18, 1969

IN THE PRIVY COUNCIL

No. 29 of 1967

ON APPEAL

FROM THE GUYANA COURT OF APPEAL

BETWEEN:

IVAN PARABOO, in his capacity as one of the Executors of the Estate of TIRBOHUN PARABOO (Plaintiff)(Appellant)

- and -

TOM CRAWFORD (Defendant) (Respondent)

CASE FOR THE APPELLANT

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1. This is an Appeal from a Judgment and Order dated the 11th day of November, 1966, of the Guyana Court of Appeal (Luckhoo, Persaud and Cummings JJ.A.) dismissing with costs the appeal of the Plaintiff-Appellant from a Judgment and Order of the High Court of the Supreme Court of Judicature of Guyana (Crane J.) by which the Plaintiff-Appellant's action claiming damages for trespass and an injunction had also been dismissed with costs. The questions for determination in this Appeal are whether the Plaintiff-Appellant had a remedy and whether he misconceived his remedy by prosecuting a claim for trespass and an injunction. pp 46-53 pp 28-40

2. The Plaintiff-Appellant is the legal personal representative of the estate of Tirbohun Paraboo deceased who held a Crown licence to occupy a portion of Crown land in the rear of Plantation Brahan on the west sea coast of the County of Berbice in the territory of Guyana. The licence No. 4389 was in respect of 27.59 acres of land and was expressed to endure during the pleasure of Her Majesty with effect from the 1st day of August,

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1931. The Defendant-Respondent was one of six persons who were on the 13th April, 1951, granted a permission under regulation 7 of the Crown Lands Regulations, Chapter 175 (Subsidiary Legislation) of the Laws of Guyana to occupy and commence work, with effect from the 1st day of September, 1951, on an area of Crown land comprising 53.7 acres in rear of Brahan formerly held under licence A3793 and adjoining the area held under licence by Tirbohun Paraboo.

pp. 2-3 3. The Plaintiff-Appellant claimed in the High Court personally and in his representative capacity, damages for trespass and an injunction against the Defendant-Respondent on the ground that the Defendant-Respondent in April, 1962, trespassed upon a part of the land held under licence No.4389 and reaped and took away padi

pp. 6-8 growing thereon. The Defendant-Respondent denied trespass and claimed that the land upon which he was alleged to have trespassed formed part of the area held under the permission to occupy 53.7 acres. The Defendant-Respondent further claimed that he was entitled to occupy the portion of land in dispute by reason of his occupation thereof nec vi nec clam nec precario for upwards of twelve years thereby causing the Plaintiff-Appellant's action to be barred in terms of the Title to Land (Prescription and Limitation) Ordinance, Chapter 184 of the Laws of Guyana. The Defendant-Respondent expressly maintained by Counsel at the commencement of the trial that he was not in occupation of the Plaintiff-Appellant's land and he asserted by Counsel that the land he occupied was adjoining the Plaintiff-Appellant's land.

pp. 4-6 4. In his Statement of Claim the Plaintiff-Appellant pleaded his possession in his representative capacity of the area of approximately 27.9 acres of land held under licence No. 4389 issued by the Commissioner of Lands and Mines on the 28th June, 1944. He further pleaded that the Defendant-Respondent who was an owner of adjoining land trespassed on approximately 3½ acres of his land on the 25th September, 1962, and reaped and took away

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therefrom approximately 56 bags of padi the property of the Plaintiff-Appellant. The Plaintiff-Appellant further pleaded that since the 25th September, 1962, the Defendant-Respondent by himself his servants and/or agents had on several occasions trespassed on his land. The Plaintiff-Appellant claimed general damages in excess of $500.00 and special damage of $392.00 and an injunction.

