GL.1.Gr.2

5, 1961

IN THE PRIVY COUNCIL No.22 of 1959

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

MRS. CECILY HARRIET MATILDA PEIRIS
of No.66 Campbell Road, Colombo
(Plaintiff) Appellant

- and -

1. MRS.CHARLOTTE MARY CLARA FERNANDO
of "Credon", 18 Castle Street,
Colombo.

2. MRS. REINEE MARY PHYLLIS PERERA
Wife of Dr. A.F.S. Perera of
Colombo. (Defendants) Respondents

C A S E

FOR THE RESPONDENTS

LODGED the 29th March, 1960.

MESSRS. A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.
Solicitors and Agents for the
Respondents.

IN THE PRIVY COUNCIL No.22 of 1959

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

MRS.CECILY HARRIET MATILDA PEIRIS of
No.66 Campbell Place, Colombo
Plaintiff-Appellant

- and -

1. MRS. CHARLOTTE MARY CLARA FERNANDO
of "Credon", 18 Castle Street,
Colombo.
2. MRS. REINEE MARY PHYLLIS PERERA,
wife of Dr.A.F.S.Perera of Colombo
Defendants-Respondents

CASE FOR THE RESPONDENTS

Record

1. In this Appeal the Plaintiff-Appellant (hereinafter called "the Plaintiff") appeals against the judgment and decree of the Supreme Court of Ceylon dated the 11th May 1956 which, on an appeal by the Defendants-Respondents (hereinafter called "the Defendants") set aside the Judgment and Decree of the District Court of Kegalle dated the 31st March 1953 and dismissed with costs the Plaintiff's action. The judgment of the District Court had declared the Plaintiff entitled to the lands in respect of which she had brought the action and had ordered the ejectment of the Defendants therefrom and payment of damages and costs to the Plaintiff.

Pt.1. pp.194-206.
Pt.1. pp.177-183
Pt.1. pp.184-189.

2. The action from which this appeal arises was instituted by the Plaintiff against the Defendants for a declaration of title to and the recovery of 28 allotments of land described in the Plaint. The identification of the lands as described in the Plaint with the disputed portions of land actually in the possession of the Defendants is denied by the Defendants. The lands in dispute are three separate blocks of land in the possession of the Defendants. Two blocks 32A. 0r. 25P., and 18A. 1r. 14P. in extent were mature tea lands and the third 13A. 1r. 32P. in extent was a comparatively new plantation in tea at the time the action was brought. These three blocks were, for the purposes of the action, surveyed and depicted in three plans marked X, Y and Z respectively.

Pt.1. pp.16-23.
Pt.2. p.691, p.699, p.693.

Record.

3. The case for the Plaintiff in regard to the lands depicted in X and Y is that they form part of the planted area of Utuwankanda Estate (also called Ambulugala Division of Kempitikanda Group) which, according to her, a syndicate had planted and possessed from 1927 onwards, and of which she had become the sole owner in 1946 by virtue of (1) a deed of purchase from the syndicate, deed
Pt.2. p.513. No.2369 of 27th September 1946 (Exhibit P15) and (2) a deed of exchange No.2371 of the 25th September 1946 (Exhibit P16). In regard to the lands
Pt.2. p.524. depicted in plan Z the Plaintiff's case was that though the Defendants had admittedly possessed and planted them she had good title to them on certain deeds produced on her behalf at the trial.

4. According to the Plaintiff, the syndicate which planted Utuwankanda Estate as well as certain other lands in the district originally consisted of two British planters named Craib and Callander and three other persons namely C.W.Peiris, (husband of the Plaintiff) de Mel and Ferdinando. By agreement among the co-owners, the working and management of the lands in which the syndicate was
Pt.1. p.69 Ll.8-11. interested were entrusted to Craib and Callander who jointly held more than half the shares. In
Pt.2. pp.325-331. 1930 five more planters employed on estates in the neighbourhood joined the syndicate and one of them namely Rodale took up the management when Craib left Ceylon permanently. Rodale was Superintend-
Pt.1. p.63 Ll.6-7. ent from about 1933 to about 1946.

5. The lands which the syndicate planted in Utuwankanda Estate were, according to the Plaintiff,
Pt.1. p.66 Ll.45-48. chena or jungle land in the Kandyan Provinces. The ownership of such lands was, in the absence of a Royal Grant or Sannas, clearly vested in the Crown by virtue of the provisions of the Encroachments upon Crown Lands Ordinance (Chapter 321, Vol. 6 of the Legislative Enactments of Ceylon, 1938 Revision). The syndicate, however, appear to have acted on the footing that the lands planted by them were covered by what is commonly known in Ceylon as "village title" purchased by Pieris, de Mel and Ferdinando on deed No.32 of the 8th April, 1925
Pt.2. pp.184-202. (Exhibit P2). By Exhibit P2 the said three persons purchased 386 allotments of land described in the six schedules to the deed of which Schedule B contained 183 allotments described as adjoining each other and forming one property called and

Record.

