

Edward Senarat Dassenaiké of Ratnapura - - - *Appellant*

*v.*

Victorine May Dassenaiké *alias* V. M. Gilimale of  
Ratnapura - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1937.

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*Present at the Hearing :*

LORD THANKERTON.

LORD ALNESS.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD THANKERTON.]

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This appeal is brought under leave granted by the Supreme Court of the Island of Ceylon by order dated the 2nd April, 1935, allowing the appellant to appeal against a decree of that Court dated the 22nd January, 1935, in an action for declaration of title to land and damages, in which the appellant was defendant and the respondent was plaintiff. This decree affirmed, subject to a variation, a decree of the District Court of Ratnapura, dated the 21st September, 1933.

The appellant admitted at the hearing before the Board that the only question on which he desired to appeal, which related to the settlement afterwards referred to, was not dealt with by the decrees above mentioned, and that he could not raise it under the limited leave to appeal granted by the Supreme Court; he therefore moved their Lordships to allow an adjournment of this appeal to enable him to present a petition for special leave to appeal against the earlier decrees in the suit, so as to enable him to appeal on the question which he desired to raise. In the circumstances of the case, to which it will be necessary to refer, their Lordships refused the motion for an adjournment.

The appellant and the respondent were married in 1914, without community of goods, each retaining their separate estate. There was issue of the marriage five children, of whom one died at an early age. On the 6th January, 1923, the respondent brought suit No. 3884 in the District Court of Ratnapura against the appellant for divorce on the ground of malicious desertion, alternatively for a separation on the

ground of cruelty and for directions that the respondent should have the custody of the children. The appellant defended the action, and made counter charges and asked for decree of divorce in his favour and a settlement of properties on himself and the children.

On the 19th November, 1924, the respondent brought the present suit, No. 4191 in the District Court of Ratnapura, for a declaration of her title to, and recovery of possession of, a half share of a property known as Arcady estate subject to a *fidei commissum* in favour of the children and of the entirety of another property known as Maligatenna estate, for Rs.7500 damages in respect of mesne profits up to date of suit and damages at the rate of Rs.400 per mensem thereafter until restoration of possession. The appellant in his answer, dated the 4th March, 1925, admitted the title of the respondent to a half share in the Arcady estate, subject as aforesaid, and he alleged that a half share of Maligatenna estate had been purchased by him in the name of the respondent in trust for him. He further made a claim in respect of improvements made by him on the lands claimed by the respondent and on other lands belonging to her. He asked for dismissal of the respondent's action and that she should be ordered to convey to him the land held in trust and to pay him the sum of Rs.40,000.

The divorce suit was tried on the 7th March, 1925, when the District Judge was informed by the parties of a settlement which they had come to as to custody of the children and disposal of the properties. The respondent was then examined as a witness, but was not cross-examined; she asked for divorce *a vinculo*. At the request of the parties, the learned Judge recorded the settlement as to custody and the properties. Thereafter, on the same date, the respondent was granted a decree nisi, which was made absolute on the 9th June, 1925. The appellant made an unsuccessful attempt to have the terms of the settlement included in the decree.

On the 12th March, 1925, the appellant amended his answer in the present suit and pleaded alternatively that the properties in suit had been the subject of settlement in the divorce action, and asking that the respondent should be ordered to execute conveyances in terms of the settlement so alleged.

On the 17th February, 1928, the District Judge on the appellant's motion, ordered conveyances to be executed by the parties in terms of the settlement in regard to the properties in suit; but, on appeal to the Supreme Court, this order was set aside, and the case was remitted for trial, by a decree of the Supreme Court dated the 12th September, 1928. The appellant applied for leave to appeal to His Majesty in Council, but this was refused on the ground that the matter was interlocutory. Issues were adjusted and the case proceeded to trial on the 10th May, 1929;

the appellant did not ask for any issue as to the alleged settlement, and no such issue was framed but three issues proposed by the appellant as to furniture supplied and improvements made by him were disallowed. The appellant led no evidence, and, by decree dated 10th May, 1929, the learned Judge gave the respondent a declaration of title in terms of her plaint as amended. This decree was inconsistent with the terms of settlement alleged by the appellant. The decree further ordered the appellant to pay to the respondent Rs.75 per month from April, 1924, until restoration of possession. The present appellant appealed to the Supreme Court against this decree and against the disallowance of his proposed issues. By decree dated the 11th October, 1929, the Supreme Court affirmed the declaration of title granted by the District Judge, but found that there was not sufficient evidence as to the Rs.75 per month after the date of suit, and sent the case back for trial on this point and also, with the respondent's consent, for trial of the three issues which had been disallowed. The appellant raised no question as to the alleged settlement in this appeal, and made no attempt to obtain leave to appeal against this decree.

On retrial, the District Judge, by judgment and decree dated the 21st September, 1933, fixed the damages after date of suit at the rate of Rs.75 per month, dismissed the appellant's claim for improvements, and ordered the respondent to deliver to the appellant certain furniture. The appellant appealed to the Supreme Court, which, by decree dated 22nd January, 1935, affirmed the District Judge's decree, subject to a variation consequent on the appellant having restored possession before that date. The present appeal by leave is against this last decree of the Supreme Court only.

In the above circumstances it is clearly too late for the appellant to seek to found any case on the alleged settlement, and their Lordships had no hesitation in refusing any adjournment of this appeal which had that object in view.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

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EDWARD SENARAT DASSENAIKE  
OF RATNAPURA

*v.*

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VICTORINE MAY DASSENAIKE  
*alias* V. M. GILMALE OF RATNAPURA

DELIVERED BY LORD THANKERTON

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