1922.

Present: De Sampayo and Schneider JJ.

THE ATTORNEY-GENERAL *v.* APPUHAMY

393—D. C. Kegalla, 5,056

Ordinance No. 12 of 1840, s. 6—At what point of time must lands be chenas for the presumption created by the Ordinance?—Does the presumption apply in any proceeding outside the Ordinance? Does the presumption apply to chena lands in a royal village? Gabadagama—The term "chena" *explained.*

For the purposes of the presumption contained in section 6 of the Ordinance, the character of the land which should be considered is its character at any time material to the action; the presumption could be relied upon in an action for declaration of title and damages which is outside the special proceedings provided in the Ordinance.

Section 6 of the Ordinance No. 12 of 1840 applies to all chena lands in the Kandyan Province—even those in a royal village or Gabadagama.

The word "chena" which is used in the Ordinance is a term adopted from the Sinhalese villager, and its true significance must be sought for according to his use of the term. The villagers speak of high forest as "mukalana." When the trees in a "mukalana" or a portion of one are felled and the land cleared, whether for planting in rubber, tea, or coconut, or for cultivation with the ordinary chena products, they will speak of the clearing as "hena." They will continue to do so until the tea, or rubber, or coconut beings to yield, when the land will be called "watta" (garden), with the name of the product prefixed as tea garden, rubber garden, coconut garden. If chena cultivation is practised, the chena will be cultivated at intervals of years which will range from seven to twenty years according to the nature of the soil or other circumstances. The land will be called "chena," although the jungle may be twenty years old. Such jungles is spoken of as "lande." If the land is abandoned for about forty or fifty years, and the trees assumed large proportions, it will once again come to be called "mukalana."

It is a fallacy to suppose that a land which was a chena loses its character as a chena immediately it is planted with some product such as tea or rubber. Once a chena it remains a chena till it is converted into a "watta," or reverts to a mukalana.

THE facts are set out in the judgment.

H. J. C. Pereira, K.C. (with him *Elliott, K.C.*, and *H. V. Perera*), for appellant.

Akbar, S.-G. (with him *Muttunayagam, C.C.*), for respondent.

August 30, 1922. SCHNEIDER J.—

In this case the Crown asserted title to two adjoining allotments of land called Galgodahena and Moragahamulahena as being chena lands, situated within the Kandyan Provinces, within the meaning of section 6 of the Ordinance No. 12 of 1840. The Crown claimed a declaration of title in itself, and a sum of Rs. 50 as the value of timber trees wrongfully felled and removed by the defendant, and Rs. 15,000 as the value of plumbago dug and removed by the defendant from the said allotments of land. In the plaint the lands are described as lot No. 3,133 A8/4 in preliminary plan No. 149, and it was alleged that the plumgabo had been dug and removed from about September, 1913, and the timber trees had been felled and removed in February, 1914.

The defendant denied the title of the Crown, and pleaded that the lands belonged to a family called Rathu Kankanamalage, by which family they had been possessed for upwards of 100 years, till members of that family sold them in 1905. He also pleaded that the Crown had always acknowledged the right of that family to the lands. He denied that the lands were in the Kandyan Provinces, and claimed to be entitled to them by virtue of several deeds bearing dates from June, 1905, to March, 1913.

There were two trials before the case was argued before this Court. Originally the parties went to trial upon nine issues in December, 1919. From these issues it is clear that there was no dispute as to the identity of the lands in claim.

The first, second, and third issues are the material issues. They raise two questions of fact and one of law dependent upon those questions of fact. The questions of fact are whether the lands are situated within the Kandyan Provinces, and whether they were chena lands on September 5, 1913? The question of law is whether the lands are to be deemed the property of the Crown if the two questions of fact are answered in the affirmative. Upon the pleadings it is obvious that the third issue hangs entirely upon the decision of issues one and two, because nothing is pleaded to rebut the presumption arising under section 6 of the Ordinance No. 12 of 1840 that the lands are the property of the Crown, if issues one and two are answered in the affirmative.

In the course of the first trial it transpired that Mr. Booth, a Forest Settlement Officer, had held an inquiry into the claims to land in the village Ampe, in which the lands in dispute here are situated. This was in 1893. Mr. Booth's judgment is the document marked P 18. It is of material importance. It shows that certain claimants who appeared before him, but whose names do not appear in the document, laid claim of title to certain portions of high and low lands which are identified by the number of the lots according to the preliminary plan No. 149, which it should be here noted is the plan referred to in the plaint.

1922.

SCHNEIDER J.