known as Utuwankande Estate. The lands described in the Plaint are the allotments numbered 1-5, 7-16, 20-22, 87-93 in the said Schedule B. These said persons transferred 175/300 share of the lands purchased on Exhibit P2 to the other members of the syndicate by two deeds of transfer - deed No. 34 dated the 9th April 1925 (Exhibit D6) the consideration for which was Rs. 175,000/- and deed No.72 dated the 22nd March 1926 (Exhibit P5) the consideration for which was the nominal sum of Rs. 500/-. The first of these two deeds, D6, dealt with all the lands purchased by the said three persons on P2 except for the lands described in the plaint and two other allotments. The lands described in the Plaint and the other two allotments left out in D6 were later transferred by Exhibit P5. The curious fact that the lands described in the Plaint were omitted from D6 has not been explained. The explanation given by Peiris, the principal witness for the Plaintiff, was that the omission was due to the carelessness of the Notary; but this is in the teeth of the attestation clause in D6 which states that the particular allotments of land were expressly left out.

Pt.2. pp.202-221.
Pt.2. pp.250-252.

6. After the purchase on Exhibit D6, an undated plan was, according to the Plaintiff, prepared by a surveyor named Thiedeman (Exhibit P151) which purported to be a plan of Utuwankanda Estate and showed an extent of 266 acres as being the total extent of 116 scattered allotments of land depicted therein. The syndicate, notwithstanding the acreage shown on this plan (the reliability of which is a matter contested by the Defendants), appear to have confined their claim to 150 acres of planted land and 50 acres of jungle land. These acreages appear consistently in the superintendent's reports (Exhibits P86, P87 and P127 to P145), in two prospectuses prepared for the purpose of floating a company to take over the interests of the syndicate (Exhibits P75 and P169) and in the valuations of Utuwankanda Estate by G. Fellows on 12th January 1936 (Exhibit P164), and by W.Hermon on the 1st February 1942 (Exhibit P83).

Supplement.
P.2. p.473, p.505, pp.451-503.
Pt.2. pp.300-302, pp.661-664 pp.392-396 pp.446-450.

7. The extent 150 acres of tea indicated in all these documents appears to have been a repetition of the figure at which the area was assessed in 1927 when the land was first cleared for planting. The first physical survey of the planted area was

Record.

Supplement.

in July 1945 by surveyor Maartensz who prepared plan No.329 of the 18th July 1945 (Exhibit P124) This plan shows (a) that the lands in dispute were not in the possession of the "syndicate" in July, 1945, (b) that the area of Utuwankanda Estate actually planted in tea was 107 acres and that 53 acres consisted of assorted allotments not planted in tea, (c) that the planted area of 107 acres consisted of 12 scattered blocks of land of irregular shape and different extents.

8. The said plan 329 and Plan No.328 for other lands comprised in Kempitakanda Group were caused to be prepared by the syndicate for the purpose of transferring Kempitakanda Group to the Plaintiff. By the terms of the transfer deed No.2369 of the 27th September 1946 (Exhibit P15) the warranties of title and the Vendor's obligations to give possession were expressly limited to such lands only as were "in the possession of the Vendor's depicted in Plans Nos.328 and 329 dated the first day of September and the eighteenth day of July 1945 respectively made by H.H. Maartensz of Colombo, Licenced Surveyor". The fact that the Vendor's obligations would be limited by a reference to survey plans of the lands actually in the possession of the Vendors was known to the Plaintiff for some months before the actual execution of the deed of transfer because the agreement to transfer (deed No.1151 of the 8th November 1945 - P14) provided for that limitation.

Pt.2. p.520 Ll.16-22.

Pt.2. P.512 Ll.9-25.

9. C.W.Peiris, the husband of the Plaintiff acted as her agent in the negotiations for the purchase of Kempitikanda Group, in its management thereafter, in the correspondence with the Defendants and with the Tea Control Department after disputes arose and finally in instructing the Plaintiff's Lawyers for the purpose of this action. Peiris was from the beginning a member of the syndicate, and in his evidence claimed he knew that lands depicted in Plans X and Y had been planted for the syndicate in Utuwankanda Estate. He was a broker, a planter and very much a man of the world with a more than ordinary record of litigation; and it is difficult to reconcile this evidence with his acceptance of the limited warranty by reference to Maartensz's plan No.329 and with his failure to realise at once that the Plaintiff was not given possession of about one third of the alleged productive area of Utuwankande Estate.

Pt.1. p.64 Ll.26-32.

Pt.1. p.62 Ll.9-10.

Record.

10. The Plaintiff purchased Kempitakanda Group (including, according to her, the disputed portions of land) on the 25th September 1946 and entered into possession immediately thereafter; but it was not till the 4th of July 1947 that the Superintendent of Kempitakanda Group writing to the 2nd Defendant (on the instructions of Peiris) raised any question regarding the lands possessed by the Defendants. In her correspondence with the Defendants and later in her representations to the Tea Controller the Plaintiff's complaint was limited to the allegation that the Defendants were in possession of lands to which she had good title. It was certainly not suggested at that time that the Defendants had ousted the Plaintiff or her predecessors in title from the possession of a considerable part of the mature tea lands which the syndicate had planted and possessed.

