

Judgment 28, 1969

IN HER MAJESTY'S PRIVY COUNCIL

No. 32 of 1968

ON AN APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N :

PATTINI KUTTIGE JOKEENU NONIS
OF POOGALLA, KITHALAWA, IN
YATIKAHA KORALE SOUTH
(Plaintiff-Appellant)
APPELLANT

- and -

1. HORATALPEDI DURAYALAGE PETHTHA
alias PETHTHA VEDA,
2. HORATALPEDI DURAYALAGE WATTUWA,
both of ELUWAPOLA, IN
MAYURAWATHIE KORALE
(Defendants-Respondents)
RESPONDENTS

CASE FOR FIRST RESPONDENT

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1. This is an Appeal from a Decree of the Supreme Court of Ceylon dated the 18th day of July 1966 dismissing the Appellant's appeal from a Judgment of the District Court of Kurunegala holden at Kuliypitiya (A.M. Ameen, Additional District Judge) dated the 3rd day of June 1964 whereby the said District Judge dismissed an action instituted by the Appellant to partition certain land described in the Plaint. p.54 p.46 p.9
2. The Appellant claimed to be entitled to an undivided $\frac{1}{3}$ share of the land in suit. It was common ground that the land in suit formerly p.11, 1.13

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belonged to one Peruma, who gave it in equal shares to his three children, namely the two Respondents and one Sekera. The Appellant sought to show that he was the successor in title to Sekera, his case being that Sekera had conveyed his interest in the land to one Sumanadasa in March 1960 and that Sumanadasa had in turn conveyed it to the Appellant in July 1962. The first Respondent's case was that in July 1947 the three brothers (the two Respondents and Sekera) who were at that time jointly interested in a number of properties, came to an arrangement amongst themselves for a mutual exchange of interests. Under this arrangement the entire interest in certain properties, including the land in suit, was to be allotted to the first Respondent, who thereafter was in adverse possession of the land in suit and had acquired a prescriptive title thereto. Sekera therefore had had no right to convey to Sumanadasa nor Sumanadasa to the Appellant and no title had passed.

p.80
p.84
p.47

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3. The trial judge found in favour of the first Respondent, accepting his evidence as to the arrangement in June 1947 and as to his adverse possession of the land in suit for the requisite period, and the Judgment of the trial Court was affirmed upon appeal. The principal question that arises in this Appeal is whether the following findings arrived at and affirmed in the Courts below are correct, namely,

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- (a) that the land in suit was one of the properties which under the arrangement of June 1947 were to be allotted to the first Respondent, and that it was so allotted;
- (b) that the first Respondent had been in adverse possession of the land for the requisite period and had acquired prescriptive title thereto.

4. The Appellant commenced the PRESENT PROCEEDINGS by Plaint dated the 7th December 1962. The land in suit was thus described -

p.9

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"The lands called (1) Galagawawatta in extent One Acre, Two Roods and Ten Perches (1A. 2R. 10P.) depicted in Title Plan No. 284676 dated 29th October, 1912

p.10,
11.16-25

10 (2) Galagawahena in extent Three Acres, One Rood and Seven Perches (3A. 1R. 07P.) and depicted in Title Plan No. 298661 dated 25th November, 1913 and (3) Galagawawatta in extent Two Acres and Twenty two Perches (2A. 0R. 22P.) and depicted in Title Plan No. 284583 dated 17th October, 1912, were at the disposal of the Crown, which said lands are contiguous to each other and form one property and fully described in the Schedule hereto and is of the reasonable value of Rs. 14,000/-".

20 The Appellant pleaded that by Deed of Gift dated the 15th July 1924 Peruma gave the land to the Respondents and Sekera "each of whom thereupon became entitled to an undivided $\frac{1}{4}$ share of the said land and entered into possession thereof". He further pleaded that Sekera sold his undivided $\frac{1}{4}$ share of the land to Sumanadasa by Deed No. 29662 dated the 18th March 1960, that Sumanadasa re-sold it to the Appellant by Deed No. 820 dated the 26th July 1962 and that the Appellant thereupon became entitled to an undivided $\frac{1}{4}$ share.

30 The Appellant also alleged that he and his predecessors in title had been in the undisturbed and uninterrupted possession of the said share of the land "for a period of well over ten years and in respect of such possession pleads and claims the benefits of Section 3 of Ordinance No. 22 of 1871".

