Present : **Howard C.J. and Keuneman J.**

BANDULHAMY *et al.*, Appellants, *and* TIKIRIHAMY *et al.*, Respondents.

169—D. C. Ratnapura, 6,391.

Evidence—Plaintiffs proved to be in possession of land—Burden on defendant—Hewelande land—Nature of tenure—Evidence Ordinance s. 110.

Where plaintiffs and their predecessors have been proved to be in possession of a land, the burden of proving that they were not the owners lies upon the defendants.

Hewelande land includes land given on cultivation, the cultivator's share being half the crop after deducting various payments called *warawe*.

Quaere (1) Is such right of cultivation in perpetuity, or heritable or transferable ?

(2) Do customary hereditary rights of cultivation unassociated with soil right exists in Ceylon ?

APPEAL from a judgment of the District Judge of Ratnapura.

N. Nadarajah, K.C. (with him *G. E. Amerasinghe*), for plaintiffs, appellants.

H. V. Perera, K.C. (with him *E. A. P. Wijeyeratne*), for defendants respondents.

Cur. adv. vult.

October 28, 1943. KEUNEMAN J.—

This is an action for declaration of title. The plaintiffs claimed title to a 1/12th and 1/72nd share of the land called Tunpelecumbura, and claimed that as lessees of other shares they were entitled to open pits and

excavate for gems in an undivided ¼th plus 1/18th share of the land. They also asked for an injunction restraining the defendants and their agents and servants from opening pits and mining for gems until the determination of the action. They also prayed for quiet possession and damages.

The first, second, and third defendants filed answer, denying the allegations in the plaint, and asked for the dismissal of the plaintiffs' action, and claimed certain damages till the dissolution of the injunction, and for shares of the crop. The first defendant alone claimed title to the land, and the second and third defendants alleged that they were merely the agents of the first defendant.

In substance the plea of the defendants was that the predecessors of the plaintiffs owned no share of the soil rights, but were only "Hewel Andakarayas", and in any event not entitled to mining rights.

The field in question has a long history. The earliest document relating to it was D 1, produced by the defendant. This is a very interesting document. It is headed "Vidana-gan or Gabadagan of Uda Pattu, Nawadun Korale". Under the heading "Name of owner", there appears three names:—(1) "Doloswala Disamahatma", the predecessor of the first defendant, (2) "Gal-amune Patabenda", and (3) "ditto Unguralaya". (2) and (3) are the predecessors of the plaintiffs. The field is said to be 1 amunam in extent, and it is agreed that this is the extent of the whole field. The assessment is for the years 1826 to 1830. Under the heading of "assessment" for each of these years, there is a blank column. But there is a separate column headed "Crop assessment", where the figure of "112 beras" is given. A further column headed "Income of Government in paddy" has the entry "8 beras". In the "remarks" column is the entry "Exempted from taxation for *Radalakama*".

A great deal of argument has been addressed to us with regard to this document. For the plaintiffs it is argued that this document shows that the predecessors of the plaintiffs asserted rights as owners of soil shares and were recognised as such owners by the authorities. I think this argument is entitled to great weight, and I do not think that this entry is consistent with the theory that the only right of the plaintiffs' predecessors was a hereditary right of cultivation, without any soil rights, as contended for by the defendants. Counsel for the defendants relied very strongly on the "remarks" column, and contended that the whole land was exempted from taxation "for Radalakama", and this word clearly relates to the exemption from taxation of the lands of Doloswala Disamahatma. But I doubt whether the whole land was exempted, because the Government income in paddy is set out as 8 beras of paddy, and this may be regarded as the share payable by Patabenda and Unguralaya.

On the whole, I think this document D 1 does support the contention that at this early date the predecessors of the plaintiffs were claiming rights as owners and were recognised as owners. It is difficult to understand why a person whose only right was that of cultivation in perpetuity, as the defendants contend, should be entered in the register as an owner.

The later documents strongly support this view. There have been several dealings with the land by the persons in plaintiffs' pedigree on the footing that they were owners. In the year 1848 Galamunage Unguhamy, who is said to be the same as the Unguralaya of D 1, granted to his wife Dinkirihamy "the share which comes to me as *Tattumaru* turns in two years of every three years of one half share" of this field. This is a clear transfer of soil rights, and on the footing of this deed the plaintiffs allot to Unguralaya 2/3rd of ½ of this land, and to Patabenda 1/3rd of ½, and subsequent deeds also proceed upon this footing. The evidence shows that Patabenda had a son, Kaluhamy, who in 1871 by P 1 transferred a 1/6th share to Anadahamy, a son of Unguralaya. Unguralaya has four sons, Anadahamy, Mituruhamy, Mudalihamy, and Pinhamy. Mituruhamy by P 2 of 1896 conveyed his 1/12th share to Anadahamy. Anadahamy himself transferred the shares he had inherited and acquired to his grandchildren and to his son by P 3 and P 4 of 1899. Pinhamy by P 8 of 1898 gifted his 1/12th share to his three children, who leased to the first and second plaintiffs by P 6 of 1937. Mudalihamy had three children, and the second plaintiff and fourth defendant acquired the share of one child Ran Etana by P 5 of 1921, and the second plaintiff obtained a lease P 7 of 1937 from another of the children Rankirihamy. The share leased is 5/36th and there are two lessors, but Rankirihamy appears to have transferred her 1/36th share to her husband, Bandulahamy, previously by P 36 of 1914. What rights the other lessor in P 7, Dingirihamy, had, I have not been able to discover.

