

~~P.G.~~
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judgment
5, 1965

IN THE PRIVY COUNCIL

No. 50 of 1962

ON APPEAL FROM THE SUPREME COURT OF CEYLON

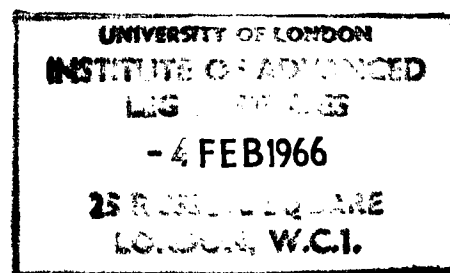
D. ROBOSINGHO MUDALALI
alias GAMPABA MUDALALI

- and -

1. L.D.P. JAYAWARDENE
2. GALPOTTAGE HENDRICK
PERERA
3. B.W. PATHIRANA
4. DR. M.G. PERERA

CASE FOR THE 4TH RESPONDENT

HATCHETT JONES & CO.,
90, Fenchurch Street,
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No. 50 of 1962

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :-

D. ROBOSINGHO MUDALALI
alias GAMPAAH MUDALALI (2nd
Defendant) Appellant

- and -

1. L.D.P. JAYAWARDENE (1st
Plaintiff)
2. GALPOTTAGE HENDRICK
PERERA (2nd Plaintiff)
3. B.W. PATHIRANA (1st
Defendant)
4. DR. M.G. PERERA (3rd
Defendant) Respondents

CASE FOR THE 4TH RESPONDENT

Record

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon dated the 26th January 1961, dismissing, with costs, an appeal from a Judgment and Decree of the District Court of Kurunegala, dated the 16th May, 1958, whereby in an action instituted by the 1st and 2nd Respondents (the 1st and 2nd Plaintiffs) against the Appellant (the 2nd Defendant) and the 3rd Respondent (the 1st Defendant) for (a) a declaration that they are entitled to certain land and premises in the District of Kurunegala (b) ejectment of the Appellant and 3rd Respondent therefrom and (c) damages, the Court granted to the 1st and 2nd Respondents the relief prayed for.

pp.22-23
pp.14-19

Record

As Vendor of the said land and premises to the 1st and 2nd Respondents, this Respondent (the 4th Respondent - 3rd Defendant) was made a party to the action as Defendant No.3 solely to enable him to appear and warrant and defend the title to the said land and premises which was conveyed by him.

2. The main questions for determination on this appeal are :-

(1) whether or not, on the evidence produced by both sides in this case and, generally, in its circumstances, the Courts below rightly decided that the 1st and 2nd Respondents (who derive their title from this Respondent) are entitled to the said land and premises and, therefore, to the relief which they, as plaintiffs, had prayed for; and

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(2) whether in any event the said decision (based as it is on findings of fact and a knowledge of local conditions) is so devoid of judicial merit as to make this an appropriate case for intervention by Her Majesty in Council.

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3. The facts are as follows :-

pp.7-9 Instituting these proceedings in the District Court of Kurunegala against the Appellant and the Respondents Nos. 3 and 4 (this Respondent), the Respondents Nos. 1 and 2 (herein also referred to collectively as "the Plaintiffs") by their Plaint, dated the 23rd April, 1954, stated that: one Singappulige Rana Fernando was "by long and prescriptive possession" the lawful owner of the land in dispute; by deed No. 406, dated the 11th September, 1941, the said Rana Fernando had sold and transferred the land to this Respondent who thereupon had entered into possession; subsequently, by deed No. 3098, dated the 5th May, 1953, this Respondent (the 3rd Defendant) had sold and transferred the land to the Plaintiffs who had entered into possession thereof and made improvements thereto to the extent of Rs.10,000/-; the Plaintiffs' and their predecessor's possession had been undisturbed and uninterrupted and they had acquired a prescriptive title to the land; the 1st and 2nd

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Record

Defendants (i.e. the present Respondent No.3 and the Appellant) had, on or about, the 22nd November, 1953, wrongfully and unlawfully entered on the said premises and continued to be in wrongful possession of the same disputing the Plaintiffs' title to their loss and damage (Rs.5,000/- and continuing damages at Rs.1,000/- a month); the 2nd Plaintiff had prosecuted the 1st and 2nd Defendants in M.C. Kurunegala Case No. 6128 on the 26th November, 1953, and had been directed to file a Civil action on the 1st and 2nd Defendants depositing a sum of Rs.2,000/- as security which had been done on the 27th February, 1954; and that a cause of action had thus accrued to the Plaintiffs to sue the 1st and 2nd Defendants for a declaration of title, to ejectment and damages.