The Appellant sought the following relief:

- 40 "(a) That he be declared entitled to an undivided $\frac{1}{4}$ share of the said land.
- (b) That the Court be pleased to order a partition thereof in terms of the provisions of the Partition Act No.16 of 1951 and if a partition thereof be impracticable to make such order in terms of the provisions of Section 26 of the said Act.
- (c) That he be allotted a divided and specific portion of the said land in

p.10, 11.32-38

p.11, 11.1-15

p.11, 11.16-19

p.11, 11.29-37

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lieu of his undivided share therein and that he be put placed and quieted in possession thereof."

p.21 5. The first Respondent in his Statement of Claim dated the 17th July 1963 admitted that he, Sekera and the second Respondent, became the owners of the premises in suit, but pleaded as follows : -

p.21, 1.24
- p.22,
1.24

"4. This Defendant, the said Sekera and Wattuwa the 2nd Defendant were the owners of the following among other lands, in addition to the land in suit, the correct name of which, however, is Korameegahamulawatte:-

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(a) Dehigaha-Irawella of one pela paddy sowing extent situated at Wattegedera,

(b) Heen Irawella of five lahas paddy sowing extent situated at Wattegedera,

(c) Kandegederawela of five lahas paddy sowing extent situated at Wattegedera,

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(d) Wanepolawatte of 6- $\frac{1}{2}$ Acres at Wewaliadde.

(e) Galagawawatte of 4 Acres at Wewaliadde.

(f) Hettiwatta alias Galagawawatte of 2- $\frac{1}{2}$ Acres at Wewaliadde.

(g) Wattewela of six pelas paddy sowing situated at Diadora.

5. On 26th June, 1947 the said three parties exchanged with one another their interests in the said premises and at such exchange the following lands were allotted to the said three parties respectively : -

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A. To this Defendant :-

(a) the land in suit.

(b) Dehigaha-Irawella aforesaid.

(c) Heen Irawella aforesaid.

(d) Kandegederawela aforesaid.

B. To Sekera and to 2nd Defendant jointly :-

(a) Wanepolawatta aforesaid.

(b) Galagawawatte of 4 acres aforesaid;

(c) Hetti Watte alias Galagawawatte aforesaid.

(d) Wattewela aforesaid.

10 6. The said three parties thereafter possessed their respective lands adversely to each other and acquired prescriptive title thereto.

7. This Defendant states that he has acquired prescriptive title to the entirety of the premises in suit.

20 8. This Defendant denies that Sekera had the right to convey to Sumanadasa any interests in the land in suit or that the said Sumanadasa had the right to convey any interests in the said land to Plaintiff."

6. The following document (Exhibit D.1) was produced in evidence at the hearing as a part of the first Respondent's case:- p.30, l.35
p.31, l.31

Translation On the 26th day of June, p.74
1947 at Dandagamuwa

30 "We the undersigned Horatalpedi Durayalage Petta Veda of Ketawalagedera, ditto Sekera of Weweliyadde and ditto Wattuwa of Weweliyadde are the owners of the property mentioned below by right of inheritance and agree to possess as possessed earlier until deeds are executed.

To 1. Horatalpedi Durayalage Petta Veda the land called Korameegahamulawatte where he resides;

2. Dehigahairawellakumbura,

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- 3. Heenirawellakumbura, and
- 4. Kandegederawela the four high and low lands.

To 1. Sekera and Wattuwa residing at Weweliyadde the land called Wanepolawatte where they reside now.

2. Galagawawatte.

3. Mairawellakumbura.

4. Hettitwatte and

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5. Wattewelakumbura the five high and low lands.

Do hereby agree to allow the said several persons the lands mentioned herein until deeds are executed.

Sgd. Batti Sgd. Peththa
 Sgd. Hapuwa Sgd. Sekera
 Sgd. Wattuwa

1. First Witness:

Ranhotipeti Durayalage Batti the mother of the aforesaid three persons.

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2. Second Witness:

Wagapedi Durayalage Hapuwa the paternal uncle of the aforesaid three persons.

Sgd. K.A.D. Peter
 26-6-47

Translated by me,

Sgd. 11-3-64
 Sworn Translator."

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p.4, 1.2.

The second Respondent did not oppose the Appellant's claim and filed no Statement of Claim.

