Privy Council Appeal No. 40 of 1961

West Bank Estates Limited – – – – – – *Appellants*

v.

Shakespeare Cornelius Arthur (substituted for John Victor deceased) and others – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF THE WEST INDIES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JULY 1966.

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD WILBERFORCE

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a decision of the Federal Supreme Court of the West Indies in its appellate jurisdiction for British Guiana which reversed the judgment of the trial judge in the Supreme Court of British Guiana. Although there were originally two separate actions, they were heard together and a single judgment was given in both Courts. Their Lordships will deal with the matter in the same way, though they will refer separately to the two proceedings at the conclusion of their judgment.

The dispute relates to the boundary between the land of the appellants and that of the respondents, and in particular to the title to a thin strip of land over a mile long, running from east to west. At the wider, western, end it is about 100 yards in width; it tapers to about 30 yards at the narrower, eastern, end. It may be pictured as a long thin wedge or triangle with the tip cut off: the tip itself, though not the subject of present contention, was also at one stage the subject of dispute, and will be the subject of later mention.

The land to the north of the disputed strip belongs to the appellants and is known as the Reynestein Plantation; that to the south to the respondents and is known as Lot 33, being one of several lots carved out of a larger estate known as the plantation of Maria's Lodge cum annexis. Up to 1836 Reynestein and Maria's Lodge were adjoining plantations, each with a depth (running from east to west) of 750 roods—a rood being 12 feet. The measurement was taken in each case from the River Demerera, which forms the eastern boundary of each estate, and much of the difficulty which has arisen derives from the natural fact that the course of the river is not straight. For this reason, the western boundaries of the two plantations are not aligned, and it has not been easy to define with accuracy the direction of the boundary lines running 750 roods from east to west. In 1836, the owners of Reynestein sold to the owners of Maria's Lodge a slice off the southern part of their estate described as of 100 roods facade (*i.e.*, width from north to south)—hence the present description "Maria's Lodge cum annexis"—and it is out of this slice that Lot 33 was formed.

The present proceedings (initiated by the respondents) involved two separate questions. The first was, which party could show a documentary title to the disputed strip. The second, which arose if the documentary title was shown to belong to the appellants, was whether the respondents and their predecessors could establish a title by prescription to the disputed strip.

At the trial, the first issue was considered in great detail. Upon examination of the various transports (or conveyances), of such plans as existed, and upon hearing evidence from surveyors and consideration of various plans, the learned judge (Bollers J.) came to the conclusion that the southern boundary of Reynestein lay to the south of the disputed strip—indeed to the south of the whole triangle including the tip. This was sufficient to defeat the respondents' claim, so far as based on documentary title, to the disputed strip. On appeal this conclusion was upheld, and the concurrent findings of the two Courts have, inevitably, been accepted before their Lordships.

This decision made it necessary to consider the issue of prescription: as to this the Courts below have differed, the trial judge finding against the respondents' claim, the Federal Supreme Court taking the opposite view. It is this issue which their Lordships have now to determine.

In order that the rival contentions may be understood, it is necessary to provide more geographical details. As has already been explained, the ultimate eastern boundary of Reynestein and of Maria's Lodge cum annexis, including in the latter Lot 33, is the River Demerera. About 300 yards west of the river, and roughly parallel to it, is a public road: no question arises as the the portion of each estate which lies between the river and the road: the disputed strip, and indeed the whole triangle to which reference has been made, lies to the west of it. Proceeding west from the road there is, in Lot 33 an area of recognisable cultivation extending westward for some 200 roods. Furthermore, in a northerly direction, this cultivated area trenches upon the tip of the triangle, *i.e.*, upon what has been held to be, upon the documents, the appellants' property. The appellants did not at the trial contest the respondents' claim to the small area so occupied by them and, in effect, admitted that they had a prescriptive title to it. After 200 roods west from the road, regular cultivation ceases: but for some distance westwards there was evidence that the respondents had planted trees, cut grasses, and used fishing ponds in it. Further westwards still, and approaching the western boundary, the land becomes swampy, and all that was done there was during a limited period to plant some rice.

