

1948 *Present: Canekeratne and Basnayake JJ.*

NOORDEEN LEBBE Appellant, and SHAHUL HAMEED,
Respondent.

S. C. 368—D. C. Kegalla, 3,297.

Sale—Two contiguous blocks—Separate description of both blocks—Reference to plan—Only one block depicted in plan—Recitals in deed—Which description to be preferred.

C was the owner of two contiguous blocks of land referred to as the eastern block and the western block. At a sale in execution of a mortgage decree against C, the blocks were separately put up for sale and bought by S.

The auctioneer's conveyance described each block separately and went on to say "which two lands are now forming one property and described as follows in the figure of survey 2062 dated July 20, 1934, . . . and registered as two lands in C 123/134 and C 141/173". The plan depicted only the western block.

Held, that both blocks passed to the purchaser on the conveyance. The addition of an erroneous plan did not vitiate an adequate and sufficient definition with certainty of what was intended to pass by the deed.

APPEAL from a judgment of the District Judge, Kegalla.

H. V. Perera, K.C., with *C. R. Gunaratna* and *L. G. Weeramantry*, for the plaintiff, appellant.

S. J. V. Chelvanayagam, K.C., with *N. Kumarasingham* and *P. Navaratnarajah*, for the defendant, respondent.

Cur. adv. vult.

February 20, 1948. CANEKERATNE J.—

This is an appeal by the plaintiff from a judgment dismissing his action in respect of a land, which formed one of the two blocks referred to in deed P12 dated September 25, 1943.

One Abdul Careem who was the owner of these two blocks mortgaged them with one Seneviratne and at the sale in execution of the mortgage decree, No. 10324 of the District Court of Kegalla, Seneviratne agreed to purchase the same. The heirs of Seneviratne executed a conveyance, P 12—which the plaintiff contends conveyed both blocks. The defendant who appears to be a son of Abdul Careem claims one of these blocks—the disputed block—on deed D 3 dated November 6, 1943, executed by his father.

The question is whether the disputed block is comprised in and expressed to be conveyed by the deed in favour of the plaintiff. If this block did not pass to Seneviratne on deed P 10, the plaintiff's action must fail.

It can hardly be denied that Seneviratne agreed to buy both blocks at the auction sale and that consideration for both blocks was given by the purchaser. That the auction purchaser intended to procure a conveyance of both blocks is also unquestionable. The Court on June 29, 1934, confirmed the sale and authorised the auctioneer to execute a conveyance of both blocks in favour of the purchaser. It was thus competent to the auctioneer to convey them to Seneviratne; actually he received no direction from the Court to include a description of the lands by reference to a plan. It seems clear that a mistake was made by the surveyor who made the figure of survey referred to hereinafter or by the notary. It is possible, perhaps likely, that the survey or did not have a copy of the decree or of the conditions of sale of both lots with him at the time.

It is contended by Counsel for the appellant that the plaintiff became entitled to both lots and he referred to the decision in *Horne v. Struben*¹. Counsel for the respondent based his arguments chiefly on the decision in *Eastwood v. Ashton*². The Court must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. The land to be conveyed is described in the deed P 10 as follows, omitting what is superfluous,—

(1) The entirety of Urulegodawatta containing in extent two pelas in paddy sowing bounded on the east by the ditch of Werellapotha Thambigewatta, south, west and north by ditches . . . and registered in C 123/134.

¹ (1902) A. C. 454.

² (1915) A. C. 900.

(2) The entirety of Urulegodawatta together with the upstairs buildings one pela in paddy sowing bounded on the east by the fence of the garden belonging to Asena Lebbe Marikar, by the fence of the garden that belonged to Lebbe Saibo, Notary, and the ditch, south by the fence of the garden that belonged to Lebbe Saibo, Notary, west by the fence of the land belonging to Pipanchi Naide and from the fence of Kowilewatta to the fence of Ramasamigewatta, north by the high road and registered in C 141/173 and which two lands are now forming one property and described as follows in the figure of survey No. 2062 dated July 20, 1934 and registered as two lands in C 123/134 and C 141/173.

