1934 *Present* : **Garvin S. P. J. and Maartensz J.**

UPARIS *et al. v.* ROBERT *et. al.*

23—D. C. Galle, 30,946.

Malapala lands—Nature of tenure—Possessed by minor headmen and cultivators—Registration as owners before the Landraad.

Malapala lands are lands which have reverted to the Crown owing to the failure of heirs. They were given on certain conditions to minor headmen to be possessed by them as remuneration for their services or to cultivators upon terms that they gave a share of the produce to the Crown. In both cases the lands remained the property of the Crown, but by a Proclamation of the year 1800 the occupiers of such lands to whom they were given as remuneration of services were permitted to appropriate the same upon terms that they proved the material facts before the Landraad.

APPEAL from a judgment of the District Judge of Galle.

H. V. Perera (with him *J. R. Jayewardene*), for plaintiffs, appellant.

N. E. Weerasooria (with him *E. B. Wikramanayake*), for defendants, respondent.

June 11, 1934. GARVIN S.P.J.—

This was an action for a declaration of title to a land, Weligodamulla. It was the case for the plaintiffs that by right of purchase upon a Crown grant, dated September 23, 1889, one Endoris de Silva became entitled to the entirety of this land. Endoris had a number of children. To four of these—Alwis Dias, Elias Dias, Marthenis Dias, and Jane Dias—he conveyed the premises by the deed No. 9,166, of September 27, 1912. Alwis Dias had mortgaged his ¼ share, and in due course his interests were brought to sale in execution of a decree in favour of the mortgagee and were purchased by his brother, Robert Dias. In the year 1920 by the deed P4, Robert Dias and the other three co-owners conveyed the premises to the second plaintiff who was their sister. The evidence shows that this transfer though in form a conveyance on sale was in reality executed at the instance of their mother by way of dowry to their sister, Baby Nona, the second plaintiff, on the occasion of her marriage to the third plaintiff. The second and third plaintiffs leased the premises to the first plaintiff in the year 1930, and it is alleged that while the first plaintiff was in possession as tenant of the second and third plaintiffs. he was ousted by the defendant. The third defendant is herself a daughter, presumably the eldest daughter of Endoris de Silva. She was married to one Hendrick William, who died in the year 1908. The first defendant is their son. The defendants claimed to be entitled to a half share of this land which they call Wellegedamullaowita. They pleaded that the premises belonged in equal shares to one Mathes and another; that Mathes by the deed 1 D 3 of the year 1877 conveyed his half share to Moses de Silva, who by the deed 1 D 4 of 1884 sold to Babappu and that Babappu by the deed 1 D 5 of 1890 sold to Hendrick William. They

pleaded further that the land, which is said to be of 55 pelas extent, was Malapala land which belonged as to 4/5 to Mathes and his co-owner, while the remaining 1/5 belonged to the Crown. They alleged that the Crown grant in favour of Endoris was only effective to pass title to a 1/5 share of the land and denied the right of the plaintiffs to anything more than a 1 5 share of this land.

The learned District Judge dismissed the plaintiff's action with costs and declared the defendants entitled to an undivided half share of the land. In view of his own finding that the Crown grant was effective to pass title to a 1/10 and the admission throughout the evidence in this case that Endoris and his successors in title including the plaintiffs have together for the last 45 years been in possession and enjoyment of a full half share of the land the decree in so far as it dismisses the plaintiff's action cannot be sustained. It is urged, however, on behalf of the plaintiffs who appeal that the learned District Judge's conclusion was wrong and that upon the evidence judgment should have been entered for the plaintiffs as prayed for.

Now the learned District Judge has accepted the submission that this was Malapala land. This finding is based upon a note in an extract from a register of sale of Crown lands. The document is headed "Statement of offers made for the under-mentioned portion of Crown land in the Gangaboda pattu at a sale held at the Baddegama Rasthouse on December 12, 1887". There follow particulars of the date of sale, the number of the preliminary plan, the name of the land, its situation, the extent, the name of the purchaser, survey fees, upset price, and the "amount of sale". Entries made under that head show that the land, Wellegodamulla, was purchased by Don Endoris de Silva. In the column relating to the situation of the land which is said to be Udaweliwitiya there appears the following:—"1/10 Malapala (*see* marginal note)". Having arrived at the conclusion that the land was Malapala, the District Judge appears to have accepted the submission that Malapala lands were lands in which the Crown was a co-owner with its subject and that in this particular instance the Crown was entitled to 1/10 of the land, the remaining 9/10 being the property of the persons in possession.

The term "Malapala" as the word signifies was applied to lands which had reverted to the Crown through failure of heirs. Such lands were sometimes given to certain classes of petty headmen to be possessed and enjoyed by them as remuneration for their services upon condition that ¼ of the produce was given to the Government. In other instances the land was merely given to a cultivator upon terms that he was to give the Government a share of the produce which was generally a half but which was often considerably reduced where the soil was infertile and difficult to work. In both cases the Crown remained the owner of the land, but by the Proclamation of May 3, 1800, the occupiers of Malapala lands to whom the same were given as remuneration of services were permitted to appropriate the same upon terms that they proved the material facts before the Landraad and caused them to be registered in the registry of the district. The occupier thereupon became the owner of the land subject to a liability to pay the Crown a ¼ share of the produce. In all other cases Malapala lands remained the property of the Crown. There

