absolute title to the possessor.

The presumption in favour of the Crown as to forests, waste and uncultivated and unoccupied land and chenas applies to a land of a size and position sufficient to be regarded as a separate subject. A landowner may leave part of his land uncultivated; he may have trees round his field, on the banks of a river or near his house; he may choose to leave part of his garden waste, or reserve part of it for chena cultivation, and so on, and to these portions of a private estate I should be slow to give effect to a presumption in favour of the Crown.

The land, whether it be called forest or uncultivated or chena, must be a separate land, not a bit of land other parts of which are cultivated and occupied by the owner.

PLAINTIFFS prayed that the south-western part of Agalakumburahena, which the defendant was said to have forcibly entered and converted into a paddy field, be declared their property and the defendant ejected therefrom. They alleged that the land belonged to their common ancestor Ran Ettana.

The defendant denied Ran Ettana's title and claimed the land under a Crown grant dated 20th August, 1894. He pleaded in bar of plaintiffs' claim, a judgment of the District Court of Kandy, which he had obtained against certain of their predecessors in title.

At the trial second plaintiff was the only person who gave evidence for the plaintiffs. He deposed that the land in dispute was an appurtenance of Agalakumbura, that is a chena, within a district formerly included in the Kandyan Provinces; that the two

lands belonged to his mother Ran Ettana; that after her death in 1869, he and his father cultivated it with kurakkan three times; and that defendant converted the land into a paddy field about four years before the action was raised.

Defendant's counsel refused to cross-examine the witness as regards his evidence of prescriptive possession.

On the case for the plaintiff being closed, the counsel for the defendant contended that, under section 6 of Ordinance No. 12 of 1840, the land, proved to be a chena, should be presumed to be Crown property, and that the Crown was entitled to sell the land to the defendant, as it did by its grant dated 20th August, 1894. Counsel then put the defendant into the witness box, who produced the Crown grant and deposed that the asweddumizing of the land cost him about Rs. 500, and that since then he had raised crops on the field for six years.

The counsel for the plaintiff desired to rebut the presumption relied on by the defendant, but it was contended for the plaintiff that, if plaintiff were allowed to do so, it would mean the adducing of evidence once again in support of plaintiffs' title.

The District Judge (Mr. J. H. de Saram) ruled as follows:—

"The question is not whether the plaintiffs may at this stage supplement the evidence they produced to establish their title, but whether they are entitled to produce evidence by way of answer to the evidence produced by the defendant, on whom lay the burden of proving the title of the Crown involved in the third issue.

"It seems to me the plaintiffs are entitled under section 163 of the Civil Procedure Code to produce evidence that, at the date of the Crown grant to the defendant, the Crown had no title to the land in question."

After hearing the evidence of the second plaintiff in rebuttal, the District Judge dismissed the action with costs, holding that no sannas or grant was produced by the plaintiffs, or taxes paid by them, as required by section 6 of the Ordinance No. 12 of 1840, and that the evidence led in support of the cultivation of the land by plaintiffs for the prescriptive period was not satisfactory.

The plaintiffs appealed. The appeal was argued on the 25th July, 1901.

Bawa, for appellant.—The presumption created by section 6 of Ordinance No. 12 of 1840 can only arise in a case in which the Crown is a party. Nor can defendant take advantage of that presumption without specially pleading it in his answer. D. C., Kandy, 63,047; *2 S. C. C. 88;* C. R. Tangalla, 24,158; *5 S. C. C. 194;*

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C. R., Gampola, 1,094. As to evidence of cultivation, it is impossible to prove that a field has been uninterruptedly used. Fields must lie fallow. Continuous cultivation of a field does not mean occupation from month to month, but only possession *ut dominus*. Nor can a chena land be cultivated uninterruptedly. The evidence produced shows that for more than thirty years the land has been possessed by the plaintiffs and their predecessors in title without disturbance, *ut domini*. Such possession gave plaintiff an absolute title to the land.

Wendt, for defendant, respondent.—Proof of possession of Kandyan chenas can only be adduced in the ways specified by section 6 of the Ordinance. The District Judge has found against the plaintiffs in that respect. They are purchasers under the Crown, and it is competent for them to oppose the plaintiff's claim by the presumption in favour of the Crown. *Casippillai v. Ramanaden* (*2 N. L. R. 33*).