There are certain guides in this deed towards identification of the lands conveyed¹. The first is that there are two lands. The second guide is that the first mentioned land, which I will hereinafter refer to as the eastern block, is in extent two pelas, and the second mentioned land, which I will hereinafter refer to as the western block, is in extent one pela. Though the description by paddy sowing extent is not an absolutely precise measurement, it can be determined within a fairly definite limits and most villagers in the locality would be able to show the extent: the evidence led shows that one pela is about $\frac{2}{3}$ of an acre. Then one comes to the boundaries: the evidence shows that on the east of the eastern block is Werellepotha Thambigewatta and that between the eastern and western blocks is a ditch. The western block is, according to the evidence of the surveyor, within well defined boundaries, a fence on the south, a fence on the west, a ditch on the east and the Colombo-Kandy Road on the north. Another guide is afforded by the eastern block being registered in C 123/134, the western in C 141/173.

If the description in the Schedule did not contain the text at the end, beginning with the words "and which two lands" and ending "in C 123/134 and C 141/173", there could be no doubt that both blocks would have passed to the purchaser. It is admitted, and the evidence makes it clear, that the land depicted in the plan corresponds only to one of the blocks described earlier, the western block: no portion of the eastern block is included therein. The text at the end shows that the two lands now form one property, it shows also that the two lands are described as follows in the figure of survey No. 2062:—"All that allotment of land": this description is, as a matter of fact, inaccurate for the figure of survey does not depict two lands. With the deed and plan in his hand could any competent person identify on the spot the land intended to be conveyed? If he looked at the earlier part of the schedule he would notice at once that one block did not reach as far as the main road for the northern boundary was a ditch or fence, he would notice that one land was surrounded on two sides by definite boundaries and on the other side by the high road: if he then examined the plan, it would strike him that the description therein was not consistent with the description in the earlier part of the schedule. It is true that if he had only the plan in his hand he could identify on the spot the parcel of land depicted therein, that is only the western block; but this would hardly be a correct method of ascertaining what was transferred by this deed. Where there are several

¹ (1902) A. C. 454.

descriptions which, when evidence of surrounding facts is admitted, are not consistent with each other, the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration of the language used and the facts properly admissible in evidence¹. The description by reference to the plan when taken with the earlier part of the schedule is inaccurate and misleading. The descriptions contained in the earlier part of the schedule are certain and unambiguous.

The conveyance contains a recital to the effect that the land and premises intended to be thereby assured were put up for sale by public auction on May 24, 1934, by the transferor and that the highest bidder and purchaser was the transferee. There is a reference to the decree in case No. 10324, to the confirmation of the sale by the Court and an order for executing a conveyance in favour of the purchaser. The property is referred to in the recital "as the lands and premises described in the schedule hereto". The schedule contains the descriptions previously referred to by me to wit, (1) "The entirety of . . . registered in C 123/134", (2) "The entirety of . . . registered in C 141/173 and which two lands . . . survey No. 2062 dated July 20, 1934, made by . . . and registered as two lands in C 123/134 and C 141/173". But it becomes abundantly clear on a reading of the language of the deed that "the figure of survey No. 2062 dated July 20, 1934," could not have been part of the description of the lands and premises put up for sale on May 24, 1934. Where there is an ambiguity in the operative part of an indenture recourse may be had to the recitals to see whether they throw any light on the matter. The recital if properly examined refers to the eastern and the western blocks without any reference to the figure of survey. The recital further tells an inquirer that by this deed it is intended to assure the parcels of land put up for sale at the auction of May, 1934. One has then to see what was put up for sale at the auction. There were two lots offered for sale separately. The eastern block was put up for sale on the spot first, the bid of Seneviratne was accepted and he signed the conditions of sale No. 4744 (P3); next the western block was offered for sale on the spot. Seneviratne's bid was accepted and he signed the conditions of sale No. 4745 (P4). On referring to the particulars in P3 and P4 it will be apparent that the lands and premises intended to be transferred were the eastern and western blocks: P3 contains the same description as is to be found in lines 1 to 6 of the schedule in P10 with a reference to the registration, and P4 the same description as is to be found in lines 7 to 16 of the schedule with a reference to the registration. No plan is introduced to show the position of the properties. The only description consistent with the recital is that contained in lines 1-16 of the schedule to deed P10. This description ought therefore to be preferred.

The appeal is allowed. Judgment will thus be entered in favour of the plaintiff in terms of prayer (a), (c) and (d) of the plaint: the defendant respondent will also pay the costs of appeal and damages at the rate of Rs. 20 per annum from the date of the plaint till possession is given.

¹ (1915) A. C. 900.