Pt.1. p.78 Ll.32-33
Pt.2. pp.619-620.
Pt.2. pp.619-633.
Pt.2. pp.633-637.

11. The Plaintiff instituted this action on the 16th of August 1949 and amended her plaint twice thereafter, but, throughout, her allegation against the Defendants was in the following terms: "The Plaintiff now complains to this Court that the Defendants are in wrongful possession of the said premises in Schedule A ever since the purchase in 1946 and of the premises in Schedule B from the year 1947 ..... "In other words, no specific allegations of ouster was made in the Plaint.

Pt.1. pp. 16-25.
Pt.1. p.18. Ll.33-40.

12. The 28 allotments of land in the Plaint were described by reference to Theideman's Plan 1304 (Exhibit 151) and by the names and boundaries appearing in the Plaintiff's title deeds. As these names were no longer in use and as the old boundaries were no longer discernible, the learned trial Judge, in accordance with the pre-trial procedure usually adopted in land cases where it is necessary to identify the lands claimed in a plaint with the lands actually in dispute, allowed the Plaintiff's application that a commission be issued to surveyor Frugtneit and directed the surveyor to survey after due notice to parties the lands "according to the boundaries set out in the Schedules A and B to the Plaint and any other boundaries that may be pointed out by the parties and plantations and buildings standing thereon and claims thereto". The procedure adopted by the Commissioner, however, rendered the plans produced by him at the trial and marked X, Y, Z quite unhelpful for the purpose of

Supplement.
Pt.1. p.90. Ll. 8-10.
Pt.1. p.2. Ll.4-5.
Pt.2. p.640 Ll.1-6.

Record.

identifying the lands described in the Plaintiff's title deeds with the lands claimed by her. What the Commissioner did was to survey the lands possessed by the Defendants (except for certain areas covered by decrees of Court and others lying a good distance away) and thereafter to superimpose the plans so produced upon Thiedeman's plan No. 1304 (Exhibit P.151). Thiedeman's plan was itself the result of a survey made without any reference to the title deeds of the Plaintiff.

Pt.1. p.90 Ll.6-24.

Pt.1. p.86 Ll.27-28.

13. The Defendants in their pleadings dated the 20th December 1949, the 21st November 1950, the 14th August 1951 and throughout the proceedings denied the Plaintiff's title to the disputed portions of land and also denied that the Plaintiff or her predecessors in title had possession of any of them. The case for the Defendants was that the lands in dispute formed part of Uduwewela Estate which the 1st Defendant had purchased on deed No. 1065 of the 18th January 1928 (Exhibit D29) and which she had possessed uninterruptedly thereafter as sole owner until the 9th August 1936, when, by deed No.1046 (Exhibit D31) she gifted an undivided share of the said estate to her daughter, the 2nd Defendant as her dowry on her marriage with Dr. A.F.S. Perera. Soon after purchasing Uduwewela Estate (which at the time of purchase had mature tea on an extent of 8A. 3R. 15P. out of the area covered by plan Y), the 1st Defendant's husband M.S. Fernando, acting as her agent, planted the land and thereafter obtained a crown grant dated the 7th August, 1930 (Exhibit D17) for a planted area of 29A. OR. 05P. which covers the land depicted in plan X, except for an extent of 2A. OR. 02P. on the West which was in the possession of the 1st Defendant and for which a Crown grant had been issued to one Sendiya in 1915. The lands covered by plan Z (also referred to as B Schedule lands in the course of the proceedings) were planted by the 1st Defendant from about 1937 onwards and were throughout in the possession of the 1st Defendant.

Pt.1. p.24 Ll.12-18.
Pt.1. p.31 Ll.24-28.
Pt.1. p.51.
Pt.2. pp.276-279
Pt.2. pp.403-408
Pt.2. pp.337-340
Pt.2. p.49.

14. The 45 issues raised at the trial related to the following matters:-

Pt.1. pp.39-41.

(a) The identification of the plans X, Y and Z with the lands described in the Plaint.

Pt.1. pp.55-57.

(b) The important question as to which of the contending parties planted and possessed the lands covered by Plans X and Y.

Record.

(c) The Plaintiff's paper title to the lands as shown in the title deeds produced by the Plaintiff.

(d) The Defendants' paper title, particularly the title conveyed by the Crown Grant D.17.

(e) Whether the Defendants, particularly the 1st Defendant, committed a series of frauds:

(i) by suppressing important and material facts from Government Officials in order to prove that the lands in Schedules A and B belonged to the 1st Defendant.

(ii) by producing certain fictitious survey plans which had no application and making wrongful and illegal use of them and thereby cause damage and detriment to the Plaintiff?

(f) The prescriptive rights of parties.

(g) Compensation for improvements.

(h) Damages for wrongful occupation.

15. The Plaintiff did not give evidence but called the following witnesses: C.W. Peiris her husband, William Hermon who had inspected the tea lands of Utuwankanda Estate in 1936 and 1942, Montgomerie a director of Bois Brothers and Co., Ltd., who were the estate agents of "The Syndicate" from 1931 until 1946, Surveyor Theideman who made Plan No. 1304 (Exhibit P151), the surveyor Frugtniet who was commissioned by Court to survey the lands in dispute and Passe a clerk of Lewis Brown and Co. Ltd., Colombo who acted as estate agents between 1927 and 1931.

