

2000

NO. 458/W

DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

ABDELILAH ALAMI BINANI

Plaintiff

-and-

MOHAMED ZAMAL RAHAMAN

Ms. N. Pierre for the plaintiff

Mr. P. Mohanlall with Mr. R.N. Poonai for the defendant

DECISION

The plaintiff brought an action for possession and trespass of the land described as “Firstly”, “Secondly”, and “Thirdly” in Transport No. 158 of 1997.

The defendant filed a defence to the plaintiff’s claim in which he claims that he and his principal’s predecessors were in occupation of a parcel of land north of the Public Road at Plantation Orangestein since the year 1956. The lands north of the Public Road, the defendant alleged, never formed a part of the lands described in the plaintiff’s transport since the northern boundary of the plaintiff’s lands is the public road itself.

According to the evidence, Binani claims that he became the owner of a piece of land measuring 25 roods by 750 roods as described in “Firstly” on the transport. He said he acquired the lands from two different persons one Samad and one Azad. He said Ganga Kishna was the previous owner of these lands. He said “Secondly” and “Thirdly” were acquired from Samad and “Firstly” was acquired from Azad. Two transports were tendered, 322/77 and 283/77. He said Ganga Kishna owned the said lands by these transports. He also tendered a plan no. 6069 which he said he got from Ganga Kishna.

The plaintiff also said that he first saw the land when Kishna showed it to him in 1996. He said Kishna showed him the land north near the water, south of the public road. He said he saw a house on the south side on the public road which was occupied by the children of Mr. Azad . He said this house was excluded from the sale, and was situate on the property he bought. He said a few years ago he saw a new erection on a portion of the land to the north, about 6 years ago. He said he saw no structure before that and that he did not give anyone permission to build it. He said Mr. Rahaman told him that he built it. He said that since filing the proceedings he last saw the house about 2 years ago. He said he entered an agreement of sale in 1994 and that sometime after he spoke to one Nazimul Bacchus who told him that the lands north of the public road did not belong to Kishna, but he said Kishna told him he owns all the land except the house.

The lands referred to as “Firstly”, “Secondly” and “Thirdly” do not refer to any plans. The lands which the defendant’s principal occupies is described on a plan no. 30467 by M. S. Azam, Sworn Land Surveyor, dated 30th August 2000. The defendant claims that there was a house on the land north of the public road which was repaired periodically by the defendant’s principal and his predecessors in title.

From the plaintiff’s evidence I find no support for his contention that any of the lands described in his transport extended beyond the public road and to the north thereof.

At the trial the plaintiff relied on a number of plans - exhibit D (by Nehaul), exhibit E (by Mcgregor), exhibit J (by Semour) and exhibit K (by Edwards). None of these plans are referred to in the plaintiff’s transport.

Mr. Choo-Shee-Nam, SLS, gave expert evidence. He referred to plan no. 3261 and stated that this plan shows the western half of Orangestein and that it is the same area shown on Transport no. 158/1997. He also said that this plan shows the northern boundary of Plantation Orangestein as the Essequibo river. He also referred to plan no. 27866 and stated that this plan refers to lots 3 and 4 Orangestein and that it is the same area referred to in transport no. 158/1997. He further stated that the area described at “Secondly” and “Thirdly” comprise an area as shown on the plan. He also said

that the area described as “Secondly” on the transport describes lots 1, 2, 3 and 4 on the plan.

The witness was also shown plan no. 24936 by McGregor and states that this plan shows part of plantation Orangestein. He said this plan refers to lots 3 and 4 as being held by Ganga Kishna by transports no. 283/1977 and 322/1977. He said transport no. 158/97 is a direct description of the predecessor transports 283 and 322 of 1977. He said plan 24936 depicts the same two areas at “Secondly” and “Thirdly” on transport no. 158/97. He said that lots 3 and 4 are held by the plaintiff under transport 158/1977.

Therefore it is evident that the plaintiff, Binani, bought the exact areas of land that Ganga Kishna held by transport and that is the areas at “Secondly” and “Thirdly”.