5. The Defendant-Respondent pleaded by way of Defence a bare denial of the alleged trespass and damage. The Defendant-Respondent further pleaded that he occupied nec vi nec clam nec precario for upwards of 13 years a portion of land immediately adjoining land formerly occupied by the Plaintiff-Appellant's testator and the Plaintiff and that the portion of land occupied by the Defendant-Respondent was part of a tract of 53.7 acres referred to in a licence of occupancy No. 3793 granted on the 1st September, 1931, for 21 years for agricultural purposes to his deceased father John Crawford and three other persons. The Defendant-Respondent further pleaded that on the 13th April, 1949, a permission to occupy the land held under licence No.3793 was granted to himself and other persons and that he was lawfully entitled to occupy the portion of the 53.7 acres. In the alternative, he pleaded that if he was not entitled to occupy the portion (which was not admitted) the Plaintiff's action was barred in terms of the Title to Land (Prescription and Limitation) Ordinance, Chapter 184. pp. 6-8

6. The action came on for hearing before the Supreme Court (Crane J.) on the 18th November, 1964, and preliminary arguments concerning the right to begin were heard. It was submitted by Counsel for the Plaintiff-Appellant that the right to begin was with the Defendant-Respondent who by his pleading had admitted occupation of the land in dispute and it was further submitted that the Defendant-Respondent should prove his title. For the Defendant-Respondent it was submitted by Counsel that he had not occupied land claimed by the Plaintiff-Appellant and that he was occupying land adjoining the Plaintiff-Appellant's land. It was further submitted that the plea of occupation nec vi nec clam nec precario was an alternative plea, that trespass p. 9

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was not admitted and that the Plaintiff-Appellant should prove his possession. The Court (Crane J.) ruled that the right to begin was with the Plaintiff-Appellant and the trial proceeded accordingly.

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7. The Plaintiff-Appellant gave evidence of his possession of approximately 27.9 acres of land held under licence No.4389 and asserted that the Defendant-Respondent first went on the land on the 25th September, 1962, with a combine to reap rice. The Plaintiff told him not to do so. He also testified that in April, 1962, a grandson of the Defendant-Respondent named Noel Ross went on the land and ploughed 2 of the 27.9 acres. The Plaintiff told the Defendant of the trespass. He said that in September, 1962, the Defendant-Respondent reaped 56 bags of padi from the land which was ploughed and sown by the Plaintiff-Appellant before April, 1962, when Ross ploughed. He said no crop was planted in 1963 and that the Defendant-Respondent did not return to the land since 1962.

8. The Plaintiff-Appellant was supported by two witnesses who were Edgar Monah a sergeant of the Rural Constabulary and Compton McLean a Senior Lands and Mines Surveyor of the Department of Lands and Mines in the territory of Guyana

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called as an expert. The evidence of Edgar Monah was:-

Examination-in-chief

"On Tuesday 24th April, 1962, I went to Plan. Brahan to the rice field owned by plaintiff Paraboo. There was growing rice there. I know the defendant Tom Crawford, but I do not know if he has land. I saw five (5) north/south paals with initials "C.S. McL" written thereon. The rice was growing on both sides of the paals. The parties were with me when I went first, but the plaintiff was present alone. This was in September 1962 when I went back. Defendant was not present. When I went back I observed that east of the paals on plaintiff's land

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175 rods x 12 feet were reaped. I saw another portion 200 rods by 3 rods were reaped from plaintiff's land. When I went in April, 1962, plaintiff said his rice lands were east of the paals, but Crawford said he owned 3 rods in plaintiff's land. They had a dispute about 3 rods in plaintiff's land. Crawford did not tell me that he had been on the land for any length of time. I assessed padi reaped from the two portions I mention at 56 bags padi which is equal to 28 bags rice, Price is $7.00 per bag for padi."

Cross-examination

"Paraboo showed me east of the paal and told me that was his rice lands. When I say Paraboo's land, I was referring to the land he showed me."

Re-examination

"In this land Paraboo claimed, defendant was claiming 3 rods. Crawford also showed me his lands west of the paal."

