

4,1958

No. 2 of 1957.

In the Privy Council.

UNIVERSITY OF LONDON

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

24 JAN 1959

TITUL OF ... CEY
LEGE STUDIES

52056

BETWEEN

TENNEKOON MUDIYANSELAGE TIKIRI
BANDA AMUNUGAMA (Plaintiff) . . . Appellant

AND

10 HERATH MUDIYANSELAGE TIKIRI BANDA
HERATH (Defendant) . . . Respondent.

Case for the Respondent

RECORD.

1. This is an appeal from a judgment and decree of the Supreme Court of Ceylon dated the 5th February, 1955 (reported in 56 N.L.R. 529), setting aside a judgment and decree of the District Court of Kurunegala dated the 10th February, 1952, whereby it was held in an action brought by the Appellant against the Respondent that the Respondent holds certain land (described in Schedule "B" of the plaint) in trust for the Appellant.

pp. 75-81, 82-83.
pp. 56-70, 71.

20 2. The District Court further ordered and decreed that the Respondent should execute a conveyance of the said land in favour of the Appellant and that the Appellant should be placed and quieted in possession thereof. But the Supreme Court allowed the Respondent's appeal and dismissed the Appellant's action. By an agreement in writing dated the 30th October, 1952, the parties agreed that in the event of the Respondent ultimately succeeding in the action the Appellant should be decreed to pay damages to the Respondent as from the 25th July, 1947, fixed at Rs. 500/- per annum till the Respondent was restored to and placed in possession of the said land and by consent the Supreme Court made an order to that effect.

p. 56.
p. 6, l. 9.
p. 82.

30 3. The said land is part of land called Peelagawatta which was originally owned by one Edward Banda Korala. Edward Banda died intestate and without issue on 3rd March, 1929. His widow was Bandara Menika, and the Respondent is her nephew. Edward Banda's household also comprised a girl, Somawathie Kumarihamy, who later became the Appellant's wife.

4. Somawathie was born on 7th September, 1912, the daughter of one Wijesundera Mudiyansele Appuhamy. Soon after her birth she was taken (together with her natural father) by Edward Banda and Bandara Menika into their household and was brought up and treated as their child. She was still a minor in 1929, when Edward Banda died, and in 1932, when she married the Appellant. She died on the 27th September, 1945, leaving a will dated the 25th May, 1941 (P.1), in which she bequeathed all her property movable and immovable to the Appellant. The Appellant claimed in the action that Somawathie had been adopted for the purpose of inheritance by Edward Banda in accordance with the formalities of the relevant Kandyan law, and was thus the sole heir of Edward Banda, and that he (the Appellant) was the sole heir of Somawathie and so entitled to the land in question. 10

p. 110.

5. The Respondent, on the other hand, derived title to the land from Edward Banda's widow, Bandara Menika. She administered Edward Banda's estate in Testamentary Case No. 3714 in the District Court of Kurunegala, and it was common ground that under Kandyan Law she was his heir to the extent of a life interest in his entire property. When she applied for letters of administration, she swore two affidavits (P.3 and P.4) dated 11th June, 1929, and 8th July, 1929, affirming that she and Somawathie, the adopted child of Edward Banda, were his heirs and that Somawathie's father, Appuhamy, was a fit and proper person to be appointed her guardian; but she stated in her Petition dated 9th July, 1929 (P.5), that as to Somawathie's adoption "the petitioner is unaware whether it is in accordance with the requirements of Kandyan law for the purpose of inheritance." That Somawathie had been validly adopted by Edward Banda for the purpose of inheritance and was accordingly his heir was by this time disputed by two sisters of Edward Banda, named Kuma Kumarihamy and Ran Menika. They were made respondents to Bandara Menika's petition, together with Somawathie and Appuhamy, and they filed a Statement in Case No. 3714 (D.28) admitting Bandara Menika's claim to letters of administration but claiming to be themselves the sole heirs of Edward Banda and in particular denying the claim of Somawathie and Appuhamy to any share in his estate. 20 30

p. 76, ll. 1-3.
p. 58, ll. 22-25.

pp. 115, l. 1, 116-117.

p. 119.

pp. 121-122.