One other feature must be referred to since it assumed much importance in the case. That consists of a so-called dam running from east to west. The feature can more appropriately be visualised as a bank about 24 feet wide formed by the soil excavated from ditches on either side. It runs along the north of the cultivated area and continues westward to about half the depth of the plantation, but the southern ditch continues until about 200 roods from the boundary. The northern line of the disputed strip runs along this southern ditch—which means that the respondents' claim is that the southern ditch forms the boundary. In order to make this claim good they had to show that they had established a title by prescription over that portion of the appellants' land lying between the true boundary, according to the documents, and the southern ditch.

The relevant enactment as to prescription in British Guiana is Chapter 184 of the Laws of British Guiana—which states:

> "Title to land . . . may be acquired by sole and undisturbed possession, user or enjoyment for thirty years, if such possession, user or enjoyment is established to the satisfaction of the Court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose."

The respondents' evidence to support a prescriptive title fell under the following headings:

(1) Cultivation

(2) The cutting of timber, wood and grass

(3) Fishing in ponds

(4) Growing of rice

In addition the respondents relied upon the presence of the dam as a physical feature having the appearance of a boundary.

The learned trial judge considered the evidence of a number of witnesses, including John Victor, one of the original plaintiffs, but since deceased who had known Lot 33 since about 1910.

As to cultivation, he found the weight of evidence to be decidedly in favour of the defence (*i.e.*, the present appellants) and he held that in 1959, 1958 and 1943 there was no cultivation on the disputed area west of the established cultivated area of 200 roods. As to the period before 1943, he referred to evidence that part time farming in spots used to be done beyond (*i.e.*, west of) the cultivated area from time to time, but found that the respondents were not definite as to any specific area of the backlands being cultivated by them.

As to cutting timber, wood and grass, the learned judge accepted that this had taken place in the backlands over a considerable period, but held that such acts, and using lands for access could not amount to such a dispossession and taking of adverse possession as to start time running against the true owner.

As to fishing in ponds, the learned judge found that there was no evidence as to the nature or origin of these ponds and similarly held that fishing in them could not be described as an act of dispossession or taking of adverse possession.

As to the growing of rice, he found the evidence to be uncertain as to both time and place, and at most to cover a period of five years.

Finally the learned judge referred to the presence of the dam. He referred to evidence that dams of this kind are commonly "side-line dams", *i.e.*, dams thrown up on a common boundary by the digging of ditches on either side. But he found that there was no evidence how this dam was constructed, who built it, or for what purpose. The date of its construction could not be fixed more precisely than between 1854 and 1891. He concluded that it would be "wrong and unsafe to find that it was a side-line dam".

His judgment continued with this passage

> "It may very well be that the plaintiffs always regarded this dam as the northern boundary of Lot 33, and the evidence shows that the servant or agent of the defendant Company, William Wilson, never cut wood to the south of that dam, and that Cockfield, one of the predecessors in occupation and/or title of the defendant Company, never worked to the south of the dam, but there is no convincing evidence that it was a side-line dam dividing the two estates, and that the plaintiffs and defendant Company or their predecessors in title agreed that the dam should form the northern boundary of Lot 33."

He therefore found that the respondents had not made good their case.

When the case came on appeal before the Federal Supreme Court, the primary findings of fact of the trial judge were accepted by the Court. But the Court found that Bollers J. had misdirected himself in that (i) he treated the respondents as trespassers *ab initio* in respect of the disputed strip (ii) he applied to the evidence of user the standards appropriate to proof of dispossession by user (iii) he failed to give proper effect to the meaning of section 3 of Cap. 184 (iv) he declined to consider the respondents' acts of user as a whole both to time and to space.