The evidence of Compton McLean included the following:- pp. 15-21

That he had carried out a survey of Plantation Brahan for the Lands & Mines Department for the Defendant who was dissatified with it. The Plaintiff occupied land to the east of the Defendant and if the witness had agreed with the Defendant, the result would have been an encroachment on the land to the west. The witness laid down the boundary between the Plaintiff's and Defendant's lands according to the original surveys of his predecessors. It appears that one Ramdhoney was occupying a 'gib' of land to the west which the defendant should have been occupying and as a result of this the Defendant was occupying a similar portion of land to the east which belonged to the plaintiff and accordingly the witness supported the Plaintiff's claim.

9. The only evidence given for the Defence was pp. 21-24

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that of the Defendant himself who stated (inter alia) that he had occupied the land for 15 years. His lease was renewed in 1959. He disagreed with the McLean survey but sought to comply with it by telling his co-proprietors that they would have to move to the west to occupy the portion of land wrongly occupied by Ramdhoney. They refused to do so. The Defendant asserted that there was no boundary between his lands and those of the Plaintiff. In the past the Plaintiff had worked on the land he now claimed.

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10. On the 31st day of March, 1965, the learned trial judge (Crane J.) dismissed the Plaintiff-Appellant's case after finding that the survey by McLean could not upon examination support the claim that the land in dispute was part of that held under licence by the Plaintiff-Appellant's testator and that he was not bound by the survey if he were "to discover flaws in it." The learned trial judge also referred to

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the Guyana case of Harwadin v. Park (1938) L.R. B.G. 172 and distinguished it by reference to his finding that it was not until the year 1960 that either party knew that something was wrong with the boundaries thereby implying that the determination of the question whether there was a trespass depended upon a party's actual knowledge of the boundaries. The learned trial judge also found that the Plaintiff-Appellant was not in possession of the land claimed and he held that the action was misconceived because the evidence disclosed that the Plaintiff-Appellant was never in possession of the disputed land and that the acts of trespass complained of were on the Defendant-Respondent's side of the boundary on land which had been continuously in possession of the Defendant-Respondent and his relatives since the land was surveyed by a Government Surveyor, D.O. Leila. The learned trial judge also found that the Plaintiff-Appellant only began to assert his claim to the contested strip since the time of the survey by McLean whose survey he held could not affect the right of the parties.

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11. The learned trial judge also based his judgment on the alternative ground that the plea in paragraph 5 of the Defence was sustainable and that possession for upwards of 16 years of the disputed land which was part of the area of 53.7 acres held under permission was sufficient to enable the Defendant-Respondent to set up the proviso to Section 3 of the Title to Land (Prescription and Limitation) Ordinance, Chapter 184, of the Laws of Guyana and that the Defendant-Respondent and his predecessors in title had occupied the land in a manner which gave them a title to it.

12. The Appellant gave notice of appeal upon the 8th day of May 1965 and an amended notice was served upon the 23rd day of September 1966. The grounds of appeal, including the amendments, referred (inter alia) to the rejection of the only expert witness who was called and also alleged that the Prescription Ordinance did not apply to Crown Land, or, alternatively, that there had been a mutual mistake between the parties in respect of their boundaries which would prevent time running.

13. The Judgment of the Court of Appeal was delivered upon the 11th day of November 1966. The Court appeared to differ from the learned trial judge and decided the case on the basis that McLean's survey ought to have been accepted but agreed with the learned trial judge that the action could not succeed because the action was framed in trespass. The Court of Appeal did not deal with the alternative ground of the judgment that the action concerned part of the 53.7 acres granted under permission and was occupied in longum temporis in a manner which attracted the provisions of the Title to Land (Prescription and Limitation) Ordinance, Chapter 184. The Court of Appeal in the judgment of Persaud J.A., in which Luckhoo and Cummings JJ.A. concurred, related the substance of McLean's testimony that the Plaintiff-Appellant was entitled to 1.8 acres of land because the physical eastern boundary of the Defendant-Respondent's land has shifted to the Plaintiff-Appellant's land the occupation having come about because one Ramdhoney had occupied 1.8 acres falling within land to which the Defendant-Respondent and his co-permittees were entitled.