The Attorney-General v. Appuhamy

Mr. Booth states it as his opinion, an opinion—which must be accepted, because these Settlement Officers have exceptional opportunities of acquiring knowledge of this kind in the course of their official duties—that chena cultivation had been practised in the village of Ampe from time immemorial, and that the claimants have a right to continue that practice on the same lands as they and their predecessors "have hitherto cultivated as chenas."

Proceeding to inquire what those lands were, and to what extent chena cultivation had been made, he concluded from the documentary evidence produced that the two lands now in claim and three others had been partly cultivated as chenas, some in 1863, others in 1873. He ascertained that an extent equivalent to 7 acres, out of all the five allotments which were 12 acres in extent, had been cultivated as chenas. He therefore admitted the right of the claimants to practise chena cultivation to that extent in those five chenas. To use his own words: "I admit the right of the claimants to practise chena cultivation, and I permit them to continue such practice on the following lots to the extents specified:—Lots 3,046, 3,132H, 3,049G, a portion of 3,049Q1 equal to 19 acres 1 rood, and a portion of 3,133J3 equal to 7 acres in preliminary plan 149. I disallow the claim to dig for plumbago on any portion of lot 3,133J3."

When B. Banda, a man who had held the office of Korala over the division to which the village Ampe belongs, and a witness for the Crown, was being cross-examined, the Crown proctor produced the document D 1. This document is a petition admittedly signed by R. Haramanis Appuhamy, the principal witness for the defence and one of the vendors to the defendant. The petition is dated July, 1904, and is addressed to His Excellency the Governor. It states that the petitioner had contracted a marriage with one of the women of the Rathu Kankanamalage family. It gives the names of all the claimants who preferred claims before Mr. Booth, the petitioner's wife being one of them. It sets out quite accurately what Mr. Booth had decided. It makes charges against certain officials, and in conclusion prays that in terms of Mr. Booth's settlement that he and his co-owners be "granted" the "two chenas," which are now in dispute.

The document D 2 dated January, 1905, is the reply of His Excellency. It informs the petitioner that "the 7 acres of chena will be marked off, and the co-heirs will be put in possession." It would appear, therefore, that by D 2 the Governor refused to grant the prayer of the petitioner that the two chenas now in claim should be granted to him and his co-heirs, and informed the petitioner that, in terms of the settlement by Mr. Booth, a 7-acre block would be marked out by a survey, out of the 12-acre block of land.

If the defendant meant to raise an issue upon these documents, this was the stage at which he should have done so. It is permitted

by our Civil Procedure Code to raise an issue at any stage of a trial, but no issue in fact was raised, and the trial proceeded upon the original nine issues with which it started.

On January 6, 1920, the learned District Judge pronounced his judgment holding against the defendant on all the issues. The defendant appealed from that judgment. When the appeal came up for argument, defendant's Counsel asked that another issue should be framed, and the case sent back for trial of that issue. To this course the respondent's counsel had no objection. This Court then *pro formâ* set aside decree, and sent the case back for trial of the new issue suggested, viz.: "Do the documents D 1 and D 2 constitute a grant by the Crown of the two lands, Galgodahena and Moragahamulahèna, within the meaning of section 6 of the Ordinance No. 12 of 1840."

After trial of this issue the learned District Judge held against the defendant once again, and the defendant had appealed.

The questions which were principally argued before us in appeal might be stated as being the following:—

(1) At what point of time must the lands in claim have been chenas for the presumption created by the Ordinance to arise? The defendant's counsel contended that they must be chēnas at the date of the institution of this action or have been so shortly before.

(2) Does the presumption in favour of the Crown in section 6 of the Ordinance apply in any proceedings outside those provided in the Ordinance ?

(3) If the lands are situated in a Gabadagama, can the Crown claim title under the provisions of section 6 of the Ordinance?

(4) Has the Crown established a case for Rs. 15,000 as damages?

The first two questions are questions purely of law. At the argument of this appeal, it was agreed by Counsel on the two sides that the decision of the law in this case should follow the decision of the same law in the case of *Mudalihamy v. Kirihamy* which was then awaiting argument before a Full Bench of this Court.

The judgment of this Court in that case was delivered on August 25, 1922. [1]

It was held there that for the purposes of the presumption contained in section 6 of the Ordinance, the character of the land which should be considered is its character at any time material to the action, and that the presumption could be relied upon in an action like the present which is outside the special proceedings provided in the Ordinance. According to that decision the time material to this action is the year 1893, when the Forest Settlement Officer, Mr. Booth, held his inquiry as to the claims between the Crown on the one part and the village-claimants on the other. That was

[1] *Vide S. C. Min., dated Aug. 25, 1922.*

the date of the first conflict between the Crown and the claimants through whom the defendant now claims title ; but, according to issue A suggested by the defendant's counsel and issue 1 by Crown Counsel at the trial, the date to be taken into consideration was the institution of the action (issue A) or September 5, 1913; (issue 1) the ouster complained of as occasioned by the digging of plumbago.