Pt.1. pp.41-44.
pp.57-83.
Pt.1. pp.103-105.
Pt.1. pp. 95-102.
Pt.1. pp. 84-88.
Pt.1. pp. 88-93.
Pt.1. p. 83.

16. In support of her claim that the "Syndicate" had planted and possessed the lands covered by plans X and Y, the Plaintiff relied on the following matters -

(a) A letter dated the 1st February 1929 to C.W. Peiris who was a member of the Syndicate at the time, from Lewis Brown and Co., Ltd., (Exhibit P72) which refers to a new clearing of 150 acres in Ambulugala Division (UtuwankandaEstate).

Pt.2. p.307.

(b) An assessment report of the 19th July 1934 on Kempitikanda Group by William Hermon

Record.

Pt.2. pp.382-383.

(Exhibit P.79) which contains the following passage:-

"The total extent of the tea area is stated as 301 acres in two divisions:

Ambulugala division 150 acres planted in 1927.

Kempitikanda ... 151 acres planted in 1929".

(c) A Valuation Report dated the 1st February 1942 on Kempitikanda Group by William Hermon (Exhibit P83) which contains the following passage:-

Pt.2. pp. 446-450.

"I was shown no plan of the estate but the appropriate acreage is stated to be as follows:

(1) tea in bearing 1927 - 150 acres.

(2) tea in bearing 1928 - 151 acres.

Pt.2. p.485 p.486 pp.451-503.

(d) The monthly reports of Superintendents of Kempitikanda Group (Exhibits P85, P86, P127-P145) show the figures of 150 acres of tea in bearing throughout for Ambulugala Division (Utuwankanda Estate).

Pt.2. pp.392-393.

(e) A valuation Report of Ambulugala Division (Utuwankanda Estate) by G. Fellowes (Exhibit P164) which contains the following passage:

"Tea in bearing - 150 acres (subject to survey)

Jungle - 50 acres (subject to survey)

Total 200 acres (subject to survey)

Pt.2. pp.317-320. Pt.2. pp.661-664.

(f) Two prospectuses (Exhibit P75 and P169) prepared by Bois Brothers and Co., Ltd., refer to Ambulugala Division (Utuwankanda Estate) as having 150 acres of tea.

Pt.2. pp.355-358.

(g) The Return dated the 3rd August 1933 made by Bois Brothers and Co., Ltd., to the Tea Controller (Exhibit P76) which stated that the area planted in tea in Ambulugala Division was 150 acres and the report dated the 21st September 1935 on Ambulugala by R.P. Gorton at the instance of the Tea Controller which refers to the same acreage.

Record.

17. The evidence on which the Defendants relied for establishing the claim that they planted and possessed the lands covered by plans X and Y since 1928 includes the following :-

(a) The Account Book D51 which was maintained by the husband of the 1st Defendant from the date of her purchase of Uduwewela Estate and which contains references to the planting of the lands covered by X and Y as well as of other lands belonging to Uduwewela Estate. — Pt.2. p.280. Pt.3. pp.22-81.

(b) The check rolls of Uduwewela Estate maintained by the conductor of the Estate (Exhibits D84 - D90) and letters written to the husband of the 1st Defendant by persons who helped him to plant Uduwewela Estate (Exhibits D52, D54-D58 and D61). — Pt.2. p.467. p.471. p.501. p.508. p.523. p.629. p.637. Pt.3. pp.168-181.

(c) On an application made by the 1st Defendant to the Crown, on the 26th January 1929 (Exhibit P117), all the lands covered by plan X (except an extent of 2A. OR. 02P. covered by plan N 312359 dated the 10th March 1915, (Exhibit P71) were surveyed (PP 3994 dated October 1929 - Exhibit D15) and blocked out into a number of allotments which were advertised for sale or settlement in the Government Gazette. In this advertisement the 1st Defendant was shown as the claimant (Exhibit D2, dated 24th January 1930) and after a public inquiry into the 1st Defendant's claims the Crown issued to her the Crown Grant D17 dated the 7th August 1930 together with the supporting Title Plans Nos.405308, 405309, 405310, 405311, dated the 9th April 1930. It is submitted that the survey, the advertisement and the inquiry could not have taken place if the syndicate had been in possession of the lands in Plan X in 1929 and 1930 as stated by the Plaintiff. — Pt.2. pp.303-305. Pt.3. p.81 b. Pt.2. p.49. Pt.3. p.171. Pt.2. pp.316-317. Pt.2. pp.337-340. Pt.2. pp.321-323.

(d) On the 13th June 1930, the 1st Defendant instituted action in D.C. Kagalle 9555 for declaration of title against two persons in respect of the block of land shown in Plan X as PP3994/1. For the purposes of this action, the said Block 1 of land was surveyed by surveyor Nugapitiya who produced — Pt.2. pp.332-334. Pt.2. p.691.

Record.

