Privy Council Appeal No. 22 of 1959

Cecily Harriet Matilda Peiris - - - - - - - *Appellant*

v.

Charlotte Mary Clara Fernando and another - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH FEBRUARY, 1961

Present at the Hearing:

LORD KEITH OF AVONHOLM
LORD DENNING
LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
MR. L. M. D. DE SILVA

[*Delivered by* MR. DE SILVA]

The appellant instituted this action against the respondents in the District Court of Kegalle for a declaration of title to twenty-eight parcels of land set out in two Schedules, eighteen in Schedule A (hereafter referred to as A1 to A18) and ten in Schedule B (hereafter referred to as B1 to B10), for an order of ejectment and for damages on the ground that the respondents were in unlawful possession of the said land. The respondents admitted possession but denied that it was unlawful. The second respondent is the daughter of the first and derives such rights as she claims from the first. It has not been necessary to refer to her rights separately.

The learned District Judge gave judgment for the appellant. On appeal to the Supreme Court (Pulle J. with whom Basnayake C.J. agreed) that judgment was set aside and the action dismissed with costs.

The land was situated in the Kandyan Provinces and at times material to this case it had all been chena (a type of land well known in Ceylon which is subjected to periodic cultivation) or jungle and certain provisions of law applicable to such land are relevant to this case.

Section 6 of Ordinance 12 of 1840 as it originally stood is to the following effect:—

> "6. All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan provinces (wherein no thombo registers have been heretofore established), be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except . . ."

Then follow certain specified exceptions which neither of the parties have sought to call in aid. They have no bearing upon this case.

Section 8 says:—

> "8. Whenever any person shall have, without any grant or title from Government, taken possession of and cultivated, planted, or otherwise improved any land belonging to Government, and shall have held uninterrupted possession thereof for not less than ten nor

more than thirty years, such person shall be entitled to a grant from Government of such land, on payment by him or her of half the improved value of the said land, unless Government shall require the same for public purposes, or for the use of Her Majesty, Her heirs, and successors, when such person shall be liable only to be ejected from such land on being paid by Government the half of the improved value thereof, and the full value of any buildings that may have been erected thereon."

Possession for over thirty years entitled the possessor to the land. There is also provision for the grant of "a certificate of the Crown having no claim" to any piece of land if after investigation such was found to be the case. If after investigation the Crown found that it was entitled to the land, as a matter of administrative procedure, during the period relevant to this case it frequently granted a Crown Grant on such terms as it thought fit to a person of its choice. It would usually be to the person (if any) in possession. The price required from such person would take into account the length of the period of possession and the improvements effected by the possessor. The grants under the administrative procedure just mentioned were made quite independently of the statutory rights conferred by section 8. Before such a grant was made there was a careful investigation by the Government Agent after very wide publicity had been given on the spot and elsewhere that an investigation was going to take place. Any person interested in the land would have had plenty of opportunity to make representations as to any interest he may have had. One such grant (discussed later) was made to the first respondent.

Certain amendments to Ordinance 12 of 1840 were made in 1931. They do not alter the passages set out above and moreover do not in any way affect the points that arise in this case.

The appellant claims on a chain of title (it would be more accurate to say two chains but as this fact is of no significance to what follows it will not be referred to further) which reaches back to two persons T. B. and H. W. Boyagoda who purported to buy the land from various persons at a time when it was still chena or jungle. The land was first planted in 1927.

On this appeal it has not been contended, quite rightly in their Lordships' opinion, with regard to any land forming the subject matter of this action, that the statutory presumption of title in the Crown in respect of jungle has been rebutted; nor has it been contended that the statutory provision in respect of chena namely that it shall "be deemed to belong to the Crown" comes within any of the exceptions mentioned in Section 6 (above). It is not disputed that the so-called chain of title was a chain of deeds from vendors who had no title as the title was in the Crown. Such deeds, often called village title (as was done by counsel in this case) while they pass no title are often used as evidence, far from conclusive, of possession. They are in appropriate cases of evidentiary value to support evidence of acts of physical possession but without the latter they are useless.