In addition to this, there is a mortgage bond P 23 of 1888 by Mituruhamy to Pinhamy of 1/12th; another mortgage bond P 24 of 1894 by Mituruhamy to Mudalihamy of the same 1/12th; and another mortgage bond P 25 of 1932 by Jasohamy, one of the grantees under P 8, and by Ratranhamy, said to be a child of Mudalihamy.

No doubt these documents are all or almost all deeds executed within the family, but there is no reason to doubt that they were regarded by the recipients as genuine deeds, and the land has subsequently been dealt with upon the footing of these deeds.

The plaintiffs have also produced a number of documents relating to the grain tax, to show that their predecessors have had the grain tax levied upon their shares of the field in question. The documents P 9 to P 22 relate to the period from 1883 to 1892, and are in the nature of receipts. Further, the registers P 27 to P 30 show members of the plaintiffs' pedigree entered as owners for periods during the sixties and the seventies of the last century. The actual years have not been reproduced in the copies. Registers P 31 and P 34 show that the four sons of Unguralaya are entered as owners of this field in 1881.

P 37 is perhaps the most significant of these registers, for in it the name of the owner of the field in question is given as Ratnapura Bandara, a predecessor of the first defendant, but the extent is given as 2 pelas instead of 1 amunam. The plaintiffs argue that this shows that Ratnapura Bandara was only entitled to ½ the field. P 37 is for a period of years in the sixties and seventies of the last century. P 35 is another

register in which Ratnapura Bandara is entered as owner of this field the extent being given as 2 pelas, but the date of the register does not appear.

It has been contended for the appellants, and I think rightly, that there is very strong evidence to show that the predecessors of the plaintiffs held the land on the footing that they were owners of a half share of the soil rights. That the predecessors of the plaintiffs were in possession of the land has been amply proved, and in fact has been admitted by the defendants, and under section 110 of the Evidence Ordinance the burden of proving that the plaintiffs and their predecessors were not owners lay upon the defendants.

The case for the defendants is as follows:—They contend that Doloswala Disamahatma was the owner of the whole field of 1 amunam. I have already dealt with their contention as regards D 1. They have also produced the will of Doloswala Disamahatma, D 2 of 1837, in which he devised this field together with a very large number of other properties to his son-in-law. The point is made that he deals with the whole of the land, and not merely with a share. In the inventory D 3 the field is described as 1 amunam in extent. D 4 is a mortgage bond by Ratnapura Bandara, already mentioned, in 1876 of this field of 1 amunam. In view of the suggestion to be dealt with later, I may mention that among the other properties mortgaged are the "Hewelande" of two different fields, but there is no mention of "Hewelande" in connection with the field in question. I cannot say that a satisfactory explanation of the difference has been given to us. D 5 is another mortgage by the same mortgagor of this field among other lands in 1882. In the inventory D 6 of the estate of Ratnapura Bandara, this field of 1 amunam is included, and his successor mortgaged this field among other lands by D 7 of 1905. I may remark here that this field Tunpelecumbura appears together with a very large number of other lands in the will D 2. There is no description of the extent or the tenure. In the inventory D 3 the extent of 1 amunam is given, and the subsequent documents D 4, D 5, D 6, and D 7 reproduced that description. D 3 to D 7 deal with a large number of lands. If we bear in mind the documents produced by the plaintiffs, I do not think the defendants' documents sufficiently displace the inference that the plaintiffs' predecessors claimed soil rights in half this land, and that only the balance half share was vested in the Doloswala family.

The explanation offered by the defendants of the possession of the plaintiffs' predecessors is that the latter were "Hewel Andakarayas", whose only right was to cultivate the land—this was a perpetual and hereditary right—and to give the ground share, namely, one half, to the owners. They say that the Hewel Andakarayas had no right to the soil and no right to dig for minerals. A witness, Tikiri Banda, Chairman of the Village Committee, said that it was the custom for the owner to entrust a field to asweddumise, and the man who asweddumises has by arrangement the right to cultivate always—a right which is heritable and can be transferred by deed, but the soil rights remained with owner. Ellawala Rata Mahatmaya gave evidence to a similar effect. But I do not think this is evidence of any value, for neither of these witnesses claims to be a student of this system of land holding, and their experience

of "Hewelande" is scanty and unconvincing. These witnesses cannot claim to be experts in this connection. Undoubtedly, however, "Hewelande" is a term in use. Codrington in his *Glossary of Native, Foreign and Anglicized Words* describes "Hewelande" as (1) Cultivator's share of the produce of a field, being half of the crop after deducting various payments called *Warawe* . . . . , (2) Paddy paid for hire of cattle, (3) Share of the crops to which a person is entitled for the trouble of ploughing". It is to be noted that Codrington nowhere suggests that the right is one in perpetuity, or heritable, or transferable. Nor has any authority been cited to us to show that by custom hereditary rights of cultivation, unassociated with soil rights, exist in Ceylon, and it is difficult to see how such rights can be split up into fractions by the law of inheritance, and still be exercised.