The Full Bench decision concludes the first two questions, because the effect of that decision is that if these lands were chena lands in 1893, they are Crown lands by virtue of the presumption in section 6 of the Ordinance. But, upon the facts of this case, it seems to me that it is immaterial at what point the character of these lands is taken into consideration, whether in 1893, or in September, 1913, or at the date of the institution of this action. Their character is still the same. They are chenas. What then are the facts ?

The document P 18 clearly indicates that in 1893 Mr. Booth and also the defendant's predecessors-in-title regarded the lands in dispute as chenas. The settlement arrived at was the granting or the recognizing of the existence of the right to practise chena cultivation on a portion of these two allotments of land among others.

In D 1 in 1904 Haramanis Appuhamy, the defendant's predecessor-in-title and chief witness in this case, speaks of these lands as chenas at that date. The effect of that witness' evidence given in this case in December, 1919, is that these lands were chena even at that date (*vide* his re-examination). The only other witness for the defence is the *ex*-Gan-arachchi, Appuhamy by name. He states that in 1905 the two lands were in jungle forty or forty-five years old. But he does not call the lands by any other name than " hena, " which is the same as " chena. " That he had before his mind's eye the precise meaning of words is made clear when he proceeds to say that the 7 acres of chena, which the De Mels were in possession, had ceased to be chena in 1905 as they had become a garden (" watta ") by being planted with coconut and the trees coming into bearing. There is nothing in his evidence, therefore, to conflict with all the other evidence that the lands were chenas at the time the three and half of four-year old rubber now on the lands was planted.

But the strongest evidence against the defendant as to the facts that the lands are chenas is his own evidence given in case No. 19,061 of the Police Court of Kegalla. The date when he gave this evidence does not appear in the document (P 18), but it may be gathered to have been about 1916 from the other evidence in this case. He there speaks of these two lands as chenas. He said: " I started clearing the land, I think, in 1915 or 1914. Before that it was chena jungle. "

It may, therefore, be fairly stated that according to the statements to be found in the documents in this case, and the evidence for the defence, the defendant and his predecessors-in-title regarded the lands in dispute as chenas from 1893 downwards.

On the other hand, the Crown has called reliable evidence as to the character of the lands.

Mr. Surveyor Costa states that they were chena lands when he surveyed them in 1916. He describes them as a " new clearing " at that date, and that he reckoned the jungle which had been felled to have been about twenty years old from the girth of the stumps. It wants but little knowledge of the country to give that opinion. It calls for no expert knowledge. The very nature of a Government surveyor's work would make him an expert if that term may be applied to knowledge gained in that way.

The evidence of Mr. Costa is supported by that of B. Banda, the Korala. He says that before the rubber now on the lands was planted, the lands were in jungle. Moragahamulahena with a growth seven to eight years old and Galgodahena with a growth over twenty years old. He says that neither of the lands was mukalana (that is, high forest), but that they were old chenas. I would prefer to accept the evidence of this witness to that of Appuhamy. For the better appreciation of the evidence of the witnesses, I would like to say here that by long residence in this Island and frequent intercourse with the villagers, I am quite familiar with the meaning they attach to the words " chena " or " hena ". They speak of high forest as " mukalana. " When the trees in a " mukalana " or a portion of one are felled, and the land cleared whether for planting in rubber, tea, or coconut, or for cultivation with the ordinary chena products, they will speak of the clearing as " hena." They will continue to do so until the tea, or rubber, or coconut begins to yield when the land will be called " watta " (garden), with the name of the product prefixed as tea garden, rubber garden, coconut garden. If chena cultivation is practised, the chena will be cultivated at intervals of years, which will range from seven to twenty years according to the nature of the soil or other circumstances. The land will be called chena, although the jungle may be twenty years old. Such jungle is spoken of as " landa. " If the land is abandoned for about forty or fifty years, and the trees assumed large proportions, it will once again come to be called " mukalana. "

The word " chena, " which is used in the Ordinance, is a term adopted from the Sinhalese villager, and its true significance must be sought for according to his use of the term. It is a fallacy to suppose that a land which was a chena loses its character as a chena immediately it is planted with some product such as tea or rubber. Once a chena it remains a chena till it is converted into a " watta " or reverts to a " mukalana. "

But apart from this short dissertation on the word " chena," the evidence in the case establishes that the lands in dispute were chena lands not only in 1893, but also in September, 1913, and even at the date of the institution of this action.

