[illegible] 22, 1960

IN THE PRIVY COUNCIL No. 20 of 1959

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE ATTORNEY-GENERAL of Ceylon
(Defendant) Appellant

- and -

1. R.B. HERATH (Plaintiff)
2. P.B. ATTANAYAKE (Defendant)
Respondents

CASE FOR THE APPELLANT

1. This is an appeal by the Attorney-General of Ceylon (hereinafter called "the Attorney-General") from the Judgment and Decree of the Supreme Court, dated the 6th March, 1958, whereby the Supreme Court on an appeal by the First Respondent above-named (hereinafter called "the Plaintiff") set aside the Judgment and Decree of the District Court of Colombo, dated the 7th February, 1956, and directed that decree be entered declaring the Plaintiff entitled to the two lands in respect of which he had brought the action; that the Plaintiff be restored to and quieted in possession of the said land and that the Second Respondent above-named (hereinafter called "the Second Defendant") be ejected therefrom.

Record

p.41 - p.77

p.32 - p.35

2. The Plaintiff became entitled to the lands in respect of which he brought the action (hereinafter called "the lands") on the 28th October, 1946 (Exhibit P.22) as the successor in title to one Allis Perera to whom the Second Defendant, a previous owner, had transferred them in satisfaction of a debt secured by a mortgage of the lands. (Exhibit 1D5). The Second Defendant had, however, made an application on the 6th July, 1945, to the Land Commissioner for the redemption of the lands

pp.114-115

pp.100-102

Record

under the provisions of the Land Redemption Ordinance No. 61 of 1942 (hereinafter called "the Ordinance") which provided for the compulsory acquisition by the Crown of agricultural lands which had been transferred or sold by their owners in satisfaction of mortgage debts or mortgage decrees during a certain period of economic depression. The Land Commissioner thereupon directed the Plaintiff to state his objections to the proposed acquisition. The Land Commissioner considered the Plaintiff's objections and being satisfied that the lands fell within the description in Section 3(1)(b) made the statutory determination under Section 3(4) of the Land Redemption Ordinance that the lands be acquired. This decision was followed by an order of the Minister of Agriculture and Lands dated the 10th May, 1951 (by which date the Land Acquisition Act No. 9 of 1950 had replaced the Land Acquisition Ordinance No. 3 of 1876) declaring that the lands were needed for a purpose deemed to be a public purpose within the meaning of the Act and

p. 125

that they would be acquired under the Act (Exhibit 1D1). In pursuance of the Minister's Order, the Assistant Government Agent, Nuwara-Eliya, took steps under the Act for the acquisition of the lands and finally possession of the lands was taken upon an Order of Possession under Section 36 of the

p. 140

Act (Exhibit 1D3).

3. On the 28th of February, 1950, after the statutory decision of the Land Commissioner to acquire the lands, the Plaintiff through his proctor took for the first time the legal objection that the Plaintiff and his predecessors in title held the lands as paraveni nilakarayo and that the lands could not be acquired under the Land Redemption Ordinance because they belonged to the Pathini Devale (a temple) which was entitled to services in

pp. 120-121

respect of the lands (Exhibit P4). This objection to acquisition is the main question arising in the present appeal. It was also the basis of an earlier action (D.C. Kandy case No. L3692) which the Plaintiff instituted on the 23rd June, 1952 against the Land Commissioner and the Assistant Government Agent, Nuwara-Eliya, for a declaration that the lands were "not liable to be acquired under the provisions of the Land Redemption Ordinance"

pp. 130-131

(Exhibit P22). The Defendants filed answer pleading in defence that they had acted lawfully under the provisions of the Land Redemption Ordinance and

prayed for the dismissal of the action (Exhibit P22). On the trial date, the Plaintiff being absent and unrepresented, the action was dismissed and his application for setting aside the order of dismissal was refused on the 10th October, 1953 (Exhibit P24). Thereupon the Plaintiff brought the present action on the 1st May 1954 against the Attorney-General of Ceylon and the Second Defendant praying, inter alia, for a declaration of title to the lands and in addition or as an alternative to such a declaration, for a declaration of his right to possess the said lands. The basis of the Plaintiff's action was that the steps taken under the Land Acquisition Act were void in law because the lands belonged to the Pathini Devale and not to the Nilakaraya and could not therefore be acquired under the provisions of the Land Redemption Ordinance.