According to the appellant this chain of title covered the lands she claims as well as certain other lands. The lands covered by the chain stood in 1925 in the names of three persons, C. W. Peiris (husband of the appellant and a witness in the case), D. J. B. Ferdinando and A. C. de Mel, as joint owners (referred to hereafter as the syndicate). These three persons executed in respect of an undivided seven-twelfths portion of the land deed of conveyance No. 72 of the 22nd March, 1926, in favour of two persons, A. P. Craib and A. D. Callander, who started to cultivate the land for the first time. The balance five-twelfths was held by Peiris, Ferdinando and A. C. de Mel in declared shares. By a deed of 1929 C. W. Peiris transferred a share of the land covered by the chain to the appellant. The transfer was effected by reference to three portions, Utuwankande of about 500 acres, Kempitikanda of 540 acres and Moderatenna of about 40 acres. Subsequently by reason of transfers on a number

of deeds, the details relating to which do not appear to their Lordships to be relevant to this judgment, the appellant became the transferee of further shares till in September 1946 she was the sole transferee of the land covered by the chain. It will be seen that the land covered by the deeds in the chain was very much more in extent than the land claimed in this case by the appellant and it seems clear from the evidence that the syndicate and its successors planted and possessed a tract of land. The question for decision is whether or not that tract included the land the subject matter of this action.

Their Lordships will now deal with the lands set out in Schedule A. The blocks A1 to A17 appear in the plan X. A18 appears in plan Y.

In respect of title the appellant has nothing more than village title coming to her through the chain already referred to. This as already stated is a loose term for something which contains no element of actual title. The appellant's case is that the land was first planted in 1927 and before that it was jungle or chena. Peiris, the husband of the appellant, said:—

> "I knew the time the estate was planted in tea. Schedule A forms part of Ambulugala division of Kempitikande Group. The entirety of Ambulugala division was planted in tea—in extent 150 acres, in the year 1927. There were reserve lands also. When I speak of the lands in schedule A, it includes land A18 also. It was also planted in tea at the same time. A18 is some distance away from the main block".

He also said "The block I now claim was then either jungle or chena" meaning by "then" at a time prior to 1927. When he said "I now claim" he meant "my wife (the appellant) now claims" and was understood so to mean. It is contended by the appellant that from 1927 the appellant's predecessors in the chain of title were in possession till somewhere about 1946 when the respondent wrongfully encroached on the land. It was said for her that in such circumstances she was entitled to a declaration of title against the respondent, an order of ejectment and damages. It is conceded by counsel for the respondents that if the facts alleged by the appellant were substantiated she would be entitled to the relief she prayed for. The basis for this admission is the decision of the Supreme Court of Ceylon in the case *Unnanse* v. *De Hoedt* (22 N.L.R. 406) that even though possession for ten years will not defeat the title of the Crown (as the provisions of the Prescription Ordinance No. 2 of 1871 are of no avail against the Crown) yet by reason of certain provisions in that Ordinance, in a case to which the Crown is not a party, a person who has been in possession for ten years is entitled to ejectment against a person actually in possession at the time of the action even though the title at the time can be said to be in the Crown.

The case for the respondents can be stated in outline shortly thus: It is said there are chains of title which together cover the lands shown in plan X and reached down to the first respondent prior to 1930. It has not been argued that they conferred more than village title. Some of the transferors on these chains are the two Boyagodas mentioned earlier but this fact does not appear to their Lordships to make a material difference and they will not concern themselves as to how the Boyagodas came to make competing transfers. On an application made in January 1929 to the Government Agent of Kegalle District, after all the formalities and publicity which accompany such applications had been complied with, she was granted a Crown Grant dated the 7th August, 1930 covering all but two portions (these are dealt with later) of the land shown in plan X. It is the respondents' case that for some time before the Grant and from the date of the Grant up to date of action she was in possession. It is said for her that the plantation on the land was made by her servants and that the appellant never planted or had

possession. It is conceded by counsel for the appellant that if the facts alleged by her with regard to possession are established the respondents are entitled to succeed.

The Crown Grant of 1930 if not followed by possession (that is if possession had been in the appellant's predecessors) would not be sufficient because, as conceded by counsel for the respondents, possession by the appellant for a period of ten years or more would entitle the appellant under the provisions of the Prescription Ordinance to resist any claim by the respondents.