No where does the witness advise us whether any of the lands in transport no. 158/97 held by the plaintiff extend north of the public road. The surveyor simply states that “Firstly, Secondly and Thirdly” on Binani’s transport refers to part of plantation Orangestein, and he says the northern boundary of Plantation Orangestein is the Essequibo river.

In the plaintiff's transport "Firstly" is described as having a northern boundary "on the north by the public road and on the south by Crown Lands". The witness stated that the lands at "Firstly" do not extend beyond the public road. He says that lots 3 and 4 are held by the plaintiff by transport 158/97 but says that there is no empirical data to say that 'secondly' and 'Thirdly' refer to plot 4. He further states that Edward's plan refers to plots S and R but that 'Firstly' in the plaintiff's transport does not refer to either S or R north of the public road. He said that S is a part of lot 4.

In Binani's transport 'Secondly' is described as having "said western most portion having a façade of 100 roods by the entire dept of the said plantation, and 'Thirdly' is described as "said western most portion having a façade of 100 roods by the entire dept of the said Orangestein."

None of these descriptions are able to inform us whether 'Secondly' and 'Thirdly' extend north of the public road. In fact "firstly' states quite clearly that the northern boundary is the public road itself.

A look at Abdool Samad's transport shows the exact description of 'Firstly' and 'Secondly' that is described on Binani's transport. No where does Abdool Samad's transport state that any of the lands described therein extend north of the public road.

None of the plans tendered in evidence shows that the lands held by Binani extend north of the public road and none of the surveyors who gave evidence were able to say whether 'Secondly' and 'Thirdly' described in Binani's transport extend north of the public road.

Mr. Azam, SLS, also gave evidence. He stated that there is no reference to any plan in the description of 'Firstly'. He said the description at 'Secondly' describes an undivided quantity of shares that can be anywhere and not a specific area and does not refer to a plan. He said that the plan by Seymour does not include any lands north of the public road. He said that the plan by McGregor in his opinion does not show that lots 3 and 4 are held by Ganga Kishna and stated that 'Secondly' and 'Thirdly' on Binani's transport shows that Binani has an interest in the lands partly shown on the plan.

He further said that the plan by Edwards depicts lands which location he cannot be sure about, since the transport describes undivided shares. He says undivided means that you have a portion of the whole but a specific portion cannot be identified. He said he cannot be sure that the area depicted therein is a part of the land in Binani's transport and said that the land shown on the plan is part of the western 100 roads. He says exhibit D, the plan by Nehaul, shows a part of plantation Orangstein and that it is part of the land described in Binani's transport.

The important fact to note about the evidence given by both surveyors is that neither of them was able to say whether the lands held by Binani extended north of the public road. In fact neither surveyor was able to pinpoint exactly where Binani's lands were located on any one of the plans.

Therefore I have no alternative but to look at the evidence of the other witnesses to try and determine what lands were actually transferred to Binani.

The plaintiff, Binani, gave evidence that he bought the lands described in his transport as 'Firstly' from Azad and the lands described as 'Secondly' and 'Thirdly' from Sammad. He said he saw the transports that Ganga Kishna owned the lands, and that he saw transport no. 283/1977 when Kishna acquired the lands from Samad. He said he got a plan from Kishna showing parts of plantation Orangestein. He said Kishna showed him the land north near the water, south of the public road. He said he saw the land with its boundaries but because it was bushy they did not go deep. He said there was a building on the south side of the public road which was occupied by the children of Azad, and he said that house was not included in the sale. He said a few years ago he saw a new erection on a portion of the land to the north. He said he objected and filed an action for trespass.

He said he entered an Agreement of Sale in 1994. He said he spoke to Nazimul Bacchus in New York and he told him that the lands north of the public road did not belong to Kishna. In relation to 'Firstly' he admits he does not own any lands north of the public road. In relation to 'secondly' and 'thirdly' he said both areas run the entire depth of the plantation which extends to the crown lands, and ends at 'east bank of the Essequibo river'. This witness could not say how long the east bank extends for but states that the lands north of the public road were part of the lands in his transport.