Record
pp. 132-133
p. 139
pp.10-12

4. On the 8th September, 1954 the Attorney-General filed amended Answer resisting the Plaintiff's action. His defence on the merits was that though services were owed to the Pathini Devale in respect of the lands, the lands could nevertheless be acquired under the provisions of the Land Redemption Ordinance. The amended answer also raised certain other defences on which a large number of issues were raised at the trial. The principal points of dispute, however, were the following:-

pp.17-19

(a) Whether the decision of the Land Commissioner to acquire the lands under section 3 of the Ordinance is open to review by a Court of Law;

(b) Whether the decision of the Land Commissioner to acquire the lands can be attacked collaterally in the present action against the Attorney-General without appropriate proceedings having been first taken to set aside the decision;

(c) Whether a paraveni nilakaraya is the owner of the lands held by him within the meaning of section 3(1)(b) of the Ordinance;

(d) Whether the legality of the declaration by the Minister under section 5(1) of the Land Acquisition Act No. 9 of 1950, as modified for the purpose by the Ordinance, can be canvassed in a Court of Law;

Record

(e) If the said order of the Minister can be canvassed in a Court of Law, whether it is open to the Plaintiff to challenge it in the present action against the Attorney-General;

(f) Whether the order of possession made under section 36 of the Land Acquisition Act No. 9 of 1950 precludes the plaintiff from seeking the relief he claims; and

(g) Whether the dismissal of the Plaintiff's action in D.C. Kandy No. 3632 operates as res judicata in respect of the issue whether the lands could be legally acquired under the provisions of the Ordinance.

The first of these questions does not arise for decision on the present appeal because the parties have agreed to be bound by the decision of this question in the case of Ladamuttu Pillai v. Attorney-General & Others (D.C. Colombo Case No. 288Z SC No. 457 of 1954) which is now under appeal to Her Majesty in Council.

p.41, 11.15-19

5. The relevant provisions of the Land Redemption Ordinance No. 61 of 1942 and of the Land Acquisition Act No. 9 of 1950 are as follows:-

"3. (1) The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that the land was, at any time before or after the date appointed under section 1, but not earlier than the first day of January 1929, either -

(a) sold in execution of a mortgage decree, or

(b) transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was immediately prior to such transfer, secured by a mortgage of the land.

(2) Every acquisition of land under sub-section (1) shall be effected in accordance with

the provisions of sub-section (5) and shall be paid for out of funds provided for the purposes of this Ordinance under section 4.

(3) No land shall be acquired under sub-section (1) until the funds necessary for the purpose of such acquisition have been provided under section 4.

(4) The question whether any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment; and every such determination of the Land Commissioner shall be final.

(5) Where the Land Commissioner has determined that any land shall be acquired for the purposes of this Ordinance, the provisions of the Land Acquisition Ordinance, subject to the exceptions, modifications and amendments set out in the First Schedule, shall apply for the purposes of the acquisition of that land; and any sum of money which may, under such provisions be required to be paid or deposited by the Land Commissioner or by Government by way of compensation, costs or otherwise, shall be paid out of funds provided for the purposes of this Ordinance under section 4."

Section 5 of the Land Acquisiton Act as modified by section 62 of the Act for the purposes of the Land Redemption Ordinance is as follows:-

Section 5

"(1) Where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance, the Minister shall make a written declaration that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the province or district in which such land is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near such land."

Record

"(2) A declaration made under sub-section (1) in respect of any land shall be conclusive evidence that such land is needed for a purpose which is deemed to be a public purpose."

"(3) The publication of a declaration under sub-section (1) in the Gazette shall be conclusive evidence of the fact that such declaration was duly made."

6. At the trial no evidence was led on either side and the District Judge was invited to decide the case on the admissions made by Counsel and upon the documents marked and put in without proof.

pp. 32 - 35. 7. The learned District Judge by his Judgment dated the 7th February 1956, dismissed the Plaintiff's action with costs.

He held -

p. 33, ll.15-19 (a) that a paraveni nilakaraya is an owner of the lands which he holds and that the lands in question could therefore be legally acquired under the provisions of section 3 of the Ordinance;

p. 33, ll.20-34 (b) that the decision of the Land Commissioner to acquire the lands under section 3(1)(b) was a judicial act and could have been quashed by a mandate of the Supreme Court in the nature of a writ of certiorari but in view of section 3(4) it was not open to challenge that decision in the present action;

p. 34, ll.16-31 (c) that steps were properly taken for acquisition under the Land Acquisition Act;

p. 34, ll.32-40 (d) that the defence of res judicata failed because the Defendants in the earlier case were different and also because the Plaintiff's claim in the new action was based upon a new fact, namely, that the Crown took possession of the lands. It is submitted that the Judgment of the learned District Judge is right for the reasons given by him except for his view that the decision of the Land Commissioner could have been quashed by a writ of certiorari and his finding that the defence of res judicata was not available in the case.

pp. 38 - 40 8. The Plaintiff appealed to the Supreme Court

Record

and his appeal was heard by a Divisional Bench of the Supreme Court (Basnayake C.J., Pulle J. and K.D. De Silva J.) who by their Judgement, dated the 6th March 1958, allowed the appeal and directed that decree be entered declaring the Plaintiff entitled to the lands and ordering the ejectment of the Second Defendant. It also directed an order in favour of the Plaintiff for possession and for costs in both Courts. pp. 41 - 75

9. It is respectfully submitted that the Judgment of the Supreme Court is wrong on all the matters arising in this appeal.