It will be seen from what has been said that the crucial question to be decided is the question of physical possession, namely, whether as the appellant alleges from about 1927 she and her predecessors in her chain of title had been in possession till ousted somewhere about 1946 or whether as the respondents allege they have been continuously in possession from somewhere about 1930.

The Supreme Court makes forcible reference to the implications of certain evidence given by one Hermon, a witness called by the appellant, whose evidence was regarded in the Courts in Ceylon as being beyond challenge and was not in fact challenged. During periods material to this case there was a Tea Controller in Ceylon with regard to whose functions all that need be said here is that in performing them he had to obtain assessments of the productivity of the estates in Ceylon and for this purpose his assessors frequently, if not always, visited them. In 1938 Hermon at the instance of the Tea Controller inspected the estate known as Uduwawela group belonging to the respondents and three plans were produced before him by the first respondent who claimed as hers the land shown on them. One of them was plan 1340. As stated by the Supreme Court "Lands A1 to A17 are admittedly within plan 1340". A tracing of plan 1340 was sent by Hermon to the Tea Controller as showing land shown by the first respondent as belonging to her. During his inspection Hermon verified the boundaries on plan 1340 with the boundaries of the land shown by the 1st respondent. Earlier, in 1934, Hermon had also visited Kempitikanda Estate to make an assessment for the Tea Controller. It is in a division called the Ambulugalla Division of Kempitikanda that the appellant says her blocks A1 to A17 are situated. "Is it possible" says the Supreme Court "that Mr. Hermon was shown in 1938 on behalf of the owner of Uduwawela an area already shown in 1934 as part of Ambulugala division of Kempitikanda? To this question Mr. Hermon's answer is precise. He says, 'The land which I inspected as Uduwawela estate was a different land to that what I inspected as Ambulugala division. If I went to the same land twice I would have identified it and reported so to the Tea Control Department. . . . If the same block was claimed by two different parties, I would have realised that there was a conflicting claim and would have reported to the Tea Controller'. It is unfortunate that the learned Judge does not advert to the implications of Mr. Hermon's evidence of his visit to assess the productive capacity of Uduwawela Estate." Hermon also visited the appellant's land in 1942 for the purpose of making a valuation. After referring to certain cogent facts which support Hermon's evidence the Supreme Court continues "The result which the plaintiff cannot avoid is that Mr. Craib in 1934 and Mr. Rodale in 1942 (both of them co-owners of Kempitikanda) did not claim the lands in dispute in this case as part of Kempitikanda or of Ambulugala division." Of Craib and Rodale it should be said that in addition to being co-owners they were superintendents of appellant's land, Rodale from 1935 and Craib before then.

Their Lordships find themselves in agreement with the Supreme Court. On that finding the inference arises that the appellant's predecessors (her husband C. W. Peiris was one of them) were not in possession at the times of Hermon's visits and that the story of continuous possession from 1927 is untrue.

If as stated by C. W. Peiris and argued for the appellant the appellant's predecessors planted and possessed the land from 1927 for several years they must have been dispossessed at some point of time by the respondents

who, it is agreed, are in possession now. The date of encroachment is said by the appellant to be somewhere about 1946. It could be suggested that the encroachment took place over a period of time or on a single day but the physical accompaniments of an encroachment thirty-two acres in extent (extent in plan X) could not have taken place without accompanying complaints to the authorities or at least to the respondents. It could not have passed unobserved however furtively it might have been done. The only evidence on the question of dispossession is that of C. W. Peiris. He had up to 1946 on his own evidence visited the land only four or five times. He does not speak to acts of physical dispossession such for instance as that of one or more persons on respondents' behalf preventing a worker continuing to work on the land for the appellant or her predecessors. No witness speaks to physical acts of dispossession. Peiris said "I had a land clerk, conductors and watchers" and again "I had a Kanakapulle residing at Ambulugala". These are employees of different grades usual on plantations. These employees would have observed incidents connected with dispossession if they had taken place and some at least of them must have been available as witnesses. None have been called. The Supreme Court (in a context not altogether the same as above) says "It is difficult to imagine by what process the plaintiff lost possession." This difficulty their Lordships share.