p.8,
11.28-32

p.8,
11.33-37

p.8,
11.38-39

As to the 3rd Defendant (this Respondent), the Plaintiffs said :-

"9. The 3rd Defendant is made a party necessary to give him notice of this action to enable him to appear and warrant and defend the title conveyed by him to the Plaintiffs and no other relief is claimed against him in this action."

p.9,
11.1-4

4. The Plaintiffs' prayer in their said Complaint was as follows :-

"1. That Plaintiffs be declared entitled to the land and premises more fully described in the Schedule hereto.

p.9,
11.5-14

"2. That 1st and 2nd Defendants and those holding under them be ejected from the said premises;

"3. That the said Defendants be ordered to pay the Plaintiffs the said sum of Rs.5,000/- being damages up to date hereof and further damages at Rs.1000/- a month from date hereof until the Plaintiffs are restored to possession.

"4. For costs "

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- p.11,
11.33-35 5. The 1st Defendant (present Respondent No.3) did not file any Answer. As will appear below, his alleged interest in the said land was acquired from the 2nd Defendant (present Appellant) but subsequently re-sold to the latter before these proceedings were instituted.
- pp.11-12 The 2nd Defendant, by his Answer, dated the 3rd August, 1954, prayed for the dismissal of the action and said, in effect, that: the land in.
pp.11,
11.18-35 dispute was, as waste land, declared by the Crown (by its Order under the Waste Lands Ordinances, 1897-1903, published in the Government Gazette No.6927, dated the 1st March, 1918) to be in the ownership of two persons, Henry Fernando and his son Albert Cyril Fernando; upon Henry Fernando's death, his half-share in the land had been inherited (in equal shares) by his five children and the said Albert Cyril Fernando thus became the owner of a 6/10th share in the land, the other four children, viz. Henry Lionel, Claudia, Stella and Olga, each inheriting a 1/10th share in the land; upon the death of the said Albert Cyril, his 6/10th share was inherited by his two children, Leila Godiva and Bede; Henry Lionel, Claudia, Stella, Olga and Leila Godiva and Bede being possessed of the said land sold the same to the 2nd Defendant by deed No.35, dated the 7th October, 1953; the 2nd Defendant, by deed No.4498, dated the 3rd November, 1953, sold a 1/10th share in the land to the 1st Defendant who, however, about three months later, resold the same to the 2nd Defendant by deed No.4701, dated the 8th February, 1954.
- p.12,
11.1-7 The 2nd Defendant stated further that he and his predecessors in title "have been in the undisturbed and uninterrupted possession of the said land adverse to and independent of all others for a period of over 10 years for which possession they plead the Prescriptive Ordinance." He alleged also that he had made improvements to the land to the extent of Rs.10,000 which sum he claimed in reconvention if the Plaintiffs were declared entitled to the said land.

Record

6. By his Answer, dated the 1st December, 1954, the 3rd Defendant (this Respondent) stated, inter alia that -

pp.12-13

"the 1st and 2nd Defendants have no manner of right title or interest in the said land and if the said Defendants have disturbed the possession of the Plaintiffs, this Defendant admits that a cause of action has accrued to the Plaintiffs to sue the 1st and 2nd Defendants."

p.13,
11.8-17

He stated, further, that "if the Defenants have taken any steps to acquire title to the said premises they had acted in fraud of the Plaintiffs and of this Defendant."

He claimed no relief in the action as no relief had been claimed against him. He prayed however that -

"the Court be pleased to grant him his costs and such further or other relief as to the Court shall seem meet and discharge this Defendant from the proceedings."

7. On the framing of Issues at the trial, Counsel for the 2nd Defendant (present Appellant) objected to the 3rd Defendant (this Respondent) participating in the proceedings. On this objection the learned District Judge's Order was as follows :-

pp.13-14

"No order has been made that the case should proceed against him" \angle i.e. this Respondent \angle "ex parte". As such he can take part in the proceedings."

p.14,
11.1-2

8. Seven Issues were framed at the trial and these, after a consideration of the oral and written evidence which both sides had adduced, were answered thus by the learned District Judge :-

"1. Are the Plaintiffs entitled to the land and premises described in the

p.14,
11.9-10

Record

Schedule to the Plaint upon the title
pleaded in the Plaint?"

p.17, 1.25 Answer: "Yes".

p.14,
11.11-12 "2. Are the 1st and 2nd Defendants in
wrongful and unlawful occupation of the said
premises from about the 22nd November,
1953?"

p.17, 1.26 Answer: "Yes".

p.14, 1.13 "3. If so what damages are the Plaintiffs
entitled to?"