10. On the main question arising on the merits, it is submitted that the Judgment of de Sampayo J. in the case of Appuhamy v. Menike (19 N.L.R. 361) is right. It is submitted that a Ninda-lord has no real rights in respect of the property held by a Nilakaraya and that his right to receive services or the commuted money payment merely entitled him to bring a personal action for the enforcement of payment in case of default. He has no right of re-entry and when a holding is sold in execution of a money decree obtained by the Ninda-lord the balance of the money realised after satisfaction of the money decree is payable to the paraveni nilakaraya. The nilakaraya, on the other hand, can alienate, encumber and gift the land in any manner without any reference to the Ninda-lord. He can bring a possessory action and is treated as a person having dominium for the purpose of bringing a rei vindicato action. It is further submitted that in the case of Appuhamy v. Menike Ennis J. agreed with de Sampayo J. that the paraveni nilakaraya was the owner of his holding and that both learned Judges based their decision of the case on the finding that the services in respect of the holding were indivisible. Their view of the nature of a paraveni nilakaraya's holding is consistent with the origin of this species of feudal tenure. The paraveni nilakarayo were hereditary feudal tenants holding directly from the King at the time of the Royal grants. The grantees were not free to remove the paraveni nilakarayo. The grants were not in reality grants of lands which the grantees might parcel out among their own tenants but rather grants of services in respect of the lands. Nor is the idea of conceding ownership to hereditary feudal tenants foreign to the general law. The

Record

p. 56, l.36 - p. 57, l.7

Roman Dutch Law accorded the status of owner to a hereditary tenant even though it was clear that the holding was originally taken directly from the feudal lord. It is submitted with respect that the learned Chief Justice was wrong in his view that the question whether a paraveni nilakaraya is the owner of the land he holds could be answered by reference to the Roman Law concept of dominium. That concept is alien to the Kandyan system of land tenure which is feudal in nature. The theory that a person entitled to the absolute dominium of a land will remain the owner of the land even after he has lost all rights of possession and enjoyment cannot be applied to a Ninda-lord because he never had at any time absolute dominium. If any one had such a right it was the King and the grant to the Ninda-lord cannot be regarded as a transfer of dominium. The idea of ownership in the Roman sense was not fully accepted even in the Roman Dutch Law.

11. Assuming that section 3(1) of the Ordinance does not empower the Land Commissioner to make an inviolable decision and that section 3(4) does not directly protect a decision under 3(1), there remains the further question whether the decision of the Land Commissioner can be attacked collaterally in the present action. It is submitted that the decision of the Land Commissioner is a judicial decision and that so long as he has acted bona fide (this is not denied by the Plaintiff in the present case) and has acted within his jurisdiction, his decision is valid until it is quashed. It is not denied that in the present case the Land Commissioner's decision under 3(1) is in regard to the subject matter of his jurisdiction, namely, agricultural land. In Ceylon the only Court that can quash a judicial order is the Supreme Court and the proper procedure is an application for a mandate in the nature of a writ of certiorari. The District Court cannot therefore quash the Land Commissioner's decision nor give any relief to a party on the footing that the order of the Land Commissioner is not valid.

12. With regard to the question whether the declaration of the Minister under section 5(1) of the Land Acquisition Act No. 9 of 1950 can be canvassed in a Court of Law, it is submitted that the effect of section 5(3) is to preclude a Court from receiving

Record

any evidence to show that the declaration was not duly made. The intention of the Legislature appears to be to ensure that the title of the Crown to the lands compulsorily acquired is unassailable. Assuming, however, that notwithstanding this sub-section, the validity of a declaration by the Minister can be attacked on the ground that the conditions necessary for the making of a valid declaration were lacking, it is submitted that under section 5(1) the only condition precedent is the existence of a valid determination by the Land Commissioner. As submitted hereinbefore a bona fide determination within jurisdiction is valid even if it happens to be erroneous. In any event, the correctness of the Land Commissioner's determination cannot for the reasons submitted earlier, be canvassed in the present action.