6. There was at that time considerable uncertainty, as the Supreme Court pointed out, as to what was required by Kandyan law to constitute an adoption for purposes of inheritance. It is not therefore surprising that there should have been these rival claimants to Edward Banda's estate, that they should have been separately represented by different proctors (whom the Supreme Court described as "experienced lawyers") and that acting through them, and presumably on their advice, they arrived at a settlement which on its face bears the marks of a genuine compromise. This settlement was approved by the District Judge on 9th September, 1930, and on a consent motion on 9th October, 1930 (D.29 and D.30=P.6). The consent motion was signed not only by the District Judge but by Bandara Menika, Kuma Kumarihamy, Ran Menika and also by Messrs. Perera and Perera, proctors for Somawathie and Appuhamy, her guardian *ad litem*. The terms agreed and approved by the signatories were that the movable and immovable properties of Edward Banda's estate should be divided equally between Bandara 40 50

p. 79, ll. 21-46

pp. 136-138.

Menika, Somawathie, Kuma Kumarihamy and Ran Menika. Bandara Menika thereby waived her undisputed life interest in 3/4ths of the estate and accepted instead an absolute title to an undivided 1/4th share in which she already enjoyed a life interest; Somawathie, Kuma Kumarihamy and Ran Menika each received an undivided 1/4th share of the estate free of Bandara Menika's life interest.

7. On 2nd December, 1936, Bandara Menika donated to her nephew, the Respondent, by Deed No. 1700 (D.27), the undivided 1/4th share of some of the properties which passed to her under this settlement together with an additional 1/12th share which she had subsequently purchased by Deed No. 1494 from Ran Menika, who had herself acquired it under the same settlement. Bandara Menika died on 31st July, 1940.

8. During the period of nearly 10 years which Bandara Menika had lived after the settlement all the parties acted upon the settlement including Somawathie, who attained her majority on 7th September, 1933, after she had married the Appellant. She applied on 13th November, 1940 (P.9), for letters of administration of Bandara Menika's estate, as her sole heir, but on the footing that Bandara Menika was entitled to a 1/4th share of Edward Banda's estate under the settlement. Furthermore Somawathie had purchased at an auction, held by the Appellant's elder brother as auctioneer on 10th October, 1931, a 1/12th share of land, including the land in dispute, which had come to Ran Menika under the settlement of 9th October, 1930, and this had been conveyed to her, after she had married the Appellant and attained her majority, by Deed No. 500 dated 22nd February, 1934 (D.2), which recited that settlement. On the same date Somawathie executed a Mortgage Bond No. 501 (D.1) in favour of Ran Menika of a 1/3rd share of the same land, that is the 1/4th share which Somawathie herself received under the settlement as well as the 1/12th share which she had bought from Ran Menika, and the Appellant himself witnessed the execution of the bond, which referred to the terms of the same settlement.

9. It was not until 1943, over three years after Bandara Menika's death, that Somawathie attacked the validity of the 1930 settlement, first in a petition to set it aside filed in Case No. 3714 on 22nd October, 1943 (P.19), and then in her Answer filed on 23rd December, 1943 (D.5), to Ran Menika's claim in Case No. 1541 (D.4) for moneys due from her on the mortgage bond. The Supreme Court had in August, 1943, finally established Somawathie's right to be considered the adopted daughter and sole heir of Bandara Menika (not Edward Banda) by dismissing the appeal of Ukku Banda Ambahera and the Respondent (who were nephews of Bandara Menika) against the decision of the District Judge in her favour (P.14). (The decision of the Supreme Court (P.15) is reported in 44 N.L.R. 457.) Somawathie's case for setting aside the settlement was that the Court had been induced to approve it by all the parties to it having collusively concealed from the Court that she was Edward Banda's adopted daughter and sole heir, and that she had not challenged the settlement before because the parties to it had concealed from her the fact that it had been made on the basis that she was alleged not to be Edward Banda's adopted daughter and sole heir.

10. That this settlement was made fraudulently and collusively and in fraud of the Court was and is the basis of the Appellant's claim against the Respondent. It was and is essential to the success of his claim that he should establish, not merely that Bandara Menika adopted Somawathie, but also that Edward Banda adopted her, and that both adopted her *for the purpose of inheritance* according to Kandyan law. And even if that was established, it remained to be proved that the 1930 settlement was fraudulent and collusive, or that Bandara Menika gained a pecuniary advantage by availing herself of a fiduciary character within the meaning of section 90 of the Trusts Ordinance.

Appendix A.