Plan No.1964 dated the 11th March 1932 (Exhibit D32) and the 1st Defendant was declared entitled to this block of land by the Decree in the said case dated the 7th December 1932 (Exhibit D40). It is submitted that this survey would not have been possible if the Plaintiff's predecessors in title had been in possession.

Pt.2. p.676.

Pt.2. p.351.

(e) In June 1938 William Hermon (the Plaintiff's witness) inspected Uduwewela Estate at the instance of the Tea Controller. The Inspection Report of William Hermon dated the 11th July 1938 (Exhibit D12) together with his evidence given at the trial proves conclusively that the lands in dispute depicted in Plans X and Y were in the possession of the 1st Defendant at least by the 30th June 1938. This report shows that H.W. Gordon (who a few months later acted as the Superintendant of Kempitikande Group) showed Hermon round Uduwewela Estate and that Hermon inspected the areas planted in tea and checked the acreage by reference to three plans - (a) Plan No.1342 dated the 22nd July 1927 (Exhibit D7) which covers the same area as Plan Y (b) Plan No.1444 dated the 17th July 1928 (Exhibit D64) for a Block 7A. 3R. 03P. in extent and not in dispute and (c) Plan No.1340 dated the 22nd July 1927 (Exhibit D60) which includes all the lands depicted in Plan X. In his report he stated that the boundaries of all three blocks as seen on the ground agreed with those given in the plans referred to. The full extents as shown in Plan No.1342 and in Plan No.1444 were reported to be covered by mature tea. With regard to the lands covered by Plan 1340 he reported that an area of 40A. OR. 27P. contained old tea, that two areas 1A.Or.0P. and 2A.1R.02P. in extent contained young tea and interplanted tea respectively, and that Block No.7 of Plan 1340 contained seed bearers. The total area of Uduwewela Estate planted with tea was reported to be 71A.2R.03P. In his evidence at the trial Hermon stated: "The inspection by me was in 1938. I had already gone to Ambulugala Division in 1934 and I subsequently went to Ambulugala Division in 1942. The land which I inspected as Uduwewela Estate was a

Pt.2. pp.420-424.

Pt.3. p.159a.
Pt.2. p.371.

Pt.2. p.303.

Pt.1. p.104.
Ll. 16-21.

Record.

different land to that which I inspected in as Ambulugala Division. If I went to the same land twice, I would have identified and reported so to the Tea Control Department".

18. The learned trial Judge in his judgment dated the 31st March 1953 held in favour of the Plaintiff on the issue of possession. It is submitted that the learned District Judge's finding is clearly wrong. The learned Judge's basic reason for rejecting the evidence of possession adduced by the Defendants is to be found in the following passage in his Judgment:- Pt.1. pp.177-183.

"For evidence of possession it will be seen that both parties rely on documents relating to estate management. The documents produced by Plaintiff cover the period from 1928 to 1948 and have been kept by Lewis Brown & Co., or Bois Bros. who were the managing agents of the Kempitikanda Group of which the Ambulugala division of 150 acres in tea containing the lands in suit formed a part. Some of these documents are returns furnished to the Tea Control Department during the control years when the actual acreage in tea and the quantity of tea leaf plucked had to be given. Reports P79 of 1934 and P83 of 1942 by Hermon and P164 of 1936 by Fellowes were made after the two valuers visited the estate, were shown round by the superintendent who overlooked the estates before the reports were made. There is no reason therefore to think that all these documents are not a truthful record of what they contain and that they contain entries that are false or fraudulent". Pt.1. p.179 Ll. 33-45.

The learned Judge wrongly regarded the documents to which he refers as showing that the figure of 150 acres was accurate and that the managing agents as well as Hermon and Fellowes vouched for its accuracy. This basic error arose from a serious misconstruction of the documents and a misapprehension of the evidence of Montgomerie in regard to the part played by Bois Brothers and Co., Ltd., in the affairs of Kempitikanda Group.

19. Hermon, Fellowes and Gorton who in their reports referred to the extent of tea in Ambulugala Division did not vouch for the acreage. On the contrary each of them in his own way made a guarded Pt.2. p.446 Ll. 10-11.

Record.

Pt.2. p.392. Ll.24-28. Pt.2. p.359. Ll. 5-6. Pt.1. p.103. Ll.32-35.

statement clearly showing that he took no responsibility for its accuracy. Hermon who gave evidence for the Plaintiff stated, in regard to his report, as follows: "In regard to the acreage of Ambulugala, I myself did not check it up because I had no plan. No plan was produced before me. The extent in my report was put down on a statement made to me by Mr. Craib". Montgomerie, a director of Bois Brothers & Co., Ltd., called by the Plaintiff gave evidence which included the following clear statements:-

Pt.1. p.98. Ll.40-41.

> "As far as Kempitikanda Estate was concerned my Firm never had to inspect the estate, or even visit it for business purposes" ..... It was not my business to verify the acreage given in the returns".

Pt.1. p.100. Ll.41-44.

> "Q. During the period that you were agents, could you say whether you were aware that Kempitikanda Estate was in actual possession of 150 acres of tea in Ambulugala Division?"
>
> ". No."

Pt.1. p.83. Ll.30-31.