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p.17, 1.27 Answer: "Damages agreed upon".

p.14, 1.14 "4. Prescriptive rights of parties."

p.17, 1.28 Answer: "Plaintiffs have prescribed to
the land".

p.14,
11.18-19 "5. Is the 2nd Defendant entitled to the
land described in the Schedule to the Plaint
upon the title pleaded in the 2nd
Defendant's Answer?"

p.17, 1.29 Answer: "No".

p.14,
11.20-21 "6. Is the 2nd Defendant entitled to
compensation for improvement to the land?"

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p.17, 1.30 Answer: "No".

p.14, 1.22 "7. What is the value of the improvements?"

p.17, 1.31 Answer: "Does not arise and was not
proved."

pp.14-17 9. By his Judgment, dated the 16th May, 1958,
the learned District Judge, answering the Issues
as stated in the preceding paragraph, granted to
the Plaintiffs, the relief prayed for, as stated
in paragraph 1 hereof.

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Referring to the respective cases of the
parties, the learned Judge said :-

Record

- 10 "According to the Plaintiff(s) the 3rd Defendant Dr. M.G. Perera" [this Respondent] "purchased this property on deed P1 of 11th September, 1941" [deed No.406] "from one Rana Fernando. The transferor on P1 states that she is entitled to this land by right of inheritance from her son and grandson Singapullige Henry Fernando and Singapullige Albert Cyril Fernan o. Thereafter Dr. M.G. Perera planted this land. With the deed are attached, a copy of the Final Order No.1991 of the 1st March, 1918, showing that Henry Fernando and Albert Cyril Fernando purchased the land from the Government; a plan, dated 15th May, 1953, an extract from the Ceylon Government Gazette No.6927 of 1st March, 1918. Thereafter the two Plaintiffs purchased the land on deed P2 of 5th May, 1953". [deed No.3098]
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10. Referring to the Plaintiffs' case as to the unlawful entry and wrongful possession of the Defendants, the learned District Judge said :-
- 30 "According to the story of the 1st Plaintiff, he was in possession of this land and he and the 2nd Plaintiff put up a house and the 2nd Plaintiff occupied that house. On 11.8.53. the 2nd Plaintiff left the land as he had fallen ill. In November, 1953, the watcher he had placed was ousted by the Defendants and he made a complaint to the D.R.O., to the police, and to the headman, Later he found that the cocoanut plants which were there when he purchased the land removed by the Defendants."
- 40 The learned Judge then referred to the evidence given by one Wickremasinghe, Assistant Superintendent of Clovasana Estate belonging to this Respondent. This evidence related to the planting of trees, crops, etc. on the land in question subsequent to its purchase by this
- p.15,
11.1-11
- Ex P1
pp.31-33
- p.32,
11.34-36
- Ex.P2
pp.34-37
- p.15,
11.12-18
- p.15,
11.21-35

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Respondent; and to the Government Agent's direction to a person to whom a Government allocation of the land appears to have been made (presumably in error) to leave the land as it was in fact private property.

11. The learned District Judge next referred to evidence which had been adduced in support of the defence. He said :-

p.15,
11.36-45

"The defence called Mr. Claude Stanley Fernando an Advocate practising at Colombo. His father was one Henry Fernando and his brother Dr. Albert Cyril Fernando. These two names tally with the names of the purchasers from the Crown in 1917.

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"But Mr. Claude Fernando definitely states that he was not aware of this land. I therefore do not know whether it is really his father and his brother who were the purchasers. There may have been two other persons by the names of Henry Fernando and Albert Cyril Fernando who may have purchased this. These names are fairly common in Ceylon. Claude Fernando became aware of this land only when one Pathirana told him about the existence of these lands.

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p.15, 1.46
to p.16,
1.6
Ex.2 D1
pp.41-46

"Claude Fernando and Chandra Bede signed deed No.35 of 1953 (marked 2 D1) in favour of the 2nd Defendant, and very advisedly Mr. Claude Fernando had got it inserted that he would not warrant and defend title as he was not aware of the existence of the land.