8. The case went to trial on the following issues : -

- (1) Did Sekera referred to in the plaint transfer his $\frac{1}{3}$ share on deed No. 29662 of 18-3-60 attested by S.D. Karunaratne, N.P., to Sumanadasa.
- (2) Did the said Sumanadasa transfer his $\frac{1}{3}$ share on deed No. 820 dated 26-7-62 attested by A.B.M. de Alwis N.P., to the Plaintiff.
- (3) If the above points of contest are answered in the affirmative, is the Plaintiff entitled to $\frac{1}{3}$ share of this land.
- (4) Did Petta the first Defendant, Sekera and Wattuwa exchange their lands as described in para. 5 of the statement of the (1st) Defendant's.
- (5) As a result of such exchange, are the premises in suit, in the exclusive possession of Petta the first Defendant.
- (6) Prescriptive rights of parties.
- (7) If issue 1 to 3 are answered in the affirmative is the Plaintiff entitled to a partition as prayed for." p.36, 1.5

9. The Appellant gave evidence on his own behalf, relying upon Deed No. 29662 of the 18th March 1960 and Deed No. 820 of the 26th July 1962. He referred to the land in suit as "the land called Galaga Watte" depicted in the plan filed by the Commissioner appointed by the Court to carry out a survey. pp.80, 84 p.30, 1.6

In cross-examination the Appellant said that he did not know anything about the land in suit prior to 1962 and that when he came to know the land the first Respondent was residing on it. He said that Sekera had come to Court but had not been summoned "to warrant and defend" his (i.e. the Appellant's) title. He was shown p.30, 1.27 -p.31, 1.14

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p.74

Exhibit D.1 and identified the signature thereon of Peter who, he said, was a dealer in coconuts and the uncle of Sumanadasa (to whom Sekera purported to convey on the 18th March 1960 by Deed No. 29662). He denied that "this land was bought for Peter" and did not know why Peter was present in Court. He (the Appellant) "bought this land for Rs. 2,500/- from Sumanadasa", which sum was what Sumanadasa had asked. No money had passed on the day the deed was executed, but the purchase price had been paid "in four instalments before the writing of the deed". No other witnesses were called in support of the Appellant's case. 10

p.31, 1.25
- p.32,
1.23

10. The first Respondent gave evidence in support of his own case. He said that he and his brothers had been entitled to other lands, besides the land in suit. These lands had been possessed in various groups at various places. There had been an exchange of family lands, the particulars of which were as set out in paragraph 5 of his Statement of Claim. On 20th June 1947 he and his two brothers signed Exhibit D.1., and his mother and mother's cousin also signed. The document itself was in the handwriting of Peter Ralahamy. The division of lands between the three brothers had in fact taken place long before the execution of Exhibit D.1. No deeds had so far been executed. 20

The first Respondent concluded his evidence chief as follows : - 30

"There is a plantation on this land aged 35 years and under. This plantation was made by me. Neither Sekera nor Wastuwa did plant this land. There is a house on this land. I built that house about 17 or 18 years ago. I am living in that house. According to D.1 I got certain lands and my two brothers got certain separate lands. Sekera and Wastuwa jointly got certain lands. I got separately a certain number of lands. As I suspected that there would be trouble with my brothers, I got lands separately. I preferred to have my lands separately because I thought that otherwise, in the future there would be 40

trouble with regard to possession. The other two brothers are in possession of the lands referred to in D.1. I pay the acreage tax for this entire land. I produce a receipt to show that I have paid acreage tax from 1951 to 1962 for this entire land. Even up to date I have been paying acreage tax. I produce an extract showing the payment of acreage tax marked D.2. This land is also called Horameegahamulla Watte. I produce marked D.3. the receipt for the tax paid in 1963 for the land called Galagawa Watte alias Horameegahamulla Watte, for the 3rd and 4th quarter of 1963. I also produce the receipt for the taxes paid for the second quarter of 1961 as D.4. I have mortgaged the entirety of this land. I produce marked D.5. the Mortgage Bond No. 8395 dated 1947 which was shortly after the execution of D.1, whereby I mortgaged this land to a person called Menika."

