

1914.

Present : Lascelles C.J. and De Sampayo A.J.

KAPURUHAMY v. APPUHAMY et al.

199—D. C. Anuradhapura, 619.

Stamp duty—Instrument executed on behalf of the Government of Ceylon—Ordinance No. 9 of 1909, s. 4—Irrigation Ordinance, s. 47—Certificate of sale—Bias—District Judge adjudicating on the regularity of certificate of sale issued by him as Government Agent.

A certificate of sale issued under section 47 of the Irrigation Ordinance, No. 16 of 1906, is liable to stamp duty.

That exemption from stamp duty under section 4 (1) of the Stamp Ordinance, 1909, applies to instruments executed on behalf of the Government only where but for such exemption the Government would be liable to pay the duty.

It is improper for a Judge to try the irregularity of a certificate which he himself has issued in his capacity as Government Agent.

THE facts are set out in the judgment.

D. B. Jayatileke, for defendants, appellants.—The sale was bad because the debt for which the land was sold was not due at the date of seizure. See section 42 of Ordinance No. 16 of 1906. The

seizure and sale were fraudulent. The learned District Judge should have allowed the issue as to whether the seizing officer had the written authority under the hand of the Government Agent, as is required by section 43 of the Irrigation Ordinance. The certificate of sale should have been stamped, in accordance with section 47 of the Irrigation Ordinance, 1906. The omission to do so is a fatal irregularity.

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Abdul Cader, for plaintiff, respondent.—The issue whether the debt was due or not at the date of the seizure is raised in appeal for the first time. It is not open to a party to raise a point of law for the first time in appeal, unless it might have been put forward in the Court below under some one or other of the issues framed. See *Appuhamy v. Nona*.¹ When the learned District Judge refused to frame an issue on the point whether the seizing officer had the authority to seize, the appellant should have appealed at once if he thought that the point raised was one which went to the root of the plaintiff's title. See *Punchi Appuhamy v. Mudianse*.² Fraud is merely alleged, but not proved. A certificate of sale of this nature confers upon the purchaser a title complete against the whole world. A presumption arises under section 114 of the Evidence Ordinance in favour of the person relying on the certificate of sale that the sale was duly made under the Ordinance. The burden of proving fraud is on the defendants. See *Guñesekare v. Teberis et al.*³

The omission to stamp the certificate is not a fatal irregularity. The defect can be cured under sections 36 (d) and 37 of Ordinance No. 22 of 1909.

D. B. Jayatileke, in reply, cited *Abubakker Lebbe v. Ismail Lebbe et al.*⁴

July 8, 1914. LASCELLES C.J.—

This is an appeal in an action in which the plaintiff has recovered judgment for certain paddy fields at Talawa in virtue of a certificate of sale purporting to have been issued under section 47 of the Irrigation Ordinance, No. 16 of 1906.

The validity of the certificate has been attacked on certain grounds, which I will proceed to consider.

In the course of the trial one Kiri Banda, a clerk to the Irrigation Superintendent, was called to prove the condition of the land when he made the seizure. This witness deposed that he was authorized by a Mr. Misso to sign seizure forms, and that on the occasion when the land in question was sold he signed the seizure form on that authority. He did not produce, and presumably had not, the written authority under the hand of the Government Agent, which

¹ (1912) 15 N. L. R. 311.

² (1907) 2 A. C. R. 159.

³ (1906) 10 N. L. R. 18.

⁴ (1908) 11 N. L. R. 309.

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is required by section 43 of the Irrigation Ordinance. At this stage the defendants' proctor asked the learned District Judge to frame an issue on the point whether the seizing officer had the authority to seize. This application was refused.

The Judge, in my opinion, was wrong in refusing to accept this issue. He had power to frame an additional issue under section 149 of the Civil Procedure Code. The point raised was one which went to the root of the plaintiff's title. The inquiry which the additional issue would have involved would have been of the simplest nature if, indeed, any further inquiry was needed. The result is that judgment has been given for the plaintiff on a title which, on the official evidence in the record, is of no value whatever. As it is possible that some explanation may be given of what is apparently a fatal flaw in the title, the case must go back for the trial of the suggested issue.

There is another point raised, I understand, for the first time on appeal. The certificate of sale is bad on its face, inasmuch as the land purports to have been sold for a debt which was not due at the time of the sale. The certificate recites that Rs. 17.25 was owing for irrigation interest and labour rates for the year 1912, and Re. 1.50 for costs, and that the land (which was more than 8 acres in extent) was seized in conformity with Ordinance No. 16 of 1906 and sold for Rs. 20.50 on June 18, 1912. Now, under section 42, all contributions under the Ordinance are due and recoverable on June 30 in each year. The seizure and sale are, therefore, on the face of the document contrary to law. It makes no difference that the payments are primarily due under the Kalawewa Yoda-ela Irrigation Ordinance, No. 20 of 1908, as by section 6 of this Ordinance the rates and charges due under that Ordinance are enforceable and recoverable under Part IX of the Irrigation Ordinance, 1906. The certificate is apparently bad, but the plaintiff should have an opportunity of offering any explanation which he may be able to place before the Court.

The next point is with regard to the liability of the certificate to stamp duty. The learned District Judge has held that, inasmuch as the instrument was executed "on behalf of the Government of Ceylon," it is exempt from stamp duty under section 4 (1) of the Stamp Ordinance, 1909. This decision is clearly erroneous, as the exemption extends to instruments executed on behalf of the Government of Ceylon only where "but for such exemption the Government would be liable to pay the duty chargeable in respect of such instrument." But by section 47 of the Irrigation Ordinance, 1906, it is provided, not only that such certificates are liable to the stamp duty on conveyances, but that the duty is payable by the purchaser. The Government would in no case be liable to pay the stamp duty. The exemption thus has no application. In terms of section 37 (b) I make a formal declaration that the instrument, in my opinion,

should not have been admitted without payment of stamp duty of 25 cents, and a penalty under section 36 (a) of Rs. 2.50. I direct a copy of this declaration, and also the instrument, be sent to the Commissioner of Stamps under section 37 (2) (c). I may state, with reference to the proviso to section 37, that I do not think that there was any intention on the part of the purchaser to evade payment of duty.

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The principal defence set up on the facts was that the plaintiff, who was a vel-vidane, and was in charge of the whole share belonging to the plaintiff, defendants, and others, received the amount due for the share, and then, instead of paying over this amount, allowed the land to be sold, and bought it himself at the very low price of Rs. 20.50. The learned District Judge has acquitted the plaintiff of anything worse than sharp practice, and I accept his finding, though he has overlooked the evidence that one of the shareholders, Muttu Menika, is dead.

The result is that the judgment must be set aside, and the case remitted for the trial of the following issues, namely:—

- (a) Was the land in dispute seized by the Government Agent, or by any person authorized by writing under the hand of the Government Agent?
- (b) In view of section 42 of the Irrigation Ordinance, 1906, and section 6 of the Kalawewa Yoda-ela Irrigation Ordinance, 1908, was the amount of Rs. 17.25 owing at the date of seizure?

As it would be manifestly improper that the District Judge should try the regularity of a certificate which he himself has issued in his capacity as Government Agent, I direct the further proceedings to be tried before another Judge. The evidence already recorded will stand, and either party will be at liberty to adduce further evidence bearing on the additional issues.

The appellants are entitled to their costs of the appeal, and the other costs will be costs in the cause.

DE SAMPAYO A.J.—I agree.

Sent back.