Ganga Kishna, the previous owner of these lands gave evidence that he acquired the said lands from Abdool Samad and Mohamed Asad . He said the plan by McGregor was commissioned by him in 1994. He said on the north was the river, on the south was crown lands, on the east was land owned by Mr. Sookdeo and on the west was land owned by Dolphin. He said plot V was exempted since Mohamed Asad occupied that portion and it did not form part of the sale. He said plot V had a building and that no-one else had any building on the land. He said when he sold the land to binani there were no erections north of the public road. He said the description from transport 283/77 and 322/77 are the same description in the Agreement of sale except for the portion occupied by Asad. He said he showed Binani Nehaul's plan and McGregor's plan and stated that Nehaul's plan shows the boundary crossing the public road. He said Harry Mohan had filed prescriptive rights for the land north of the

public road but said he was not informed of the survey done by Harry Mohan nor did he oppose the application because he was ill. He said he does not know what happened to the matter.

It is noteworthy that in the transport of Ganga Kishna the land is described exactly as it is described in Binani's transport, and it is difficult to determine from Kishna's transport exactly what he sold. From the description he sold portion of and in "one undivided fourth part or share in and to the western most portion of Orangestein having a façade of 100 roods by the entire dept of the said Orangestein."

A perusal of the plans by Nehaul and Mcgregor that Ganga Kishna relied on does not show whether these lands extend north of the public road, and in any event as stated by the witnesses Choo-sheenam and Azam, Sworn Land Surveyors, what Binanai held were undivided shares of plantation Orangestein and not any specific portion. It is therefore not clear even from Ganga Kishna's evidence whether he knew exactly what lands he held by transport. He simply sold to Binani the lands as described in his transport.

Sookdeo Ramrattan next gave evidence. He said the land Binani bought was next to his land and that Ganga Kishna told him that the land Binani bought runs from the river all the way down to the conservancy. He said he used to pick fruit from the land north of the

public road. He said there was nothing else north of the public road other than fruit trees. He said he saw the house built after Binani bought the land from Krishna. He said he knows Mohamed Asad and that he owns land south of the public road but he doesn't know if he was cultivating land north of the public road. He said Mohan Persaud went to live north of the public road after Binanai had already bought the land. Essentially this witness is saying that Mohamed Asad owned land south of the Public Road.

The defence commenced their case after this witness and called Mohamed Rahaman. He also said that Mohamed Asad was the owner of lands south of the public road. He said in 1983 Mohamed Asad and his family occupied the land north of the public road and that there was a house and trees on the land. He said from 1983 to today he never saw Ganga Kishna in occupation of the lands north of the public road. He said Harry Mohan lived in the house north of the public road until 1984. He said the land north of the public road was cultivated by Nazimul Bacchus and her family and himself. He said he knew Binanai bought some lands south of the public road. He said what Sookdeo said that he saw the house built after Binani bought the land is not true. He said Mohamed Asad's transport does not relate to the lands north of the public road.

Nazimul Bacchus gave evidence and said that his grandfather Abdul Samad was the owner of lands at Orangestein by transport 2260/56.

He said there is a public road where the lands in transport 2260/56 were situated. He said these lands never extended north of the public road. He said his father Mohamed Asad was in occupation of the lands north of the public road . He said in 1969 when his grandfather sold the land to Ganga Kishna, he Ganga Kishna did not occupy the lands north of the public road. He said his father had a building on the land in which he stored crops and fertilizers and cultivated fruit trees and crops. He said after his father died he took control of the lands north of the public road. He said he opposed Harry Mohan's application successfully and he said he continued to cultivate the land and when he migrated in 1993 he gave Mohamed Rahaman the land.

The evidence from the surveyors is that Binani's transport does not refer to a plan, and none of the plans tendered in evidence depicts the area held by Binani under transport no. 158/97. As far as the plans show is that Binani holds undivided shares in plantation Orangestein; no specific area has been identified on any of the plans as showing where binani's land is and the boundaries.

I will therefore have to look at the evidence of the witnesses who from their knowledge have stated that Ganga Kishna never owned any of the lands north of the public road and therefore could not have sold any lands north of the public road to Binani.

I also have to look at the history of the transaction to determine what was sold to Binani. In Binanai 's transport the northern boundary of the plaintiff's land is stated as the public road in the description at 'firstly'. The plaintiff, that is Binani, led no evidence to show that any of the lands described in his transport extended beyond the public road to the north thereof, nor do the lands described in the plaintiff's transport refer to any plan and no such plan was produced. None of the plans tendered in evidence are referred to in the plaintiff's transport.