Blocks A1 to A17 shown in plan X form one tract and are just over thirty-two acres in extent. A18 shown in extent as just over eighteen acres in extent shown in plan Y is a separate block some distance away. The land to the south of the land shown in plan X is admittedly the respondents' and the suggestion is that the respondents encroached in a northerly direction. It is a significant fact that admittedly there is now no physical boundary between what is admittedly the respondents' land and the disputed tract on plan X. There is also no evidence and not even a suggestion that such a physical boundary ever existed. It is not probable that if, as stated for the appellant, the disputed tract had been in the possession of her predecessors for a considerable period only an imaginary line, that is a boundary unaccompanied by physical demarcation, would have existed between her land and the respondents'.

The Supreme Court refers to certain correspondence between the appellant and the second respondent beginning with a letter of the 2nd August, 1947 and ending with one of the 18th February, 1948. The first letter is as follows:—

"Dear Mrs. Perera,

Kempitikande Group/Ambulugala Division

Mr. N. W. Perera, our Superintendent of the above property has informed me that he has written to you regarding certain blocks of land at Uduwewela and Polwatta Villages, forming part of the above named Division, which, he says, have been encroached on by Uduwewela Estate belonging to you.

I am not in a position to say anything until the matter has been looked into by my lawyers. I believe you also may be in the same position. Shall we, therefore, refer this matter to be amicably looked into by your lawyers and mine and advise us so that we may abide by their decision?

I understand that your Superintendent is preparing to open up some of these blocks in Tea. I shall be much obliged if you will kindly instruct him not to incur any expenditure till the title to these lands is examined.

Kindly let me have a reply as early as possible.

Thanking you,

Yours sincerely,

MRS. CECILY H. M. PEIRIS."

Of this and the subsequent letters the Supreme Court says :—

> " They certainly do not give one the impression that the defendants were accused of forcible dispossession of plaintiff's agents or servants. The correspondence hardly throws any light on how large areas planted in tea and forming part of Ambulugala division had been encroached upon without the knowledge of those persons who were in charge of the division."

Their Lordships agree. It is to be observed that if there had been a physical encroachment it is not (as suggested by the letter set out above) primarily the lawyers who could have assisted but the employees on the spot. The correspondence suggests that about this time the appellant discovered not an actual enoroachment on land possessed by her but a real or imagined discrepancy between the area covered by the deeds constituting her village title and the area actually possessed by her.

In deciding the case in favour of the appellant the learned trial judge was materially influenced by the view he had formed that her predecessors had been in possession of 150 acres of tea in the Ambulugala Division of Kempitikanda. The learned trial judge thought that certain managing agents had stated that the Division was 150 acres in extent and had vouched for the extent. But as pointed out by the Supreme Court these agents did not manage the land on the spot and it is doubtful whether they could properly be called managing agents. The representative of one of these firms described his firm as a " financial " agency which financed the owners and kept a watch over the accounts. He said he could not say whether Ambulugala Division consisted of planted tea of the extent of 150 acres. He had not visited the estate. His firm did not have to inspect the estate or even visit it for business purposes. Other similar firms also kept accounts. These accounts refer to " 150 acres " but do not in any way vouch for the accuracy of the figure taken presumably from statements sent to them by the superintendents on the spot. There was no evidence from these superintendents or other employees on the spot. It has been argued that the superintendents must have had an approximately accurate idea of the extents stated in their reports, but their Lordships do not feel reliance can be placed on what they said as they have not given evidence. It is more likely that the figure was taken from a computation from deeds conveying parcels of land to which the grantors had no title as they, as stated already, belonged to the Crown. Statements in such deeds cannot be expected to have any regard for accuracy as to extent of the tracts they were intended to cover. In any case as already explained it is not extent covered by the deeds but the extent possessed that matters. The Supreme Court held that the learned trial judge had misdirected himself in drawing the inferences that he did from the reports of the agents mentioned. With this their Lordships agree.