is no evidence here that this land was at any time given out as remuneration for services or that it was "enregistered" as required by the Proclamation of 1800. There is no evidence at all of any regular payment of a ¼ share to the Crown at any time. Indeed, if any inference is to be drawn from this entry in the Register of Sales which is the only evidence which has any bearing upon this question it is that it was regarded as Crown property and at the disposal of the Crown. The figures 1|10 consistently with the rest of the document would seem to indicate that the share exacted from the cultivator was one-tenth. The inferences arising from this entry are consistent with the Crown grant whereby the Crown purported to sell and convey the entire land and not any limited interest therein. Indeed, there is nothing either in this case or in the history of Malapala lands to support the suggestion that the Crown was a co-owner in this land to the extent of 1|5 as originally suggested or to 1|10 as later found by the Judge. The plaintiffs are thus able to relate their title to a grant from the Crown and the entry in the extract far from being antagonistic to this claim supports their contention that the Crown had good title to the land, for as I have endeavoured to show the Crown is the owner of all Malapala lands except such as have passed into private ownership by reason of the appropriation permitted by the Proclamation of May 3, 1800.

It is by no means unlikely that prior to the date of the sale by the Crown this land was cultivated and possessed from time to time by villagers and possibly by Moses and that the occupiers came to regard themselves as having some right in the land. This would explain and account for the deeds produced by the defendant. But it is a striking circumstance that while the defendants claim that Hendrick William and his predecessors did enjoy a half share there is no evidence whatever of any possession or enjoyment of the remaining half share by those to whom they allege it passed. Indeed, it is admitted that Endoris from the time of the Crown grant did exercise rights of ownership in respect of this land which are wholly inconsistent with the suggestion that all that he obtained was a 1|5 or a 1|10. The District Judge states with reference to the possession of the plaintiff's predecessors in title "Their possession . . . .. enures to the benefit of the defendants their co-owners. This appears to me to be fortunate for defendants as they could hardly expect to support their position on both tattumaru possession and also an amicable division by a fence". There can be no question, therefore, that the plaintiffs and their predecessors in title have been in possession of this land and that that possession is ascribable to a grant of the entirety of this land from the Crown which apparently was vested with good title to the premises at the time of the grant. If the defendants are to succeed it can only be by proof of a prescriptive title. They do not claim to have acquired anything more than a half share of the land and as is evident from the District Judge's observations he was inclined to the view that the land was in the possession of the plaintiffs and not of the defendants.

To reinforce the title based upon the Crown grant the plaintiffs called a large number of witnesses, among them usufructuary mortgages of the whole land. These witnesses not only proved that the entirety of this land was possessed and enjoyed by the plaintiffs and their predecessors

but repel the submission of the first defendant that for the last 22 years the land had been divided into two parts by a fence, one portion being possessed by the plaintiffs and the other by themselves. The first defendant in the course of his evidence stated at one stage that all that Endoris received originally was a 1/5 share of the produce from those whom he contended were the real owners of the land. He admitted after perusing the document 1 D 1 that he could only have received a 1/10. He later stated that his father and Endoris, his grandfather, possessed the land in tattumaru and later on that upon the death of his father which took place in 1908 and thereafter the land had been divided into two portions by a fence. Now what the evidence for the plaintiffs shows is that such a fence had been erected shortly before this case came into Court and the existence of a fence for a period of 22 years is totally denied, among others by the peace officers of the district. Indeed, the third defendant who was the first defendant's mother, herself the daughter of Endoris, when speaking of the fence stated: "The fence running across the land was put up four or five years ago. Before that there was no separation of the land". In such circumstances it is quite impossible to accept the defendant's evidence of possession. Indeed, the only circumstance in the defendant's evidence which is consistent with a claim of right is a lease granted in the year 1890, by Hendrick William, of this land and another land called Adaragankande. The period of the lease was five years. Endoris appears to have acquiesced in the lease, but thereafter every document produced was executed by Endoris. They consist of two usufructuary mortgages and one other bond mortgaging the property. The explanation suggested for the lease by Hendrick William is that his father-in-law Endoris permitted him to possess the land. A circumstance which supports this explanation is that the other land, Adaragankande, admittedly belonged to Endoris and is not even claimed by the defendants. If Endoris permitted Hendrick William to lease and presumably appropriate to himself the profits of the lease of Adaragankande, there is no reason to reject the same explanation of the circumstance that Hendrick William is found by the same document to have leased the land now in dispute. That lease expired in 1895, and the effect of the evidence both oral and documentary is that the land thereafter remained in the possession and enjoyment of Endoris and his successors in title.

There is another circumstance which is not without significance. The conveyance in favour of the second plaintiff was, as stated earlier, granted at the time of her marriage to the third plaintiff in the year 1920. The third defendant who is a sister of the second plaintiff stated that she attended to everything in connexion with marriage, that she was consulted in regard to the proposal but that she did not know whether this land was transferred to the second plaintiff as dowry. She added, "I do not know what was given her as dowry". Later, in her evidence, she stated: "My brothers and sisters transferred their half share of Weligodamulla to the second plaintiff as dowry". Since her son, the first defendant, says "I heard that this land was given as dowry to the second plaintiff", there can be little doubt that she was fully aware of the transfer of this land as dowry to the second plaintiff in 1920. Being aware of it she and

her son appear to have acquiesced in it until unpleasantness arose at the time of the distribution by the third defendant's mother of her property.

The defendants clearly failed to establish a title by prescription or any other title to the half share they are claiming, whereas on the contrary the title of the plaintiffs which appears to me to be unimpeachable is reinforced by clear evidence of adverse and uninterrupted possession for ten years and more.

The judgment under appeal is set aside and judgment will be entered for the plaintiffs as prayed for, save that damages will be assessed at the rate agreed upon. The plaintiffs are entitled to their costs both here and below.

MAARTENSZ J.—I agree.

Appeal allowed.