

Privy Council Appeal No. 50 of 1962

D. Robosingho Mudalali - - - - - Appellant

v.

L. D. P. Jayawardene and others- - - - - Respondents

FROM

THE SUPREME COURT OF CEYLON

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 4TH FEBRUARY 1965**

Present at the Hearing:

VISCOUNT DILHORNE.

LORD MORTON OF HENRYTON

LORD GUEST.

LORD UPJOHN.

LORD WILBERFORCE.

[*Delivered by LORD WILBERFORCE.*]

These proceedings relate to the title to certain land, about 50 acres in extent, in the District of Kurunegala in Ceylon. The action was started on 23rd April 1954 by the first and second respondents as plaintiffs against the appellant and the third and fourth respondents as defendants for a declaration of the plaintiffs' title to the land, ejectment of the appellant and the third respondent from the land and for damages. The plaintiffs' claim was based first upon certain deeds of conveyance and secondly upon prescription. The fourth respondent was made a defendant to the action by reason of the fact that he had, in a conveyance dated 5th May 1953 to the plaintiffs warranted his (the fourth respondent's) title to the land, and in order to enable him to appear and defend the title.

At the trial before the District Court of Kurunegala, the plaintiffs were successful and on 16th May 1958 the Court granted the relief prayed for. The second defendant appealed against the decree of the District Court to the Supreme Court of Ceylon which on 26th January 1961 dismissed the appeal. The present appeal is brought by leave of the Supreme Court, by the second defendant as appellant: the only respondent who has appeared is the third defendant in the action, the 4th respondent on the record, Dr. M. G. Perera.

Their Lordships will examine first the claim based on prescription. In the plaint, the land to which claim was made was identified by a description set out in the schedule, which description corresponded to that which was contained in the schedule to a deed of transfer dated 11th September 1941 between one Singappulige Rana Fernando as vendor of the one part and Dr. M. G. Perera (the 4th respondent) as vendee of the other part. It is sufficient to state that it consisted of two contiguous allotments called Elabodahenyaya and Medakumburahenyaya marked L114A and O114 situated at Chandarayagama in the District of Kurunegala containing in extent 50 acres and 27 perches. The claim was that the said Singappulige Rana Fernando was the lawful owner of the land by long and prescriptive possession; that she sold and transferred it to Dr. M. G. Perera by the said deed of 11th September 1941 and that Dr. M. G. Perera entered into possession; that Dr. M. G. Perera by deed dated 5th May 1953 sold and transferred the land to the plaintiffs, and that the plaintiffs and their predecessors in title had been in undisturbed and uninterrupted possession by a title adverse to and independent to all others and had acquired a prescriptive title. It was then alleged that the first and second defendants had wrongly entered upon the land on 22nd November 1953.

The defence (on this issue) of the second defendant (the appellant) consisted of a denial of the plaintiffs' allegations: in addition there was a positive allegation that the second defendant and his predecessors in title had been in possession of the land for a period of over ten years. The third defendant (the fourth respondent) admitted the relevant averments in the plaint. The issues framed and accepted included explicitly an issue as to the prescriptive rights of the parties.

At the trial before the District Court a number of witnesses were called to testify as to possession of the land. For the Plaintiffs there were called (a) the first Plaintiff L. D. P. Jayawardene and (b) C. B. Wickremasinghe the Assistant Superintendent of Dr. M. G. Perera, the fourth respondent. For the second defendant (the appellant) there were called (a) Claude Stanley Fernando, whose evidence was not material on the prescriptive issue; (b) K. M. D. B. Kulatunga, who claimed to have cultivated the land for a period, (c) A. M. Rambanda headman of the village of Chandrayagama.

The defendants did not themselves give evidence, nor did the second plaintiff. The learned judge did not accept the evidence of Kulatunga as true, and held that Rambanda was a witness partial to the defence. He rejected Rambanda's evidence on the only point which was material on the issue as to prescription, namely as to the age of certain trees on the land. Their Lordships must accept the trial judge's findings as to the credibility of these witnesses and must therefore deal with this issue on the evidence of the plaintiffs' witnesses.