BASNAYAKE J.—

Omaru Lebbe Noordeen Lebbe of Mawanella brings this suit against Abdul Careem Lebbe Shahul Hameed also of Mawanella to have himself declared entitled to a land at Mawanella in the Kegalla District called Urulegodawatta of 2 pelas paddy sowing extent bounded on the *east* by the ditch of Werellepothathambigewatta, *south, west* and *north* by ditches, and for damages for being dispossessed of the land by the defendant.

The plaintiff claims the land by right of purchase on deed No. 14101 of September 25, 1943, attested by G. C. H. Molligoda, Notary Public, (P 12) and also relies on a deed of rectification No. 14201 of November 1, 1943, attested by the same notary (P 13). The defendant claims the land by right of purchase on deed No. 5745 of November 6, 1943, attested by G. R. P. Wickramasingha, Notary Public. Both parties claim to have also acquired a title by prescriptive possession.

Nearly 12 issues were suggested by the parties and adopted by the Court. The only question that arises for decision on this appeal is whether the plaintiff is entitled to the subject-matter of this action by virtue of the deed P 12. The learned trial judge has held against the plaintiff on this issue. Before examining the question in dispute it will be useful to state the history of the plaintiff's title.

By deed No. 256 of August 21, 1919, attested by A. F. R. Goonawardena, Notary Public, (P 14), one Wanniyegedara Meera Lebbe Abdul Cader Lebbe of Mawanella sold to one Ratugurunnehelagedara Usubu Lebbe Abdul Carrim of Mawanella for a sum of Rs. 4,500 the following lands:—

- (a) The entirety of Urulegodawatta with everything thereon situated at Mawana in Medapattuwa in Galboda Korale in Kegalla District, Sabaragamuwa Province, in extent 2 pelas paddy sowing extent and bounded on the *east* by the ditch of Werellepothathambigewatta on the *south, west* and *north* by ditches.
- (b) The entirety of Urulegodawatta together with the plantations and tiled upstairs buildings thereon situated at Mawana *alias* Mawanella in extent one pela paddy sowing and bounded on the *east* by the fence of the garden belonging to Assana Meera Lebbe by fence of the garden that belonged to Lebbe Saibo, Notary, and the ditch, on the *south* by the fence of the garden that belonged to Lebbe Saibo, Notary, on the *west* by the fence of the garden that belonged to Pipanchi Naide and from the fence of Kc vilawatta to the fence of Ramasamigewatta, and *north* by the high road, together with all rights thereto appertaining.

By mortgage bond No. 420 of May 27, 1930, attested by T. H. Fernando, Notary Public, (P 1), the said Ratugurunnehelagedara Usubu Lebbe Abdul Carrim mortgaged to Richard Perera Wijesingha Seneviratne, Superintendent of Minor Roads of Kegalla for a sum of Rs. 3,000 the two lands purchased by him on deed No. 256 of August 21, 1919, describing the metes and bounds of the two lands as described therein.

On February 7, 1933, Richard Perera Wijesinghe Seneviratne aforementioned instituted D. C. Kegalla Case No. 10,324 to recover the principal and interest due on mortgage bond No. 420. In the Schedule to the plaint (P 7) he described the lands exactly as they had been described in the mortgage bond.

In the decree for sale entered on March 2, 1933, (P 6) the description of the lands in the mortgage bond and the plaint were reproduced. The decree went on to authorise the auctioneer as follows:—

“and all the right, title, and interest and claim whatsoever of the said defendant, in, to, upon, or out of, the said several premises mortgaged by the said defendant be sold by Mr. D. S. Wickramasinghe, Auctioneer, and the proceeds applied in and towards the payment of the said amount, interest and costs.”

Separate conditions of sale were executed in respect of each land, P 3 in respect of the land of two pelas, and P 4 in respect of the land of one pela. P 3 and P 4 described the lands by their metes and bounds as set-out in the previous documents P 14, P 1, and P 6. The plaintiff mortgage creditor purchased the land of two pelas for Rs. 280 and the land of one pela for Rs. 1,530 and the auctioneer reported to Court accordingly.

