

Puigment
5, 1965

IN THE PRIVY COUNCIL

No.50 of 1962

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :-

D. ROBOSINGHO MUDALALI alias
GAMPAHA MUDALALI (Second Defendant) Appellant

- and -

1. L. D. P. JAYAWARDENE (Plaintiff)

2. GALPOTTAGE HENDRICK PERERA
(Plaintiff)

10 3. B. W. PATHIRANA (First Defendant)

4. DR. M. G. PERERA (Third Defendant) Respondents

CASE FOR THE APPELLANT

1. This is an Appeal from the Order of the Supreme Court of Ceylon, dated the 26th January, 1961, dismissing, without reasons being given, the appeal of the Appellant from the Order of Senaratne, D.J. dated the 16th May, 1958. Record p.22, 1.20 p.18, 1.1.

20 2. The principal questions arising in this appeal are (a) whether the Plaintiffs/Respondents proved their title to the lands in dispute; (b) alternatively whether the Plaintiffs/Respondents and/or the 3rd Defendant/Respondent had acquired a good title by prescription to the whole or any part of either of the lands in dispute.

30 3. By a Plaint, dated the 23rd April 1954, the Plaintiffs/Respondents pleaded that one Rana Fernando was by long and prescriptive possession the lawful owner of two contiguous allotments of land called Elabodahenyaya and Medakumbura henyaya; that by a Deed, dated the 11th September 1941, she sold the lands to the 3rd Defendant/Respondent; that the Plaintiffs/Respondents and their predecessors in title had acquired a prescriptive title, and that the Appellant and 1st Defendant/Respondent had wrongfully entered the lands on the 22nd November 1953. The Plaintiffs/Respondents asked for a declaration of title; an order ejecting the Appellant and 1st Defendant/Respondent, and damages and costs. p.7, 1.32

Record
p.11, 1.1

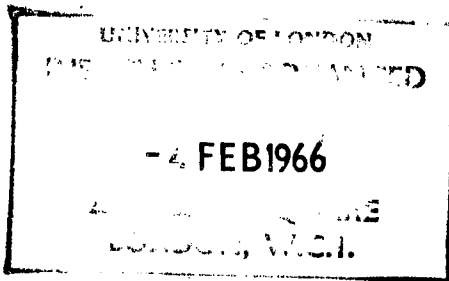
4. By his Answer, dated the 3rd August 1954, the Appellant alleged that the lands in question were originally waste lands at the disposal of the Crown; that the Crown had in 1918 declared Henry Fernando and Albert Cyril Fernando the owner of the lands; that the Appellant had bought the lands from the heirs of the said Henry Fernando and Albert Cyril Fernando; and that the Appellant and his predecessors in title had acquired the title to the lands by prescription.

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5. That Issues were framed and accepted as follows:-

p.13, 1.29

(i) Are the Plaintiffs entitled to the lands upon the title pleaded in the plaint?



(ii) Are the 1st and 2nd Defendants (i.e. the 1st Defendant/Respondent and Appellant) in wrongful occupation of the premises from the 22nd November 1953?

(iii) If so what damages are the Plaintiffs entitled to?

(iv) What are the prescriptive rights of the parties?

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(v) Is the 2nd Defendant entitled to the lands upon the title pleaded in his answer?

(vi) Is the 2nd Defendant entitled to compensation for improvements and

(vii) What is the value of the improvements?

Supplementary
Record (S.R.
p.4, 1.29
S.R.p.4,1.32-
p.5,1.7

6. The first witness for the Plaintiffs was the 1st Plaintiff/Respondent. He produced the Deeds whereby the 3rd Defendant/Respondent had acquired the lands and whereby the lands were sold by the 3rd Defendant/Respondent to the 1st Plaintiff/Respondent. He said inter alia that the 3rd Defendant had put the 1st Plaintiff and the 2nd Plaintiff in possession of the land. At that time there were some 10 or 15 coconut trees of which some were dying. They lost possession on the 22nd November, 1953. At the time the land was in charge of a watcher. At the time they had entered into possession they cleared about 8 acres and fenced it with wire and dug holes for planting seedlings. They had built a small house on the land. The 1st and 2nd Defendants were in possession for about 5 to 6 months before the date

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S.R.p.5,1.8

S.R.p.5,1.18

S.R.p.5,1.37

S.R.p.6,1.6.