According to Nazimul Bacchus, his grandfather Abdul Samad transferred a parcel of land described as 'secondly' in transport no. 2260 of 1956 to his father Mohamed Asad. Nazimul Bacchus tendered into evidence an Agreement of Sale dated 18th October 1949 in which the lands sold to Abdool Samad were described as-

“A piece of land measuring 50 (fifty) roods by 750 Roods in depth part of pln. Orangestein, situate on the right bank of the Essequibo river, in the county of Essequibo, bounded on the east and west by portion of pln Orangestein, on the north by the public road, and on the south by the crown lands, with one building thereon, save and except a strip of land 100 feet in width running through and across the said pln Orangestein.”

From this description it can be seen that the lands bought by Abdool Samad were bounded on the north by the public road and on the

south by crown lands. When transport was passed to Abdool Samad the land was apparently divided into two parcels 'Firstly' and 'Secondly' each having 25 roods instead of the original 50 roods. It therefore appears that Abdool Samad bought 50 roods of land south of the public road, since it was bound on the north by the public road, that is, the public road was the northern boundary. The land that Abdool Samad thereafter sold to Ganga Kishna which is described as 'firstly' and 'secondly' could only be the same land he bought under the Agreement of Sale and this is land bound on the north by the public road.

The lands that Abdool Samad transferred to his son Mohamed Asad and which is described as 'thirdly' on the plaintiff's transport has a façade of 100 roods by the entire depth of pln Orangeatein. Based on the previous description of 'firstly' and 'secondly' 100 roods do not extend beyond the public road, and it seems that apparently the northern boundary is the public road of all the lands held by Ganga Kishna and Mohamed Asad.

'Secondly' in the transport of the plaintiff is comprised of 2897 shares of 3072 and 'thirdly' is comprised of 175 shares of 3072 which amount to 3072 parts which is described as 'secondly' in Abdool Samad's transport as "one undivided fourth part or share in and to

the western most portion of pln Orangestein, which are cum annexis, that is, attached to 'firstly' in the plaintiff's transport, and which is bound on the north by the public road, as stated in the Agreement of Sale. Therefore Abdool Samad bought lands that were bound on the north by the public road. If the lands bought by Abdool Samad were bound on the north by the public road, then he could only have sold lands bound on the north by the public road.

Nowhere in the plaintiff's evidence has he been able to show that he bought the lands north of the public road. Nor has he shown the court that he ever exercised any rights over the land north of the public road. All the evidence points to a building having been built on the land north of the public road by Mohamed Asad who died in 1988. There is evidence that Mohan Persaud went to live in that house by permission from Mohamed Asad and this had to be before the plaintiff bought the land in 1994. Mohamed Asad died in 1988 and Sookdeo Ramrattan said Mohan Persaud was living in the house north of the public road at the time that the plaintiff bought the land. Therefore it is apparent that the plaintiff never went into occupation of the land north of the public road. Nazimul Bacchus states that he has been in occupation of the said land north of the public road for in excess of 30 years.

I therefore find from the evidence that the plaintiff has failed to prove that the lands described in his transport extend north of the public road. It seems from a perusal of the transports tendered in evidence and the Agreement of Sale that the lands that Ganga Kishna bought from Abdool Samad and which Abdool Samad had previously bought are from the description given in the Agreement of Sale bound on the north by the public road. And the lands that Abdool Samad transferred to his son Mohamed Asad and which is 'thirdly' on the plaintiff's transport appear to be all bound on the north by the public road.

The evidence of the plaintiff that he carried out acts intended to show that he acquired rights to the land north of the public road and that his actions satisfy the criteria laid down "that the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title" cannot avail the plaintiff since the plaintiff has first to prove his title.

In this case I do not find that the plaintiff has proven he has title of the lands north of the public road.

In the circumstances the plaintiff's case is hereby dismissed.

Costs in the sum of \$50,000.

Stay of 6 weeks granted.

.....

Diana F. Insanally

Dated this 18th day of June 2014