Bawa, in reply.

Cur. adv. vult.

29th July, 1901. LAWRIE, A.C.J.—

In my opinion plaintiffs have not proved their right to this land. They say that their mother was the owner of Agalakumbura with its appurtenant chena, and that they sold the field some years ago to Tikiri Vidane. The defendant bought both the field and the chena at a Crown sale in 1894. The defendant did not succeed in getting possession of the field; he brought action against Tikiri Vidane, which was dismissed of consent; but the defendant got possession of the chena and made it into a field, and he had been in possession for four years before this action commenced in 1898. The plaintiffs then came into Court to recover the land; they had no written title, and when they proposed to lead evidence that they and their predecessors possessed the land, the District Judge rightly allowed the proof to be led. The defendant's proctor ought not to have refused to cross-examine the witness who deposed to such possession. But that evidence of possession is not satisfactory.

Independently of the right of the Crown, I think that cultivation of a chena at intervals of years the last being about seven years before action, is not sufficient title to justify the eviction of a man who had been four years in possession, and had made the waste land into a field.

I need not enter on the question as to the right of the Crown to chenas in the Kandyan Provinces. I have recently given

judgment on that point in D. C., Kurunegala, 1,601, in which the Attorney-General was plaintiff. *5 N. L. R. 98.*

A judgment of mine in C. R., Gampola, 1,094, was relied on in the argument in this appeal, to the effect that possession for one-third of a century gave an absolute title to land.

I think that that is a correct statement of the law of the Island, although Bonser, C.J., has pointed out* that the Regulation No. 13 of, 1822, section 2, enacted "that all laws heretofore enacted or customs existing with respect to the acquiring of rights..... within and for the maritime districts of this Island shall cease to be of any force or effect, and the same are hereby wholly repealed."

I understand Sir John Bonser's opinion to be that since 1822 it has been impossible to acquire title by prescriptive possession in the maritime provinces. Be that as it may, the Regulation of 1822 (which was passed after the British accession to the Kandyan Provinces) does not touch the Kandyan Law, by which possession for thirty years gave title.

I adhere to the construction of section 6 of the Ordinance No. 12 of 1840 given by me in the Kurunegala case.

I wish only to add that the presumption in favour of the Crown as to forests, waste and uncultivated and unoccupied land and chenas, applies to a land of a size and position sufficient to be regarded as a separate subject. A landowner may leave part of his land uncultivated; he may have trees round his field, on the banks of a river, or near his house; he may choose to leave part of his garden waste, or reserve part of it for chena cultivation, and so on, and to these portions of a private estate I should be slow to give effect to a presumption in favour of the Crown.

I think it is likely that the land in dispute in the Kandy case reported in *2 S. C. C. 86* was a land of that kind. I gave effect to this opinion in the case reported in *2 S. C. R. 12*, and also in *Saibo v. Andris, 3 N. L. R. 218*, Bonser, C.J., agreeing.

The land, whether it be called forest or uncultivated or chena, must be a separate land, not a bit of land other parts of which are cultivated and occupied by the owner.

MONCREIFF, J.—

I am of the same opinion. On the view which I take of the terms of the Prescription Ordinance, I think that the judge rightly permitted the plaintiff to prove his prescriptive possession, if he could. The evidence, however, which the plaintiff had at his command was disclosed for another purpose, and was not sufficient to establish his claim on the ground of prescription.

* In *Dabera v. Marthelis Appu*, reported at p 210, *ante*.

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MONCREIFF, J.

I can see no reason for doubt as to the meaning of the presumption in favour of the Crown's claim to chenas in the Kandyan Provinces. I think that the provision in section 6 of the Ordinance No. 12 of 1840 means exactly what it says, and I agree with the District Judge in C.R., Gampola, 1,094, that the more a man proves that land is chena the more he assists the Crown in proving the presumption in its favour.

I accept the Chief Justice's view that this Court should not concern itself, under the provisions in question, with what men do with small corners of their land.