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of this action. Cross-examined he said there was no house on the land prior to their purchase. The watcher put on the land by the Plaintiffs had told him they were ousted. The land was 50 acres in extent but the Plaintiffs had only fenced and cleared 8 acres. He did not know who Rana Fernando was or inquire who Cyril and Henry Fernando were.

S.R.p.6,1.33

S.R.p.8,1.29

S.R.p.8,1.38

One Wickremasinghe said he was the Assistant Superintendent of the 3rd Defendant/Respondent, who had bought the land in May 1953. At the time of that purchase they had opened up about 10 to 15 acres and planted coconuts. They had built a small house for the witness to stay in. This house was neglected and partly broken when the land was sold to the Plaintiffs. Cross-examined he said he went to the land regularly to look after it. There was also a watcher on the property. They had to give up planting during the war years and the plantation was neglected. The fruits of all his labours was 15 coconut trees by 1953. He did not know if under a "Middle Class Scheme" this land had been allotted to one Kulatunga or if the latter resided on the land from 1945 to 1948 and planted it. This 50 acre block was the smallest block of the land owned by the 3rd Defendant. He was never going to be bothered by this small extent of 50 acres. In 1953 the witness had suggested to the 3rd Defendant that as the latter had bought it when it was in jungle for Rs.1000/-, it be sold and the 3rd Defendant agreed to sell as he did not want to be bothered with a jungle land. The witness was aware that the Government made an allocation of a portion of this land to somebody. He was aware of the fact that the Government Agent wrote to that person that the land be given back.

S.R.p.10,1.21

S.R.p.10,1.30

S.R.p.11,1.15

S.R.p.11,1.36

S.R.p.13,1.5

S.R.p.13,1.17

S.R.p.13,1.30

S.R.p.14,1.1

7. On behalf of the Appellant, evidence was given by one Claude Fernando. Henry Fernando was his father, who died in about 1938. This witness' eldest brother was Dr. Albert Cyril Fernando who predeceased his father. The witness and Dr. Albert Cyril Fernando's son Bede sold the land to the Appellant after the witness had obtained a power of attorney from the other owners. A few years before 1953 he had learnt that his father Henry and brother Cyril got a transfer of the property from the Crown. He produced an extract from a Government Gazette showing the settlement of the property on his father and brother. He did not

S.R.p.14,1.31

S.R.p.15,1.3

S.R.p.15,1.15

S.R.p.15,1.25

S.R.p.15,1.41

know who Rana Fernando was; there was no Rana Fernando in his family.

- S.R.p.16,1.8. Cross-examined he said he first learned about the settlement when someone came to get a transfer from him. He knew nothing about the land. Therefore he refused to warrant and defend title.
- S.R.p.16,1.38
- S.R.p.18,1.7 Evidence was also given for the Appellant by one Kulatunga who said that in 1945 he got the land in dispute from the Government Agent under a Government Scheme. Later he was told it was private land and was asked to surrender it. He was given other land instead. He cultivated the land in dispute from 1945 until 1949. No one else was in possession during that time. 10
- S.R.p.18,1.27
- S.R.p.19,1.6.
- S.R.p.20,1.25
- S.R.p.21,1.13 Finally, evidence was given by a village headman who knew the land and who claimed to remember the number of the plan allotted to it. No one had cultivated the land before Kulatunga.
- S.R.p.22,1.1
- Record 8. In his judgment the District Judge reviewed the evidence and commented that Mr. Claude Fernando had stated that he was not aware of this land. The judge therefore said he did not know whether it was really this witness' father and brother who were the purchasers. Regarding the withdrawal of the permit from Kulatunga, as the land was proved to be private land, he said:- 20
- p.15,1.39
- p.16,1.9
- p.16,1.10 "It is clear that this withdrawal of the permit was not at the instance of Mr. Claude Fernando or the other heirs of Henry Fernando and Dr. Cyril Fernando alleged by the defence. If it had been at their instance Claude Fernando would have been aware of the existence of the land. His lack of knowledge shows that it was not at their instance but Wickremasinghe the Superintendent under Dr. M. G. Perera speaks about this. Hence it is clear that it is at their instance that this had been done or on some complaint made to the Government Agent on their behalf." 30
- p.16,1.24 He went on to say that he rejected the evidence of Kulatunga and the village headman. 40