Passe, a clerk from Messrs. Lewis Brown and Co., Ltd., stated that he did not know what his Company did in connexion with these estates.

20. The references in the Plaintiffs' documents to the acreage in Utuwankande Division planted in tea are hearsay and a repetition of what appears to have been a mere assessment by some person who cleared the land for planting in 1927. Even if the reference, in Exhibit P72, to a new clearing of 150 acres is admissible evidence, it is submitted that the learned Judge omitted to consider the likelihood of error in an assessment of the total acreage of a large number of irregular blocks of land, lying as Hermon mentions in his report, on a fairly steep hill side. Nor did he consider the significance of certain documents produced by the Plaintiff which indicate that the tea area of Ambulugala Division (Utuwankanda Estate) was less than 150 acres. The weeding figures for Ambulugala Division in the Books of Accounts produced by the Plaintiff consistently show the area under tea as 128 acres. The letter dated 3rd February 1939 (Exhibit P157) also shows that in the returns to the Controller of Labour prior to January 1939 the total acreage of tea of Kempitikanda Group was

Pt.2. p.307. l.11.

Pt.2. p.446. l.26.

Pt.3. p.106, l.11. p.107, l.27. p.109, l.22. p.111, l.27. p.112, l.23. Pt.2. pp.430-431.

Record.

given as 276 acres. It also shows that up to the date of this letter acreage fees had been paid on the lower figure of 276 acres and not on 301 acres of tea. The excess of coupons over crops referred to in Hermon's report P83 again indicates an over-estimate of the acreage of mature tea.

21. The learned District Judge also misconstrued a vital document in the case - namely the report of William Hermon dated 11th July 1938 (Exhibit D12). In regard to Exhibit D12 the learned Judge said - "the acreage statement P154 of 1938 attached to D12 supports the fact that the Defendants planted only 47½ acres". The document D12 of which P154 is a part clearly shows that the Defendants were in possession of an area of 71A.2R.03P. which included the lands depicted in Plans X and Y. The only doubt that could possibly arise is whether the Defendants' agent took Hermon over the tea lands of Ambulugala Division but this is excluded by the evidence of Hermon already referred to and also by the description of the tea lands of Ambulugala Division in Hermon's Report of the 1st February 1942 (Exhibit P83) which states that the Ambulugala tea lands were a narrow strip of tea 1¾ miles long intersected by village holdings and lying on fairly steep terrain. This description does not tally with his description of the Defendants lands in D12 - "Flat to undulating, not steep anywhere". Nor would the inclusion of the lands in plans X and Y square with Hermon's description of the Ambulugala tea lands as a narrow strip of tea.

Pt.2. pp.420-424.
Pt.1. p.181. Ll.13-15.
Pt.2. p.446. Ll.21-24.
Pt.2. p.421. Ll.35-36.

22. The learned Trial Judge also misconstrued Exhibit D51, the account book produced by the Defendants. He stated that the entries in this Document related only to an extent of 47½ acres. This document clearly refers to the working of blocks totalling to 72 acres of old tea and to the new plantation in the lands covered by Plan Z.

Pt.1. p.181. Ll.10-14.

For ease of reference the Defendants produced a statement marked 'A' which is an acreage statement extracted from D51. Quite apart from the evidence adduced by the Defendants, Plaintiff's document Exhibit P163, a letter dated the 15th January 1936 from G.Fellowes to Bois Brothers & Co. Ltd., affords confirmation of the Defendants' case. The writer refers to the Defendants' estate of 80 acres and suggests that this estate too might well

Pt.3. p.160.
Pt.2. p.401. Ll.13-17.

Record.

be bought by the Tea and Rubber Company Ltd., of
Pt.2. p.661. which P169 was the Prospectus.

23. The learned District Judge also failed to consider the circumstantial evidence and the conduct of the parties. The estate in 1944 was in
Pt.2. p.485. l.10. full production; and if it is true that the Plaintiff or her predecessors in title had been dispossessed of about one-third of the alleged productive area of Ambulugala Division, that loss would have been reflected in the production figures and in the expenditure figures; but the Plaintiff has not produced evidence of any change in these figures. It is also most unlikely that the Plaintiff or her husband who claimed to know the lands planted by the Syndicate should have failed to realize such a loss at once. The learned Judge also does not consider whether the Syndicate's possession of the lands covered by X and Y was reasonably reconcilable with the surveys on
Pt.3. p.171. which PP3994 October 1929 Exhibit D15 and plan 1964 dated 18th March 1932 Exhibit D32 were made on be-
Pt.2. p.676. half of the 1st Defendant and whether it was likely that the 1st Defendant having taken the trouble to obtain the Crown Grant D17 in 1930 waited till 1945 or 1946 to take possession. The learned Judge's failure to consider some of the important and relevant circumstantial evidence was presumably due to the fact that he wrongly held that the Crown Grant did not apply to the lands in dispute. This finding is clearly erroneous because the Commis-
Pt.2. p.691. sioner in his plan X has indicated the Title Plan numbers relating to the Crown Grant D17.