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"The other heirs of Henry Fernando and Dr. Albert Cyril Fernando had given powers of attorney to Mr. Claude Fernando to transfer the land. Thereafter the Defendants had taken possession of this land from the Plaintiffs."

12. Continuing, on the evidence in support of the defence, the learned District Judge said :-

Record

p.16,
11.7-17

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"None of the Defendants gave evidence. They merely called one Kulatunga to whom the Government had given permit in 1945 to possess this land. Thereafter that permit was withdrawn from him as it was proved to be private land. 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" [this Respondent] "speaks about this. Hence it is clear that it is at their instance that this had been done or some complaint made to the Government Agent on their behalf.

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p.16,
11.18-23

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"Kulatunga admitted in evidence that the boundaries were given to him by the 2nd Defendant, Robo Singho, I do not know how he would otherwise have got the boundaries. During his possession he was not aware of Wickremasinghe being in occupation. This witness did not impress me as a truthful witness. He appears to be very partial to the defence and I do not accept his evidence as true."

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The learned Trial Judge then examined the evidence of the other defence witness the village headman; and, for reasons that he gave, he rejected the evidence of this witness who, also, was found by him to be partial to the defence and whose testimony was based on information given to him by the 2nd Defendant. From the said testimony, the learned Judge drew the following conclusions :-

p.16, 1.24
to p.17,
1.3

"2nd Defendant had tried to eradicate" [by the removal of cocoanut plants] "that someone had been in

p.16,
11.42-47

Record

possession of the land, merely to avoid prescriptive title. If it had been jungle land then prescription would not take place. The removal of such evidence clearly shows that the Defendant was aware that the land was in possession of someone and he wanted to remove it."

- p.17,
11.10-12 13. Finally, the learned District Judge said that the Plaintiffs had prescribed to the title of the land which had been in his possession since 1941 and that the ouster was only in 1953. And, on the evidence (apart from the subject of this Respondent's prescriptive title), he thought it was "more probable that the deed in favour of Dr. Perera was made by the real owners of the land." 10
- p.17,
11.13-23
- pp.18-19 14. A Decree in accordance with the Judgment of the District Court was drawn up on the 16th May, 1958, and against the said Judgment and Decree, the 2nd Defendant (present Appellant) appealed to the Supreme Court of Ceylon, on the various grounds set out in his Petition of Appeal, dated the 19th May, 1958. 20
- pp.19-22
- p.23 15. The appeal in the Supreme Court was heard by Basnayake C.J. and Sinnetamby J. who, on the 26th January, 1961, dismissed it. The learned Supreme Court Judges did not consider it necessary to set out the reasons for their decision in their Judgment. They ordered the 2nd Defendant (present Appellant) to pay the taxed costs of the appeal to the Plaintiffs and to the 3rd Defendant [this Respondent]. 30
- p.23,
11.13-15
- pp.25, 28 16. Against the said Decree of the Supreme Court, this appeal to Her Majesty in Council is now preferred, leave to appeal having being granted to the present Appellant by Decrees of the Supreme Court dated the 28th April, 1961 and the 9th June 1961.

In this Respondent's respectful submission the appeal ought to be dismissed, with costs throughout, and this Respondent should, in any event, be discharged from these proceedings, with costs throughout, for the following among other

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R E A S O N S

Record

1. BECAUSE, on the evidence adduced by both sides, it is clear that the Plaintiffs are now the true owners of the land in dispute and are therefore entitled to the relief granted to them.
- 10 2. BECAUSE, on the evidence, it is clear that the Plaintiffs' title derived through this Respondent and this Respondent's vendor is a good and sufficient title in law.
3. BECAUSE, on the said evidence, it is clear that prior to the sale to the Plaintiffs (Respondents Nos. 1 and 2 hereto) this Respondent had been in possession of the said land (which he had cultivated on his entering into possession) for more than ten years and he had thus in any event, acquired a good prescriptive title thereto.
- 20 4. BECAUSE, on the said evidence, the present Appellant has failed completely to establish his title to the said land.
5. BECAUSE this is not an appropriate case for reversal of the decision of the Courts below which is correct and ought to be affirmed.

DINGLE FOOT

R.K. HANDOO

IN THE PRIVY COUNCIL

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ON APPEAL FROM THE SUPREME COURT OF CEYLON

D. ROBOSINGHO MUDALALI
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