Their Lordships do not, on consideration of the judgment of Bollers J., find that these criticisms are justified. The learned judge, as their Lordships read his judgment, applied his mind correctly to the question whether the respondents had proved " sole and undisturbed possession user and enjoyment " of the disputed strip. As the Federal Supreme Court itself stated, these words convey the same meaning as possession to the exclusion of the true owner. The learned judge gave recognition to the fact that what constitutes possession, adequate to establish a prescriptive claim, may depend upon the physical characteristics of the land. On the other hand, he was, in their Lordships' view correct in regarding such acts as cutting timber and grass from time to time as not sufficient to prove the sole possession which is required: in this he was supported by the Canadian cases of *Sherren v. Pearson* (1887) 14 S.C.R. 581, *McIntyre v. Thompson* (1901) 1 Ont. L.R. 163 and *McInnes v. Stewart* (1912) 45 N.S.R. 435: and by the English case of *Williams v. Raftery* [1958] 1 Q.B. 159 following *Leigh v. Jack* (1879) 5 Ex. D. 264. The acts were, as he put it, not inconsistent with the enjoyment of the land by the person entitled.

The Federal Supreme Court derived a different conclusion from the evidence: they held that woodlands and rough country can be useful to a farmer if they afford natural products which he wishes to take from time to time leaving it to nature to replenish her own supplies. The respondents had, in their view, proved that they had made what was for persons of their means and class normal user of the land up to the line of the southern ditch. This does not appear to be a correct approach to the evidence. Admitting the utility of the respondents' operations, and that they did what was normal for small peasant farmers, this still does not establish a sufficient degree of sole possession and user to satisfy the Ordinance, or carry the matter beyond a user which remains consistent with the possession of the true owner. What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants.

So far their Lordships find the treatment of the evidence by Bollers J. preferable to that which was accepted in the Federal Supreme Court. In addition however to their finding of misdirection by the trial judge the Federal Supreme Court also differed from the latter in the reliance they placed on the presence of the dam. The argument accepted by the Court was to the effect that the dam was a physical feature near at any rate to the northern boundary of the respondents' property, that the respondents regarded the dam as their northern boundary, and that they had an *animus possidendi* of their entire lot, extending, in their conception, northwards to the dam.

Marnan J. delivering the Court's judgment put it in this way

> " I cannot agree that the presence of the dam is no evidence that the [respondents] reduced the land south of it into their possession, inasmuch as the question here is how far their possession extended "

and later

> "It is quite clear that the [respondents'] *animus possidendi* embraced the whole of Lot 33 and in my opinion their evidence that they carried out their intention of using the whole of their property to the best advantage and that the land they so used included the disputed strip is fortified by the fact that they found what appeared to be a ready-made northern side line on the land."

In considering the validity of this argument their Lordships must have in mind two points. First the Federal Supreme Court expressly accepted the finding of the learned trial judge, which has been quoted earlier in this judgment that, although the respondents may have regarded the dam as their northern boundary, there was no convincing evidence that it was a side-line dam or that it was ever agreed between the owners of the

estates on either side of it that it should form the northern boundary of Lot 33. Secondly the Federal Supreme Court itself did not accept the suggestion that, because of the presence of the dam and the respondents' belief that it formed the boundary, it followed that the respondents should be held to be in constructive possession of any land they did not in fact use or occupy. It followed that the true question was as to the extent of the land they did in fact use or occupy—a question to be decided on the evidence as to cultivation and user already considered.

The effect of acts of possession or user in portions of a larger area has received consideration in reported cases.

In *Clark v. Elphinstone* (1880) 6 A.C. 164 this Board was concerned with a prescriptive claim to land lying between two estates in Ceylon. The judgment of their Lordships, delivered by Sir Montague E. Smith contained these passages:—

> "There is no doubt that in many cases acts done upon parts of a district of land may be evidence of the possession of the whole. If a large field is surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole. But how can this rule of evidence be applicable to a question of undefined and disputed boundary. . . . It is impossible that the question of disputed boundary can be affected one way or the other by such acts. . . ."

The contrast drawn, it will be seen, is between the case of a hedge, which is manifestly set up as a boundary, and the case where no boundary has been defined and the line of it is in dispute.