He then said:-

"Further Mr. Claude Fernando stated that Rana Fernando is no relation of theirs. If Henry Fernando and Cyril Fernando did not belong to the relationship of Rana Fernando and that the true purchasers were the ancestors, or her brother - Claude Fernando were the true owners, Dr. M. G. Perera would have prescribed to the land from the date that he came into possession I see no reason not to accept the evidence of Wickremasinghe. Record p.17,1.4

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Hence it is clear that this had been in the possession of Dr. M.G.Perera since 1941 and that the ouster was only in 1953. Thus the plaintiffs have prescribed to the title even if title was in the defendants.

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On the evidence there is nothing to hold that Rana Fernando too had a son and grandson and their names were Henry Fernando and Cyril Fernando and who had obtained a transfer from the crown. The Crown Grant unfortunately had not been produced. But whatever the paper title of the parties were the plaintiffs have prescribed to this land.

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Therefore it must be taken into account that Mr. Claude Fernando, being an advocate, a member of the legal profession, would have known if this land belonged to them and would not wait for information to be given by others about this land and only for the sake of the transfer.

I therefore hold that it is more probable that the deed in favour of Dr. Perera were made by the real owners of the land.

I therefore answer the issues as follows:

1. Yes.
2. Yes.
3. Damages agreed upon.
4. Plaintiffs have prescribed to the land.
5. No.
6. No.
7. Does not arise and was not proved."

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Record
p.18,1.1

9. The Order of the District Judge declared that the Plaintiffs/Respondents were entitled to the premises claimed; that the 1st Defendant and the Appellant be ejected and that they should pay the Plaintiffs/Respondents Rs.100/- per month from the 22nd November 1953 until the Plaintiffs were restored to possession; and that the Appellant and 1st Defendant should pay the costs of the Plaintiffs and the 3rd Defendant.

p.21,1.12

p.21,11.16-36

10. The Appellant appealed to the Supreme Court on the grounds inter alia that Rana Fernando could not have inherited the land from Henry and Albert Cyril Fernando, who both died leaving heirs and that there was no sufficient evidence to prove a prescriptive title in the Plaintiffs. The Supreme Court dismissed the appeal on the 26th January, 1961 without giving reasons.

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11. The Appellant respectfully submits that the District Judge erred in the following respects:-

(i) There was no evidence on which he could rightly have found that the Plaintiffs had proved their title. It is submitted that, since it was common ground between the parties that at any rate before 1941 the land was unoccupied and water laid, the land was originally property of the Crown under the Water Lands Ordinance of 1897 as amended by No.1 of 1899, No.5 of 1900 and No.4 of 1903. The Plaintiffs' title was defective in that no evidence was given about the alleged acquisition by Rana Fernando, or as to who she was or her relationship to Henry Fernando and Albert Cyril Fernando, or that she was their intestate heir.

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(ii) No evidence was adduced by the Plaintiffs on which a finding of prescription in their favour could have been based. There was no uninterrupted possession as required by Section 3 of the Prescription Ordinance (C 68) by the Plaintiffs or their predecessors in title, since a third party, Kulatunga, was in possession from 1945 to 1948 or 1949. Secondly, the cultivation by the 3rd Defendant or his assistant supervisor was limited to "about 10 to 15 acres" out of a total of 50 acres. Thirdly, the subject matter in dispute being two contiguous plots of land there was no

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evidence showing of which of the two plots Record
these 10 to 15 acres formed part.

12. It is respectfully submitted that this appeal should be allowed, that the order of the Supreme Court should be reversed and the Plaintiffs/ Respondents' action be dismissed with costs throughout for the following amongst other

R E A S O N S :-

1. BECAUSE there was no or no sufficient evidence on which a finding of title in the Plaintiffs/ Respondents could have been based.
2. BECAUSE the District Judge misdirected himself on the law as to prescription and there was no or no sufficient evidence on which a finding of prescription in favour of the Plaintiffs/ Respondents or their predecessors in title could have been based.
3. BECAUSE there was no evidence before the District Judge showing to which of the two lands in dispute the alleged acts of possession by the 3rd Defendant/Respondent or his agent or servant related.

E.F.N. GRATIAEN

DICK TAVERNE

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Respondents

CASE FOR THE APPELLANT

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