24. In regard to the dispute as to title the
Pt.1. p.179. l.31. learned Trial Judge states that the title of the Plaintiff was not in dispute. It is submitted with respect that this is a fundamental error. The
Pt.1.p.90. Ll.20-23. pleadings, issues, the cross-examination of Peiris,
Pt.1. p.86. Ll.27-28. Frughtniet and Theideman and finally the address of Counsel for the Defendants show that right to
Pt.1. p.40. Ll.18.19. the end of the proceedings the Defendants contest-
Pt.1. p.56. Ll.20-21. ed the Plaintiff's title. A fundamental objection to the Plaintiff's title namely that the "Village
Pt.1. p.162. Ll.4-15. Title" claimed was not related to the lands in dispute was pressed in both Courts.

25. On the question whether the title deeds of the Plaintiff have been shown to apply to the lands

Record.

in dispute, it is submitted that, in addition to what has already been submitted, there is a further reason for rejecting the evidence of identification adduced for the Plaintiff. After Frugtniet had surveyed and inspected the lands in the presence of the parties, he visited the lands again at the invitation of Peiris, without notice to the Defendants, and in their absence obtained information, for the purpose of identification, from persons produced by Peiris but whose names, whereabouts or credentials were not disclosed to him by Peiris. The learned Trial Judge, however, without adverting to the various difficulties involved in the problem of identification held (wrongly, it is submitted) in favour of the Plaintiff on this issue.

Pt.1. p.90. Ll.27-37.
Pt.1. p.91. Ll.13-14.

26. In regard to the Crown Grant dated the 7th August 1930 (Exhibit D17) which the Defendants produced for establishing their title to the lands covered by Plan X, the learned Trial Judge said -

Pt.2. p.337.

"There are far too many irregularities to be found in the history of the Crown Grant that militate against holding that the Crown Grant applies to the lands A1 to A17". By lands A1 to A17 he meant the lands in Plan X. For the reasons already submitted, the learned Trial Judge was clearly wrong in thinking that the Crown Grant did not apply to the lands covered by Plan X. This fundamental error appears to have been the cause of the confusion in the judgment dealing with this aspect of the case.

Pt.1. p.180. Ll.36-39.
Pt.1. p.180. Ll.39-41.

27. It is submitted that once the Crown Grant is shown to apply to the lands in dispute, the only question relevant to its validity is whether the Crown had title to the lands at the time of the Grant. Peiris, in his evidence, admits that the lands in question were chena or jungle at the time the syndicate purchased them in 1925. In view of this evidence, the learned District Judge was wrong in holding that the Crown was not the owner of the lands at the mentioned time. The allegations of fraud against the Defendants, even if true, could not affect the validity of the Crown Grant. The issue of fraud was irrelevant to any consequential issue and was irrelevant to the Plaintiff's case.

Pt.1. p.66. Ll.46-47.
Pt.1. p.67. Ll.28-29.
Pt.1. p.73. Ll.18-20.

28. The irregularities referred to by the Judge are (a) that the 1st Defendant made an application for lands that did not belong to her and which

Pt.1. p.180. Ll.16-27.

Record.

(according to his incorrect finding on the question of possession) were in the possession of the Plaintiff's predecessors in title and (b) that the report of the chief headman Ratwatte dated the 18th February 1932 which was produced by the Plaintiff during the cross-examination of Ratwatte (Exhibit P177) showed that the 1st Defendant's application related to some lands other than those covered by Plan X. Whether the 1st Defendant had good legal title or not is irrelevant, since her application was made on the footing that the lands belonged to the Crown. Assuming that the lands were in the possession of the 1st Defendant at the time she made the application, her good faith in regard to the application is fully established by documentary evidence, the significance of which does not appear to have been considered by the learned Trial Judge. The 1st Defendant's application for the Crown Grant dated the 26th January 1929 (Exhibit P117) was in due form and was in respect of a certain extent of land of which a rough sketch was shown (as required) on the reverse of the form of application. The application was accompanied by a copy of the 1st Defendant's Title Plan 1304 which clearly included the lands for which the Crown Grant was sought. That the lands for which the Crown Grant was issued were included in this plan is apparent even upon a casual comparison of it with the Title Plan supporting the Crown Grant (Exhibit D17A dated the 9th April 1930). The Title Plan 1304 was the plan referred to in Deed No.1065 dated the 18th January 1928 (Exhibit D29) on which the 1st Defendant purchased Uduwewela Estate.

Pt.2. p.307.
Pt.2. p.303.
Pt.3. p.81b.
Pt.2. p.305.
Pt.2. p.321.
Pt.2. p.276.

29. It was also alleged against the 1st Defendant's application for a Crown Grant, that she had suppressed the Deed of Rectification No.31811 dated the 8th February 1928 (Exhibit D30). This suggestion has no substance because the omission, if it had any effect at all, was against the 1st Defendant's interests. A further point was made that most of the allotments of land in the Defendants' title deed No.1065 of the 18th January 1928 was described as being in Uduwewela village, while most of the lands in Plan X were in Polwatte village. This objection is discounted by the fact that the lands in question lie at the meeting point of the boundaries of the three villages, Uduwewela, Polwatte and Dodantale and by the fact that the village boundaries were uncertain. (Exhibit P109).