If, as would appear to be the case on what so far has been stated, the appellant fails to establish possession her case fails whatever may be the position of the respondents. Their Lordships will however consider the material furnished by the respondents as it supports what has already been said. Prior to 1930 the 1st respondent had a chain of title with regard to which the Supreme Court observed quite correctly " The appellants' (present respondents) chain of title undoubtedly is as speculative as the plaintiff's or of any other person who seeks to arm himself with deeds with the purpose of encroaching on and exploiting Crown lands in the Kandyan districts. The fact, however, is indisputable that by deed marked D29 of 18th January, 1928, one A. R. Senanayake and H. W. Boyagoda (two persons who figure in plaintiff's chain of title as well) purported to sell a number of allotments of land of which one was called Uduwawela estate of 85 odd acres, depicted in Plan No. 1340 of 22nd July, 1927 ".

Supported by the deed D29 the 1st respondent made an application for and received in 1930 a Crown Grant (mentioned above) for a block of land lying within plan 1340. The Grant as already stated covers the

greater part of the land shown in plan X. The publicity accompanying the enquiry into the application would have made any one in the neighbourhood who was interested in the land conscious of the fact that an official enquiry was being held with regard to it. The appellant's predecessors took no steps to make a claim themselves or to resist the 1st respondent's application. The inference that this suggests is that at that time they were not in possession of the land shown in plan X.

The 1st respondent had taken the trouble to obtain a Crown Grant in 1930 and, as observed by the Supreme Court, it is remarkable that if the appellant's predecessors had been in possession the 1st respondent would not have taken some steps to assert her rights under the Crown Grant without waiting till 1946 to commit a questionable act of trespass. In 1946 the Crown Grant would have ceased to confer any benefit on the 1st respondent if the appellant's predecessors had from 1930 onwards been in possession for over ten years.

D29 had been rectified by another deed D30. D30 was not among the documents supporting the application to the Government Agent and appellant has argued that this was a fraudulent suppression. The absence of the D30 from the documents submitted lends itself to this suggestion which however turns out on examination to be groundless. It has been held by the Supreme Court that deed D30 conveyed a second time all that had been conveyed by D29 and that the effect of D30 was only to add to what had already been conveyed by D29. The Supreme Court said "I do not see how any adverse comment on that application could be made for the reason that a deed of rectification D30 of the 8th February, 1928, was not mentioned in it. There is a recital in D30 that there are other lands comprising Uduwawela estate which are outside Plan No. 1340. The 1st defendant had supplied sufficient particulars to the Government Agent in regard to the identity of those portions of land appearing in Plan No. 1340 which she desired to be settled on her." With this view their Lordships agree and it disposes of the suggestion that the Crown Grant was obtained by the fraudulent supression of the deed of rectification. It is to be observed that even if there had been a fraudulent suppression it would still not explain the failure by the appellant's predecessors to interest themselves in the investigation which was undoubtedly taking place with regard to the land covered by the Crown Grant.

Their Lordships have so far dealt with the land shown in the Crown Grant which is the greater part of the land shown in plan X. As pointed out by the Supreme Court there are two portions in plan X which are outside the Crown Grant. The Supreme Court says:—

> "One is on the South-western end in that plan and is marked T.P. No. 312359. A copy of the title plan is the document P71. This lot has been clearly identified as the seed bearer portion of Uduwawela estate in Mr. Hermon's report D12. His evidence, which has already been dealt with in some detail, corroborates the case set up by the defendants that they were all along in possession of this block."

The second block is shown in the plan No. 1964 (document marked D32). In respect of this block the first respondent obtained a decree for declaration of title in 1932 and of this the Supreme Court said:—

> "It is again inconceivable that the first defendant successfully vindicated title to this lot against two villagers without having had at some period possession of it or that after obtaining the decree she did not continue to possess it. The possibility of the owners of Kempitikanda group having had possession before or since 1932 has to be ruled out."

Their Lordships have formed the same view.

It has not been argued that the possession of the block A18 (plan Y) was different from that of the blocks A1 to A17. The Supreme Court arrived at the same finding with regard to land shown on plan Y as

they did to the land shown on plan X and their Lordships are of opinion that this finding is correct.