13. In addition to holding that the Minister's declaration was bad because it was based on a void determination by the Land Commissioner, the learned Chief Justice also held (wrongly, it is submitted) that the declaration would in any case be ineffective because -

(a) there were certain inaccuracies in the declaration; p. 62, l.28 - p. 63, l.19

(b) there was no proof that the declaration was published in Singhalese and Tamil;

(c) there was no proof that the acquiring officer was directed to cause the declaration to be published in or near the land.

It is submitted that the inaccuracies referred to are of a very minor nature and would not affect the validity of the declaration. With regard to (b), it is submitted that the publication in Tamil and Singhalese is not legally necessary and that in any event, the publication in Singhalese and Tamil can, in the circumstances, be presumed. Similarly, it must be presumed that the Minister gave the directions which he was required to give under the section. Apart from the normal presumptions, the publication of the declaration in the Gazette is conclusive evidence that the declaration was duly made. It is submitted that for sub-section 5(3) to operate it need not be shown that the declaration of the Minister was published in Singhalese and Tamil as well.

Record

14. Section 37 of the Land Acquisition Act No. 9 of 1950 provides that the order of possession under 36 when published in the Gazette shall vest the land, in respect of which it is made, absolutely in the Crown. This section will operate in the present case unless it is shown that the proceedings under the Land Acquisition Act are a nullity. The only ground upon which the Plaintiff attacks the validity of these proceedings is that they proceeded from an invalid determination of the Land Commissioner. It is submitted that the Plaintiff cannot, for the reasons already submitted, ask the Court to grant him relief on the basis that the Land Commissioner's determination is invalid.

15. On the question of res judicata it is submitted (a) that in D.C. Kandy Case No. L3632 as well as in the present action the vital issue is the same, namely, whether the land held by the Plaintiff could legally be acquired under the Land Redemption Ordinance and (b) that there is sufficient identity of parties to support the plea of res judicata. The Defendant in the present action clearly defends the action as the agent of the Crown. So did the Defendants in the previous action. They were sued because they were, at the stage of the previous action, the agents of the Crown acting in a matter in which the Crown had an interest, namely, the acquisition of the lands in question. It was this Crown interest that the Defendants in that case defended. It is submitted with respect that the
p. 68, 11.10-18 learned Chief Justice was wrong in holding that the entirety of the law in regard to res judicata is contained in the Civil Procedure Code. The judgment of the Supreme Court in Samichi v. Pieris (1913 16 N.L.R. 257) is to the contrary effect. In Indian cases, where substantially the same question arose under the Indian Code of Civil Procedure, the Privy Council held that it was legitimate to refer to English decisions when the general principles upon which the doctrine should be applied were considered (Munnibibi v. Tirloki Nath 58 Indian Appeals 158).

16. It is respectfully submitted that this appeal should be allowed with costs throughout, that the judgment and decree of the Supreme Court dated the 6th March, 1958 should be set aside and that the decree of the District Court dated the 7th February,

1956 should be restored for the following amongst other

Record

REASONS

1. BECAUSE the Judgment of the Supreme Court is wrong on all the matters arising in this Appeal.

2. BECAUSE the learned District Judge was right in his judgment on the merits.

3. BECAUSE a paraveni nilakaraya is the owner of the lands held by him within the meaning of section 3(1) of the Land Redemption Ordinance.

4. BECAUSE the determination of the Land Commissioner is a valid determination even on the assumption that it is erroneous.

5. BECAUSE the legality of the determination of the Land Commissioner cannot be canvassed in a Court of Law.

6. BECAUSE the legality of the determination of the Land Commissioner cannot in any event be canvassed in the present action.

7. BECAUSE the legality of the declaration of the Minister under section 5(1) of the Land Acquisition Act No. 9 of 1950 cannot be canvassed in a Court of Law.

8. BECAUSE the legality of the declaration of the Minister under section 5(1) cannot in any event be canvassed in the present action.

9. BECAUSE the legality of the Order of Possession made and published under section 36 of the Land Acquisition Ordinance cannot be canvassed in the present action.

10. BECAUSE the Plaintiff's action fails on the ground of *res judicata*.

E.F.N. GRATIAEN

WALTER JAYAWARDENE

No. 20 of 1959

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE ATTORNEY-GENERAL of Ceylon (Defendant) Appellant

- and -

1. R.B. HERATH (Plaintiff)
2. P.B. ATTANAYAKE (Defendant) Respondents

CASE FOR THE APPELLANT

T.L. Wilson & Co.,
6, Westminster Palace Gardens,
London, S.W.1.
Solicitors for the Appellant.