The evidence of the plaintiff Jayawardene did little more than to establish that he and his co-plaintiff had possession of the land from 5th May 1953 to 22nd November 1953—a period of 6½ months and that when they took possession there were a few trees on the land. He said that when he took possession there was no house there. In order to establish the period of ten years which is required for a prescriptive title it was necessary to rely on possession by Dr. M. G. Perera. Dr. Perera did not himself give evidence and it was only Mr. Wickremasinghe, his Assistant Superintendent, who was called as to the period from 1941 to 1953. In his evidence in chief he referred to the purchase by Dr. Perera in 1941 and the sale in 1953 and said "I was in possession for the entirety of that period". In the rest of his evidence and in his cross-examination he gave evidence as to "opening up the land", planting with coconuts and other crops, the erection of a small house on the land where the witness stayed from time to time, efforts to improve the land by expenditure and labour, visits to the land and the absence of any disturbance of possession. As to the planting, he agreed that the land was jungle when purchased and that the area planted was "within ten to fifteen acres" on which 60 to 70 trees per acre were put: planting was given up during the war years and the plantation became neglected. The learned judge said that "he saw no reason not to accept the evidence of Wickremasinghe" and held that Dr. Perera was in possession since 1941 and obtained a prescriptive title.

On his appeal to the Supreme Court, the second defendant (the appellant) challenged these findings of the learned judge. As appears from the petition of appeal, the grounds were that the evidence of prescriptive possession was inadequate and insufficient—Dr. Perera and his Watcher not having been called; that the evidence of Mr. Wickremasinghe ought not to have been accepted on account of inconsistency between his evidence and that of the plaintiffs and the evidence of Kulatunga and the Village Headman; that the evidence of the latter ought to have been accepted. The Supreme Court however dismissed the appeal without giving any reasons for their judgment.

Their Lordships have carefully considered whether there are any grounds which would entitle them to interfere with the decision on this issue of the District Judge affirmed by the Supreme Court. The issue is essentially one of fact, namely whether the plaintiffs proved possession, adequate in continuity, publicity and extent, over 10 years or more, to establish a prescriptive title to the land in question. Certainly the evidence, in effect that of Wickremasinghe supplemented to a minor extent by that of the Plaintiff Jayawardene, was slender even when account is taken of the character and location of the land. But their Lordships consider that Mr. Wickremasinghe when

he referred to "the land" was clearly referring to that which was bought in 1941 and sold in 1953, i.e. the 50 acres 27 perches, and this being established, they cannot accept that there was no evidence on which a finding of 10 years uninterrupted possession of that land—regard being had to its nature, i.e. mainly jungle land—could properly be made. Moreover there does not appear to their Lordships to be any ground for holding that the learned trial judge in any way misdirected himself, or applied the wrong standard or test in order to decide whether the necessary possession was proved. Admittedly the passage in his judgment on this issue is somewhat brief but that may be because of the absence of any full argument on a point of law, and does not show that the correct legal considerations were not present to his mind. Equally their Lordships are unwilling to assume that the Supreme Court, on the appeal, did not apply the right test in reviewing the learned judge's findings and deciding whether it was justified on the evidence. In the absence of any error in law, which in the opinion of their Lordships, the appellant has failed to demonstrate, the case becomes one in which an issue of fact has been concurrently determined against the appellant by both courts in Ceylon. Their Lordships would not be justified in disturbing those findings.

Their Lordships are of the opinion that the fourth respondent succeeds on the issue of a prescriptive title and therefore do not consider it necessary to deal with the other issue in the appeal namely whether the plaintiffs could succeed on any other basis. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

In the Privy Council

D. ROBOSINGHO MUDALALI

v.

L. D. P. JAYAWARDENE AND OTHERS

**DELIVERED BY
LORD WILBERFORCE**

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