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11. In cross-examination the first Respondent said that his father had died "about 20 to 21 years ago". He (the first Respondent) was living on the land where he now lived in his father's life-time and was enjoying its produce. His father did not take any of the produce. His brothers had not planted any trees in the land in suit and had never picked coconuts there.

p.32, 11.25-28

p.34, 1.24

p.33, 1.36-
p.34, 1.11

He denied the suggestion that Horameegamulla Watte was a different land from that to which the action related. Horameegahamulla Watte was the land which was given to him by Exhibit D.1, which he mortgaged by Exhibit D.5 and on which he was living. This was the land to which the Appellant gave the name of Galagawa Watte and which was surveyed by the Commissioner, but its correct name was Horameegahamulla.

p.34, 1.11;
p.40, 1.23;
p.40, 11.26-29

12. On the 28th May 1964 the District Court delivered Judgment dismissing the Appellant's action with costs.

p.46

The learned trial judge found that the first Respondent was a witness of truth,

p.48, 1.19
p.49, 1.21

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p.48, l.32
-p.49, l.3

accepted his evidence, and rejected that of the Appellant. He expressed the view that, although Exhibit D.1 was not a notarially executed agreement, it was of great importance as showing clearly that there was a family arrangement at or during that time. No formal deeds were ever executed as contemplated by Exhibit D.1, but shortly afterwards, on the 1st July 1947, the first Respondent took a mortgage upon the property by Exhibit D.5.

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"And that is a very important point, i.e. that ever since that period, at least, that the parties have acted on the footing that this land was to be possessed and enjoyed exclusively by the first Defendant, and the other lands were to be possessed and enjoyed jointly by the other two brothers Sekera and Wattuwa to the exclusion of Petta. Further, nor does it end there Petta has improved this land; he has also put a substantial building on this land. That again shows that Petta has prescribed to this property to the exclusion of his brothers and all others."

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p.49, l.6

The learned judge added that it was significant to observe that neither Sekera nor Wattuwa had been called as witnesses by the Appellant.

The learned judge answered the issued as follows : -

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p.49, ll.24
-31

" Issue (1) - Yes, but this deed was executed only to create title and actually no title passed.

" (2) - Yes, but this deed was executed only to create title and actually no title passed.

" (3) - No.

" (4) - Yes.

" (5) - Yes.

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" (6) - The first Defendant has prescribed to this land exclusively.

The learned judge did not deal explicitly with Issue (7), which upon his findings did not arise.

13. The Appellant appealed from the said Judgment of the District Court to the Supreme Court which on the 18th July 1966 dismissed the said appeal with costs. pp.50-53 p.54

10 14. On the 23rd January 1967 the Supreme Court gave the Appellant conditional leave to appeal to the Privy Council and on the 8th February 1967 final leave. p.56 p.59

15. This Respondent respectfully submits that the Decree of the Supreme Court of Ceylon dated the 18th day of July 1966 dismissing the Appellant's appeal against the Judgment of the District Court of Kurunegala holden at Kuliyaipitiya dated the 3rd day of June 1964 should be affirmed and this Appeal dismissed with costs for the following amongst other

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R E A S O N S

1. BECAUSE the said Supreme Court rightly upheld the findings of fact of the said District Court, which findings ought not to be disturbed.

2. BECAUSE the concurrent findings of fact in the Courts below are fatal to the Appellant's case.

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3. BECAUSE the Respondents and Sekera (who was the Appellant's predecessor in title) exchanged with one another their interests in the lands of which they were the owners, and the second Respondent and Sekera surrendered inter alia their interest in the land in suit and gave the whole interest therein to this Respondent.

4. BECAUSE the land in suit was identified as one of the properties which under the arrangement made or confirmed in June

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1947 were to be allotted to this Respondent and it was so allotted.

5. BECAUSE the arrangement made or confirmed in June 1947 was thereafter performed and carried into effect, and the parties ever since acted on the footing that the land in suit was to be possessed and enjoyed exclusively by this Respondent.
6. BECAUSE at the time that suit was brought this Respondent had been in exclusive and adverse possession of the land for the requisite period of time and had acquired a prescriptive title thereto, ousting the title of his co-owners, and the Appellant's suit was barred. 10
7. BECAUSE neither Deed No. 29662 of the 18th March 1960 nor Deed No. 820 of the 26th July 1962 was effectual to pass any title whatsoever or had any effect in law.
8. BECAUSE the Judgment of the said District Court was right for the reasons given by the learned Additional District Court Judge and the Supreme Court of Ceylon was right in dismissing the Appellant's appeal against it. 20

MONTAGUE SOLOMON

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