In *Glyn v. Howell* [1909] 1 Ch. 666, the decision of Eve J. was that where title is founded on adverse possession, the title will be limited to that area of which actual possession has been enjoyed and that, as a general rule, constructive possession of a wider area will only be inferred from the actual possession of the limited area if the inference is necessary to give effect to contractual obligations or to preserve the good faith and honesty of a bargain.

It is unnecessary to say more of this decision than that it lends no support to the respondents' case, since here there is no question of any contractual obligation or of any bargain.

In *Kynoch Ltd. v. Rowlands* [1912] 1 Ch. 527 the true boundary consisted of a ditch, but the plaintiffs had built a wall on their side of it leaving unenclosed a small strip of their land. On this, cattle belonging to the defendants' tenants had been allowed to graze. It was held by the English Court of Appeal that the plaintiffs had not lost their title to the land, the case being treated as one in which the defendants had to prove, in the normal way, acts of ownership amounting to actual possession of the land in dispute.

Finally there is *Cadija Umma v. S. Don Manis Appu* [1939] A.C. 136 where there was a claim based on prescription to land in Ceylon. This case was much relied on by the respondents. The acts of possession invoked consisted of the taking of grass from the disputed land. Both Courts in Ceylon had held that sufficient possession had been shown to establish a prescriptive title. In dismissing the appeal, their Lordships were evidently guided both by the fact of concurrent findings below, and also by the fact that during the relevant period grass was the only or at least the main advantage accruing from the land. They also considered that in such a matter the opinion of the local Courts was entitled to special weight owing to their familiarity with the conditions of life and the habits and ideas of the people.

The present case is widely different since the area and the degree of exploitation are, as to the former, less precise and as to the latter less complete and there is no such agreement among the learned judges below, as was found in Umma's case, as to what was most in accord with the local conditions and habits. Full account of these matters was certainly taken by Bollers J. whose view was that the taking of grass and timber, in the present case, was insufficient evidence of possession.

The authorities as a whole cannot in their Lordships' opinion be regarded as supporting the respondents' argument, that the existence of the dam can be used in some way to fortify such evidence as there was regarding possession of the disputed strip. Had such evidence shown with sufficient precision, that cultivation or user by the respondents extended up to the line of the dam, the respondents' case would have succeeded. But if it fell short of that (as in the view of the learned trial judge, which their Lordships accept) it clearly did, the presence of the dam and the respondents' belief in it as a boundary could not make good the insufficiency of their evidence, or add the necessary precision where that evidence was unprecise. In its final analysis the case becomes one of appraisal of the evidence as to possession on the part of the respondents of the disputed land itself and of decision on an issue of fact. Their Lordships' opinion is that the findings of the learned judge were justified by the evidence, not vitiated by any error of law and ought not to be disturbed. The appeal accordingly must succeed.

As was indicated earlier in this judgment, the respondents brought two separate proceedings. The first was by way of Originating Summons (Action No. 1130 of 1959) in which they claimed registration in their name of the title to the land described in the summons. The order made by the Federal Supreme Court (varying the order of Bollers J.) defined the land to be the subject of registration as, in effect, including the disputed strip. This portion of the order must be discharged, and Action No. 1130 of 1959 remitted to the High Court of Guyana, successor to the Supreme Court of British Guiana, to define the land in respect of which the respondents are entitled to be registered as owners upon the footing that the land does not include the disputed strip.

The second proceeding was an action (No. 1719 of 1959) in which the respondents claimed possession of a portion of Lot 33 occupied by the appellants as trespassers, damages for trespass and other relief. In the view which their Lordships take, the appellants were guilty of no trespass and there is no land, occupied by them, of which the respondents are entitled to possession. The judgment of the Federal Supreme Court as to this action must be set aside and the action dismissed.

The respondents must pay the appellants' costs as regards the Action No. 1719 before their Lordships and in the Courts below. There will be no order as regards the costs of Action No. 1130 of 1959.

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In the Privy Council

WEST BANK ESTATES LIMITED

v.

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DELIVERED BY

LORD WILBERFORCE

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