Present : Bertram C.J. and Ennis J. 1922.

MEERASAIBU *et al. v.* THEIVANAYAGAMPILLAI.

63.—D. C. Batticaloa, 5,116.

Sale of land—Omission of a block by mistake—Inclusion of block by mistake in sale of adjoining land to another—Action in ejectment —Claim in reconvention for rectification of deed and cancellation of deed in favour of plaintiff—Joinder of vendor—Jurisdiction.

The administrator sold an estate to defendant, but by mistake did not include in the deed a block of 64 acres which formed a recognized part of the estate. Some time later the adjoining estate was sold by the administrator to plaintiffs, and the block was by mistake included in his deed. Plaintiffs sued defendant in ejectment. The defendant in reconvention prayed that plaintiffs' deed in so far as it purports to transfer to plaintiffs the block in question should be cancelled, and he also claimed a rectification of his own deed, and moved to make the administrator a party.

Held, that the administrator should be added as a party to the case.

THE facts appear from the judgment.

H. J. C. Pereira, K.C. (with him *Canakeratnem*, *Croos-Da Brera*, and *Peri-Sunderam*), for defendant, appellant.

Bawa, K.C. (with him *Bartholomeusz* and *R. C. Fonseka*), for plaintiffs, respondents.

Samarawickreme, for noticed respondent.

November 20, 1922. BERTRAM C.J.—

This is an appeal from an order of the Batticaloa District Court declining to allow the defendant, when claiming in reconvention, to add Mr. Sydney Julius, defendant's vendor, as a party to the case.

The facts alleged by the defendant are as follows:—Many years ago Mr. Edward Newnham Atherton bought up several properties in the Batticaloa District, and grouped them into certain recognized estates. On his death in 1907 Mr. Harry Creasy was appointed administrator *cum testamento annexo*, and, in that capacity and in pursuance of Mr. Atherton's will, conveyed to Mr. Atherton's widow the estates so constructed. It is alleged, however, that in grouping the various lots which made up each estate, Mr. Creasy made a mistake and excluded from one estate, known as "Mayfield,"

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a block of 64 acres which was a recognized part of that estate, and included it in another estate, known as "Vantharamoolai." In 1918 Mr. Atherton's widow died leaving a will, and letters with the will annexed were granted to Mr. Sydney Julius. Mr. Sydney Julius proceeded to advertise for sale the properties left by Mrs. Atherton. Mayfield Estate was sold to the defendant, *eo nomine*, and he was given possession of the estate, including the 64-acre block. Some months later the other estate is said to have been sold to the plaintiffs. Whether it was sold under that name or not is not clear. Mr. Sydney Julius in giving directions for the preparation of the conveyance adopted the grouping mistakenly made by Mr. Creasy, and thus, unconsciously, repeated Mr. Creasy's mistake. The consequence was that this 64-acre block, which, according to the allegations of the defendant, was an integral part of Mayfield, was included in the deeds relating to the estate known as Vantharamoolai. It is alleged, either expressly or impliedly, by the defendant that the plaintiffs had no intention of buying this 64-acre block which is a recognized part of Mayfield Estate and was never comprised in Vantharamoolai, and that Mr. Julius had no intention of conveying to the plaintiffs anything other than what was comprised in Vantharamoolai Estate. The defendant further alleged that the plaintiffs have since discovered the mistake in the deed, and, taking advantage of that mistake, are seeking to eject the defendant from this 64-acre block. He claims in reconvention that the plaintiffs' deeds in so far as they purport to transfer to plaintiffs the block in question should be cancelled. He also claims a rectification of his own deed, and, for this purpose, desires to add Mr. Sydney Julius as a party. In the alternative he asks that it may be declared that the plaintiffs hold the 64-acre block in trust for the defendant, and that they be ordered to execute a conveyance thereof to the defendant.

More briefly stated the problem is this : Sales are said to have taken place to the plaintiffs and defendant, respectively, of two estates, and, by a mistake, a block which should have been included in the defendant's deeds has been included in the plaintiffs'. The defendant asks that the mistake be rectified, and, for this purpose, desires that all the parties to the mistake should be made parties in the cause.

Assuming the facts stated to be true, it would be a singular thing if the Court were not in a position to do justice in the matter, and it is difficult to see how justice could be done unless all the parties to the alleged mistake were before the Court. For the purpose of regularizing the situation, the defendant is asking that the plaintiffs' deeds should be cancelled in so far as they purport to convey the 64-acre block. It is difficult to see how this can be done, unless both the parties to the deeds sought to be cancelled are before the Court. Also he desires that his own deed from

Mr. Sydney Julius should be rectified, so that his title to the land intended to be conveyed to him may be put on a proper footing. It is difficult to see how this can be done without bringing Mr. Julius before the Court. Further, the defendants are a necessary party to this claim, because the land which the defendant seeks to include in his deed is at present vested in the plaintiffs.

The position is very similar to that disclosed in the case of *Wickramanayake v. Abeywardene.*[1] There the conveyance sought to be cancelled was not made by mistake, but by fraud, but I see no distinction in principle between these two cases. It is true that the action there was a Paulian action, and the maker of the impugned deed is a necessary party to the Paulian action, but the same principle surely applies to a deed which is alleged to have been executed by a mistake, that is to say, it ought not to be cancelled unless the maker is made a party. Until this deed is cancelled and thus got out of the way, it is impossible for the defendant to claim that his own deed should be rectified by plaintiffs' vendor.

It is perfectly true that the defendant put forward an alternative claim, namely, that the plaintiffs held the 64-acre block under a constructive trust to convey it to himself. Mr. Sydney Julius is not a necessary party to that claim, but the defendant is entitled to have his claim considered in the alternative.

Mr. Samarawickreme, who appeared for Mr. Sydney Julius, urged that he could not be added as a party to the cause, because the deeds in question were not executed within the jurisdiction of the Batticaloa District Court, and he seemed to suggest that what was in question was not the land referred to in the deeds, but the deeds themselves. Such a suggestion seems to me to be wholly untenable.

There is one point which requires to be noticed: Among the persons who originally bought Vantharamoolai Estate was one Mohamado Ally. He sold his share to the sixth plaintiff. The defendant originally claimed that both he and Mr. Sydney Julius should be added as parties. The District Judge disallowed the application as regards both, but no appeal has been lodged with regard to Mohamado Ally. Mohamado Ally is therefore not at present a party to the cause, and our judgment in this case will not affect him. It is unnecessary at this stage of the case to decide what effect this may have on subsequent proceedings, but I draw attention to the point as one which may require consideration.

In my opinion the appeal should be allowed, but as it is allowed on the basis of averments made by the defendant which may turn out to be unjustified, the costs of this interlocutory matter, both here and in the Court below, should, in my opinion, be costs in the cause.

[1] *(1914) 17 N. L. R. 169.*

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ENNIS J.—

This was an action for a declaration of title by the plaintiffs, who claim to be the legal owners of the land claimed, against the defendants who are in possession and claim to be the equitable owners. The defendants prayed for, *inter alia*, cancellation of the deed conveying the property to the plaintiffs, and applied that the transferor on that deed, who is also their own transferor, be made a party to the case. The learned Judge refused the application, and the appeal is from that order.

In my opinion, when there is a prayer for the cancellation of a deed, it is desirable that the parties to the deed should be parties to the action, even if it be not absolutely necessary to make them parties.

A somewhat similar position arose in the case of *Wickramanayake v. Abeywardene* (*supra*), and there it was held that there was no misjoinder.

I would accordingly allow the appeal. The costs of the appeal to be costs in the cause.

Appeal allowed.