The sale was confirmed and the auctioneer was authorised to execute the necessary conveyance. In this conveyance No. 4871, executed on September 6, 1934, (P 10), the lands were described as follows:—

- (1) The entirety of Urulegodawatta together with everything containing in extent 2 pelas in paddy sowing; bounded on the *east* by the ditch of Werellepothathambigewatta, *south*, *west* and *north* by the ditches situated at Mawana *alias* Mawanella in Meda Pattu in Galboda Korale in the District of Kegalla, Province of Sabaragamuwa; and registered in C 123/134.
- X (2) The entirety of Urulegodawatta together with the upstairs tiled building standing thereon of one pela paddy sowing; bounded on the *east* by the fence of the garden that belonged to Assena Lebbe Marikkar, *south* by the fence of the garden that belonged to Saibo Lebbe, Notary, *west* by the fence of the land belonging to Pipanchi Naide and from the fence of the Kovilewatta to the fence of Ramasamigewatta, *north* by the high road situated at Mawana *alias* Mawanella aforesaid and registered in C 141/173. And which two lands are now forming one property and described as follows in the figure of survey No. 2062 dated July 20, 1934, made by K. B. Nugapitiya, Licensed Surveyor, namely, all that allotment of land called Urulegodawatta together with the upstairs and the other buildings standing thereon containing in extent three roods and twenty-seven perches 3r. 27r. as per above figure of survey; and bounded on the *north* by the high road from Colombo to Kandy, *east* by Urulegodawatta, *south* by Thambuluwawawatta, *west* by Siyambalagahamulawatta, Kovilewatta, Kamalawatta situated at Mawana *alias* Mawanella aforesaid and registered as two lands in C 123/134 and C 141/173.
- Y

The passages set out hereinbefore sidelined X and Y respectively will hereinafter be referred to as description X and description Y. Description X is the same as the description of the lands in all documents relating to them, prior to P 10, while description Y is an addition and occurs for the first time in P 10.

After the death in 1939 of Richard Perera Wijesinghe Seneviratne, the vendee on P 10, his heirs sold the lands to the present plaintiff Omaru Lebbe Noordeen Lebbe by deed No. 14101 of September 25, 1943, attested by G. C. H. Molligoda, Notary Public, (P 12). This deed described the lands in exactly the same way as they are described in the conveyance P 10.

The irreconcilable nature of descriptions X and Y appears to have been detected shortly after P 12 was executed, for, on November 1, 1943, the parties to P 12 executed deed No. 14201 of November 1, 1943, attested by G. C. H. Molligoda, Notary Public, (P 13), the main object of which appears to be to describe the lands as they were described before P 10 without the added description Y in P 10, which as already stated has been taken over to P 12.

It is not disputed that the description X which was the description used in all previous documents was an adequate and sufficient description of the two Urulegodawattas of one pela and two pelas in extent respectively and indicated with sufficient certainty what was meant to pass. But it is contended by the defendant that the description Y excludes the Urulegodawatta of two pelas from the transfer and that it did not therefore pass to the transferee. If the description X stood by itself without more, there is no doubt that both the Urulegodawatta of one pela and the Urulegodawatta of two pelas would have passed thereunder. There is nothing in the instrument P 10 or P 12 to indicate that the description Y was designed to reduce the extent covered by description X. On the contrary the words "and which two lands" in Y make it clear that its object is to express in relation to a survey plan the description X. But description Y has failed of its purpose. Not only is the plan erroneous but the description therein is equally erroneous. The extent of both lands is not three roods and twenty-seven perches as stated in description Y nor does the figure of survey No. 2062 of July 20, 1934, made by K. B. Nugapitiya, Licensed Surveyor, contain both the lands described at X, a fact admitted by Surveyor Nugapitiya himself and illustrated by his plan 2795 of October 11, 1944, prepared on a commission issued by the Court in these very proceedings.

It is settled law that any subsequent erroneous addition, as in this instance, will not vitiate an adequate and sufficient definition with certainty of what is intended to pass by a deed. It is also now well settled that where a diagram or figure of survey contradicts the unambiguous text of the title it must give way to the text. A plan will not prevail over a description which does not require a plan to explain it, nor will inaccuracies prevail when the property is indicated with sufficient certainty. The description Y must therefore yield to description X. I hold that P 12 gives the plaintiff title to both the Urulegodawatta of one pela and the Urulegodawatta of two pelas.

For the reasons I have stated this appeal is entitled to succeed. The judgment of the learned District Judge is set aside and the plaintiff's prayer is granted subject to the modification that damages should be calculated at the rate of Rs. 20 per annum as agreed by the parties. The plaintiff is declared entitled to costs in both Courts.

Appeal allowed.