1922.

SCHNEIDER J.

The Attorney-General v. Appuhamy

The evidence also establishes that they are situated within the Kandyan Provinces. The provisions of section 6 of the Ordinance No. 12 of 1840 therefore apply to them, and the Crown is presumed to be the owner of them unless that presumption is rebutted in any of the ways mentioned in that section. The only attempt to rebut the presumption consisted of the contention that D 1 and D 2 constituted a grant by the Crown of the lands in dispute.

This is a contention born of despair. It is unsound, and will not bear examination. For over the past sixty years grants of lands by the Crown have been made by a formal printed document under the seal of the Colony and bearing the signature of the Governor. It is expressed in the formal legal language usually employed to effect a conveyance of title. It is known as a Crown grant throughout the length and breadth of the land, and is a document with which most villagers are familiar. It is idle to suppose that the parties to D 1 and D 2 ever intended and thought those documents should or would have the effect of a conveyance of title.

It has been held (*The Attorney-General v. Punchirala* [1]) that the presumption in favour of the Crown enacted in section 6 of the Ordinance can only be rebutted in any one of the ways expressly mentioned in that section, and that, therefore, no title can be acquired to the chenas mentioned in that section by prescription.

Then there is the contention which seeks to repel the claim of the Crown by the assertion that the lands in claim are within a " Gabadagama " or royal village. This contention, too, it seems to me, must fail for several reasons. First there is no satisfactory evidence that Ampe is a royal village. The contention that it is a royal village is based solely upon certain statements made by the witness Balangala Banda. He stated that Ampe was a royal village, and that the tenants who are *paraveni nilakarayas* possessed lands, fields, gardens, and chenas. He does not say what his means of knowledge were either as to the question whether the village was a royal village or as to the nature of the tenancy. His official duties would not have imparted any such knowledge to him. If it were a royal village I would expect much more reliable evidence to be forthcoming, both oral and documentary. No claim of that kind was put before Mr. Booth. From the document D 4 it would appear that this witness was present at Mr. Booth's inquiry in 1893, probably in his official capacity as Korala. If so, it would have been his duty to bring to the notice of Mr. Booth that the village was a royal village. Mr. Booth's judgment indicates that no claim had been preferred to him by any of the villagers upon the footing that they were *paraveni* or perpetual tenants. Defendants' predecessor never claimed to be entitled to these lands as tenants. On the contrary in 1893 and since they have been claiming as being entitled to the absolute *dominium*. Mr. Booth could not have

[1] *(1919) 21 N. L. R. 51.*

restricted the claims to mere chena cultivation or forbidden the digging of plumbago if the claims preferred were as those of *paraveni nilakarayas* in a Gabadagama.

Even in this case it was not pleaded that the defendant's predecessors were *paraveni* tenants, nor was any issue raised as to their rights as such. The one person who should have been the most competent to give evidence on this point, Haramanis Appuhamy who sold to the defendant, is discreetly silent on this point all through his evidence. Such a claim is inconsistent with the attitude taken up by the claimants before Mr. Booth in 1893 and by Haramanis in D 1. I would accordingly hold that there is no reliable evidence that Ampe is a royal village. I would also hold that the appellant is not entitled on appeal to attempt to repel the claim of the Crown upon the ground that Ampe is a royal village, as he had set up no such claim in the lower Court, either by his pleading or by formulating an issue.

There is yet another reason why this contention should fail, and this reason appears to me to be conclusive. Section 6 of the Ordinance No. 12 of 1840 applies to all chena lands in the Kandyan Province, even those in a royal village. Therefore, even if Ampe be a royal village, the chenas in claim come within the presumption.

As to the amount of Rs. 15,000 awarded as damages, I see no justification to interfere with the order of the learned District Judge. The defendant has not met the evidence produced by the plaintiff. The actual quantity of plumbago won from the lands is a fact peculiarly within the knowledge of the defendant. This fact he has advisedly refrained from disclosing to the Court. He started his digging operations with notice of the claim of the Crown to the lands and the denial of his right to do so. He comes within the maxim *contra spoliatorem omnis præsumuntur*.

I therefore dismiss the appeal, with costs. This order as to costs will include the costs of the previous appeal, in which the direction was that those costs should be costs in the cause.

DE SAMPAYO J.—I agree.

Appeal dismissed.