I may add that the plaintiffs' witnesses denied that "Hewelande" applied to the field—whatever the meaning of the term may be. In none of the plaintiffs' deeds is there a reference to it in connection with this land, except in P 36 of 1914. In that case the transferee was Bandulahamy, and the transferor, his wife, Rankirihamy, who appears in plaintiffs' pedigree. It is, however, in evidence that Bandulahamy was a servant of the Doloswalas, and that in 1912 trouble had broken out between the Doloswalas and plaintiffs' predecessors in connection with the latter using clay from this land for tile making. Rankirihamy herself subsequently leased to the second plaintiff by P 7 of 1937—it is not clear whether her husband was alive or dead at the time. I do not think we can regard P 36 as establishing that the plaintiffs' predecessors were Hewel Andakarayas. It is to be noted in this connection that register P 38 shows that in the sixities and seventies of last century it was not unusual for a field given in Hewelande to be so described in the remarks column. This register does not relate to the land in question. The registers relating to this field in question contain no such reference.

The defendants themselves led no evidence to show that the Doloswalas gave this field to the original predecessors of the plaintiffs to be asweddumised. In fact the history before 1826 is unknown to us, and I do not think we can draw any inferences from the documents in this respect.

The learned District Judge held that Doloswala Disamahatma was the original owner of the whole field. There is no satisfactory evidence of that, and the District Judge was wrong in so holding.

A good deal of the evidence turned on the question whether the plaintiffs' predecessors and the defendants' predecessors held the land in *tattumaru*. The learned District Judge held against the plaintiffs in this respect. But the reasons he gives are not supportable in their entirety. The defendants produced D 8 and D 10, which purported to be leases taken by Mohottihamy in 1907 and 1908, *i.e.*, two years in succession, from the Doloswalas. Now Mohottihamy is described here as Galamunegedera Mohottihamy, while in all other documents the name given to the Mohottihamy in plaintiffs' documents is Galamuna Patabendige Mohottihamy. This is not all. The defendants have entirely failed to prove the signature of Mohottihamy, and the documents which were objected to

should have been rejected. The next point made by the District Judge was that grain tax was collected for a number of continuous years from members of plaintiffs' pedigree—*vide* P 20 of 1882, P 21 of 1883, P 12 of 1884, P 9 of 1885 and P 13 of 1886—and the District Judge concluded that this showed that these people cultivated each year. But this does not follow. Whatever the private arrangement may have been between the Doloswalas and the plaintiffs' predecessors, whether *tattumaru* or not, the grain tax would be payable yearly and would be levied on the owners liable each year. The District Judge also depended upon the Vel Vidane's list of cultivators of this field, D 18, but it is clear that most of the particulars in the Vel Vidane's list were provided by the Doloswalas and that the plaintiffs' predecessors were not consulted. Ellawela Rate Mahatmaya's evidence that the plaintiffs' claim as Hewel Andakarayas at the inquiry is not supported by any note made at the time. The finding of this point is very much weakened, and I think the evidence of the Gan Arachchi called by the plaintiffs was not shaken to the extent the District Judge thought it was.

But perhaps the most significant omission of the District Judge was his failure to realize that while *tattumaru*, if established, would be conclusive of the plaintiffs' case, the failure to establish that fact did not give conclusive effect to the defendants' contention. Even if the plaintiffs' predecessors cultivated each year, the question was whether they gave the Doloswalas a half share of the crop each year, or in alternate years appropriated the whole crop for themselves, or gave less than half to the Dolaswalas each year. Nowhere in their evidence have the defendants said that they received a half share of the crop each year.

On an examination of the whole of the evidence, I am of opinion that it has been proved that the plaintiffs' predecessors in title were in possession of this field as owners of a half share. They were in such possession for over a century, and accordingly must be regarded as owners of a half share of the soil by prescription. The plaintiffs are accordingly declared entitled to an undivided 1/12th and 1/72nd of this field. They are also declared entitled to open pits and excavate for gems. They are also entitled to the leasehold rights under P 6. As regards P 7, if the question now arises, the Court will determine whether Dingirihamy and Rankirihamy had any interests at the time of P 7. The claim in reconvention of the defendants is dismissed. The District Judge has not determined the question of damages to the plaintiffs, and the case must be sent back for the determination of that matter. It is very desirable that the parties should come to some agreement on that point.

The appeal is allowed in the manner I have indicated. The plaintiffs are entitled to costs in this Court and in the District Court from the first, second and third defendants.

HOWARD C.J.—I agree.

Appeal allowed ; case remitted.