Pt.2. p.287.
Supplement.

Record.

30. The learned Trial Judge mistakenly regarded the report of Ratwatte dated the 18th February 1929 (Exhibit P177), as a report on the lands in the 1st Defendant's application P117. This document was produced by the Plaintiff during the cross-examination of the Defendants' witness Ratwatte. The confusion arose not out of anything appearing on Ratwatte's report of that date but out of a reference to the Preliminary Plan 3994 (Exhibit D15) (the plan prepared in consequence of the 1st Defendant's application) appearing in the certification of the officer who had issued a certified copy of the report to Peiris in 1951. This report which is dated the 18th February 1928 cannot possibly have any connexion with the Preliminary Plan 3994 which came into existence only in October 1929. The reference to P.P. 3994 is an obvious error in the certification.

Pt.2. p.307.
Pt.2. p.303.
Pt.3. p.171.

31. It is submitted in respect of each of the lands in dispute that the Respondents, being admittedly in possession, were, by virtue of Section 110 of the Evidence Ordinance (Chap. 11 Vol. 1 Legislative Enactments of Ceylon, 1938 Revision), entitled to be regarded as owners as against the Plaintiff because the Plaintiff failed to prove her title to any of the lands. It is submitted that the Plaintiff not only failed to prove that the title deeds produced by her related to the lands but also failed to prove that her predecessors in title had any possession at all or that they held or possessed any of the lands in the manner required by Section 7 of the Encroachment Upon Crown Lands Ordinance (Chap. 321. Vol. 6 of the Legislative Enactments 1938 Revision). In regard to the lands depicted in Plans X and Y it is submitted that the Defendants have proved undisputed and undisturbed possession for well over the prescriptive period of ten years and were entitled under Section 3 of the Prescription Ordinance (Chap.55, Vol.2, Legislative Enactments, 1938 Revision) to judgment against the Plaintiff irrespective of title.

32. The Defendants appealed from the judgment of the learned District Judge and the Supreme Court (Basnayake C.J. and Pulle J.) by their Judgment dated the 11th May 1956 set aside the judgment and decree of the District Court and dismissed the Plaintiff's action with costs.

Record.

The Supreme Court held -

Pt.1. p.200. Ll.2-7. (a) That the learned District Judge had misdirected himself on Exhibit P79 (Hermon's report on Kempilikande Group dated the 19th July 1934), Exhibit P83 (Hermon's report on Kempilikande Estate dated the 1st February 1942) and Exhibit P164 (Report of G.Fellowes dated the 12th January 1936 on Ambulugala Estate) and wrongly regarded them as proof that the planted extent of Ambulugala Division (Uduwewela Estate) was 150 acres.

Pt.1. p.200. Ll. 8-10. (b) That the learned trial Judge had failed to give sufficient consideration to Exhibit D12, the Report of Hermon dated the 11th July 1938 on the Defendants' Estate, and to the evidence of Hermon.

Pt.1. p.202. Ll. 9-14. (c) That the learned trial Judge was wrong in thinking that the Crown Grant had no application to the lands in dispute.

Pt.1. p.202. Ll.31-38. (d) That there was no fraud on the part of the 1st Defendant in making her application for and in obtaining the Crown Grant D17.

Pt.1. p.204. Ll.31-47. (e) That the learned trial Judge had erred in thinking that the Defendants' Account Book Exhibit D51 showed no more than the planting of 46 acres to the south of the lands depicted in Plan X.

Pt.1. p.205. Ll. 6-10. (f) That having special regard to the character of chena lands in a Kandyan Province, the Plaintiff's title deeds read with Thiedeman's Plan raised no presumption of title or ownership.

Pt.1. p.205. Ll.10-12. (g) That in regard to the lands depicted in Plan Z, the Defendants by virtue of their possession, had a title that prevailed as against the Plaintiff.

Pt.1. p.205. Ll.33-40. (h) That the lands depicted in Plans X and Y were planted and possessed by the Defendants since 1928 and that their possession was without any challenge to their title until 1947.

33. It is submitted that in view of the serious misdirections in the judgment of the learned trial Judge, the Supreme Court was under a duty to reassess the evidence and that the Supreme Court was right in reversing the findings of the learned Trial Judge.

34. It is respectfully submitted that the Plaintiff's appeal should be dismissed with costs for

Record.

the following among other

REASONS

(1) Because the Judgment of the Supreme Court is right for the reasons stated therein and for the reasons hereinbefore submitted.

(2) Because the Plaintiff has not proved her title to the lands claimed by her.

(3) Because the Plaintiff has failed to relate the title deeds produced by her to the lands in dispute.

(4) Because the Defendants have good title to the lands in dispute.

(5) Because the Defendants are in possession of all the lands in dispute and must be presumed to be the owners in the absence of proof of title by Plaintiff.

(6) Because the Defendants had been in undisputed and undisturbed possession of the lands depicted in Plans X and Y for well over the period of prescription before the action was brought and are entitled to an order dismissing the Plaintiff's action in regard to these lands even if the Plaintiff had succeeded in establishing her title.

E.F.N.GRATIAEN
WALTER JAYAWARDENA