Nothing has been said so far as to the land shown on plan Z (plots B1 to B10 in Schedule B). According to the appellant at the time the respondents encroached on it the land was chena and had not been planted. Consequently at the time of the alleged encroachment the property belonged to the Crown. According to the appellant the respondents have been in possession ever since. As on her own showing the title was in the Crown her case fails whatever the position of the respondent may be.

Various plans have been referred to in the course of the argument. Plans X, Y and Z were prepared at the instance of the Court and have served to indicate the tracts over which the dispute has arisen. Their Lordships do not think it necessary to discuss the other plans as whatever they may purport to indicate as to title, the land shown in plans X and Y belonged to the Crown in 1927 and unless the plans can be of evidentiary value to establish possession since 1927 they are of no value at all. The appellant has not succeeded in making use of them for this purpose. Their Lordships will however mention one such plan. In 1925 Surveyor Thiedeman prepared the plan P17 produced by the appellant. Of this he said " No earlier plans were given to me nor any deeds ". He went on to say " The boundaries had been cut through chenas before I got on to the land. I think it was Mr. Craib and Boyagoda who pointed out these boundaries. Mr. Craib had them prepared for me ", and again " Except for the cut lines there were no physical features on the land. The cuts looked new—about a couple of months before I went. I made no verification of the lots ". The land at the time of the survey was chena and belonged to the Crown. The boundaries cut through chena were prepared for the purposes of the survey. There was no evidence from Craib or Boyagoda. The value of the plan is extremely obscure.

Their Lordships will now deal with the argument that the findings on the facts of the trial judge who saw and heard the witnesses should not have been disturbed. It is well established that findings of primary facts by a trial judge who sees and hears witnesses are not lightly to be disturbed on appeal. In this case however the course taken by the Appellate Court is, in their Lordships' opinion, fully justified.

The learned District Judge failed to realise that in 1927 the land was chena or jungle and was therefore the property of the Crown. The appellant's right to the land if it existed at all would have had to rest on possession. The learned District Judge treated the deeds (mentioned above) produced by the appellant as establishing legal title in her which they clearly did not, and would not have done even in the absence of the Crown Grant produced by the respondents. The basic approach to the case made by the District Judge was therefore wrong. His findings have been influenced by that wrong approach.

Further his findings on the facts were not based so much on credibility as on wrong inferences from documents some at least of which he has misread. For instance speaking of the valuation made in 1942 by Hermon he says " Hermon who visited the estate was shown round by Rodale the superintendent and found the estate (i.e. Ambulugala) to be 150 acres in tea planted in 1927 ". He did no such thing. He was careful to say in the report (document P.83) that on the question of extent he was shown no plan and that 150 acres was mentioned to him as possibly an approximate extent. He was careful not to vouch for the accuracy of this extent. A similar error is repeated with regard to a report made by one Gordon Fellowes and must have gone a long way to forming the impression in the learned District Judge's mind that the appellant's predecessors were in physical possession of 150 acres. The reports from the so-called managing agents which led the learned District Judge to the same conclusion have been discussed earlier.

Credibility would have been heavily involved if witnesses who actually put plants on the disputed land or supervised or even saw such planting

on the spot had been called by the appellant to support her case. Credibility would also have been involved if witnesses who spoke to physical acts of ouster had been called. But no such witnesses have been called. Peiris says that up to 1946 he visited the land only four or five times. He does not say he saw any acts of planting nor does he say he saw any acts of ouster. The advantage that a trial judge enjoys in deciding questions of fact of having seen and heard witnesses is not evident in this case.

The learned trial judge has failed to consider and pay due regard to certain important features of the case such for instance as Hermon's visits when the land shown in plan X was shown by the 1st respondent as belonging to her and possessed by her and not shown by those in charge of Ambulugala as belonging to and possessed by the appellant's predecessors. This feature is almost conclusive on the question of possession.

Their Lordships have examined the evidence in detail and they have formed the view that that evidence fully supports the views of the Supreme Court mentioned above and other views expressed by it in favour of the respondents. They do not think it necessary or useful to discuss those other views. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of this appeal.

(39404) Wt. 8109—53 100 3/61 D.L.

In the Privy Council

CECILY HARRIET MATILDA PEIRIS

v.

CHARLOTTE MARY CLARA FERNANDO
and another

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