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The Court did not disagree with or express inability to accept the findings of the McLean Survey and appeared to have decided the case on a question of law but on the assumption that McLean was correct. The relevant portions of the judgment are as follows:-

> "What has been hitherto stated refers to occupation according to the survey; it has nothing to do with the actual occupation which the trial judge found. The trial judge found that the Respondent Crawford was in fact since 1949 occupying 1.8 acres which, according to McLean's survey, should be within Tirbohun Paraboo's boundaries, but that this inroad was in accordance with the original occupation, which took place as long ago as 1931. The judge also expressed the view - and in our opinion this view is supported by the evidence which he has accepted - that it was only as a result of what was disclosed by McLean's survey, that the appellant appreciated that the Respondent had been occupying 1.8 acres of land covered by the former's licence, and then he sought to lay claim thereto. But, as has already been said, the occupation commenced since 1931.
>
> "Trespass is a wrongful act done in disturbance of the possession of property of another. To constitute a trespass the act must in general be unlawful at the time when it was committed; if an act done in respect of property was lawful when it was done, the doer cannot be made a trespasser by relation in consequence of a person becoming entitled to the property and of that person's title relating back to the time when it was done. (see Hals. Laws of England, Vol. 38, 3rd Ed. p. 734). If therefore the Respondent was in lawful occupation of the land in dispute - lawful in the sense that his occupation was so accepted by all sides - then the Appellant cannot now be heard to complain that acts of trespass were committed by the Respondent

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prior to McLean's survey.

"It seems to us therefore that there was enough evidence before the judge which justified his dismissal of the Appellant's claim which it must be remembered was one in trespass."

14. The Appellant respectfully submits that the above finding was wrong in law in particular in that the evidence showed that the Defendant was in occupation of land belonging to the Plaintiff and in law such occupation constituted a trespass as pleaded in the Plaintiff's claim.

15. It is submitted that the Court of Appeal were right on the pleadings to disregard the contention that title to the disputed area was sustainable in terms of the Title to Land (Prescription and Limitation) Ordinance, Chapter 184, because it was expressly claimed in the pleadings that the disputed area was part of the 53.7 acres held under permission and the plea was only relevant if the validity of the permission held by the Defendant-Respondent was challenged or if the permission were not proved. Neither event occurred and the question was not dealt with on appeal. It is also submitted that the learned trial judge was in error when he held that possession in longum temporis defeated the Plaintiff's case for on the pleadings the point was relevant only in the circumstances mentioned above.

16. The Appellant obtained conditional leave to appeal to Her Majesty in Council on the 18th day of February 1967 and final leave to appeal on the 19th day of August 1967.

17. The Appellant respectfully submits that this Appeal should be allowed with costs and that he should obtain the relief set out in his Statement of Claim for the following (amongst other)

R E A S O N S

(i) BECAUSE the Judgment of the Supreme Court erred in holding that the Plaintiff's action was misconceived because he had never

been in possession of the disputed land and also erred in holding that the Defendant had acquired a title by prescription.

(ii) BECAUSE the Court of Appeal were wrong in affirming the Judgment of the Supreme Court and erred in holding that the remedy of trespass was not available to the Plaintiff because he had in the past "accepted" the occupation of the Defendant.

(iii) BECAUSE the Appellant was upon the evidence entitled to the relief set out in his Statement of Claim.

FENTON H. W. RAMSAHOYE

JOHN BAKER

No. 29 of 1967

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O N A P P E A L

FROM THE GUYANA COURT OF APPEAL

B E T W E E N

IVAN PARABOO, in his capacity as one of the Executors of the Estate of TIRBOHUN PARABOO (Plaintiff) Appellant

- and -

TOM CRAWFORD (Defendant) Respondent

C A S E FOR THE APPELLANT

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