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11. On 21st July, 1942, the Respondent had meanwhile instituted Action No. 1052 in the District Court of Kurunegala for a partition of the property, including the land which is the subject of this Appeal, between himself, Somawathie, Kuma Kumarihamy and Ran Menika on the basis of a common title proceeding from the 1930 settlement. In his plaint (D.12) he pleaded that the 1930 settlement was *res judicata* between himself and his three co-owners including Somawathie. In her answer filed on 15th March, 1943 (D.13), Somawathie denied all the material averments in the plaint and specifically denied that Bandara Menika "had any right or title to convey to Plaintiff" (the Respondent). In spite of this plea, of the petition (P.19) to set aside the 1930 settlement, which is referred to in the preceding paragraph, and of the other steps taken by the Appellant and Somawathie, which are set out in the next paragraph, the District Judge entered an interlocutory decree for partition on 20th October, 1944 (D.17), and a final decree for partition on 16th June, 1950 (D.22), declaring the Respondent owner of a divided share of the land which is the subject of this Appeal on the basis of the 1930 settlement. Somawathie and the other co-owners received other divided allotments on the same basis in lieu of their former undivided interests in the larger land. The District Judge expressly stated (D.16) that the Respondent was entitled to his costs against Somawathie and Kuma Kumarihamy because they had raised in their pleadings a contest regarding the Respondent's title.

p. 225.

pp. 227-228.

p. 159.

p. 231.

p. 243

p. 231, l. 13

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p. 168.

p. 166.

p. 77, l. 26.

p. 214, l. 14.

p. 60, l. 22.

p. 233.

12. During the course of the Partition Action No. 1052 Somawathie obtained an order in Testamentary Action No. 3714 on 21st August, 1944 (P.23), purporting to set aside the 1930 settlement and to substitute in its place a declaration that Somawathie, as the adopted child of Edward Banda, was his sole heir. This order was obtained on a consent motion (P.22) to which Somawathie, her father Appuhamy, Kuma Kumarihamy and Ran Menika were parties, but not the Respondent. It was therefore conceded by the Appellant in the Supreme Court that this order setting aside the settlement did not bind the Respondent. On 19th October, 1944, Somawathie applied in the partition action for leave to amend her pleadings "owing to the order made on 20th September, 1944, in D.C. Testamentary No. 3714" (a reference to the order made on 21st August, 1944 (P.23), as the District Judge pointed out in his judgment in this action). That application was refused; she did not appeal against the refusal; and the interlocutory decree for partition was made next day. She then applied on 14th March, 1945, to set aside the interlocutory

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decree (D.24). That application was likewise refused (D.25) and her appeal against the refusal (D.18) was dismissed by the Supreme Court (D.19). pp. 234-236.
p. 236.
pp. 236-239.
p. 239.

13. By this time Somawathie had died and the Appellant as her heir applied (D.20) to amend the interlocutory decree so as to allot to the Appellant the 1/3rd share which had been allotted to Kuma Kumarihamy on the basis of the 1930 settlement. This application was allowed unopposed (D.21) after the Appellant's advocate had said that he was not in that application making any claim against the Respondent or contesting the rights to the share allotted to the Respondent in the interlocutory decree (D.23); and the final decree was entered accordingly (D.22). p. 240.
p. 241.
p. 242, l. 16.
p. 243

14. The Appellant then began this action by plaint dated 25th July, 1950, alleging that Bandara Menika, well knowing that she and her husband had adopted Somawathie to inherit their property, and though she was bound in a fiduciary capacity to protect the interest of Somawathie, who was then a minor and living with her, took advantage of her fiduciary position and, acting in fraud and collusion with Appuhamy, Somawathie's guardian *ad litem*, entered into a fraudulent and collusive agreement with Appuhamy, Kuma Kumarihamy and Ran Menika and applied to the Court to divide the estate of Edward Banda between herself, Somawathie, Kuma Kumarihamy and Ran Menika. The Appellant further alleged that the Court never sanctioned this compromise, that Bandara Menika gifted to the Respondent the shares claimed by her under the compromise and under the conveyance to her of part of Ran Menika's share under the compromise, that the Respondent had notice of all these facts (including apparently the fraudulent and collusive nature of the compromise) and that he obtained a final decree allotting him a divided share in the land which is the subject of this Appeal. The Appellant alleged that by reason of those facts Bandara Menika, and the Appellant after her, had held their undivided share in the land, which included the lot which is the subject of this Appeal, in trust for Somawathie, and since her death for the Appellant, and that the Respondent should be directed to execute a conveyance of that lot in the Appellant's favour. The Appellant pleaded not only the order of the District Court, affirmed on appeal, declaring Somawathie sole heir of Bandara Menika (P.14), but also the consent decree of the District Court declaring her sole heir of Edward Banda (P.23). p. 8.
p. 190.
p. 167.

15. In his Answer dated 19th October, 1950, the Respondent denied (*inter alia*) the Appellant's allegations of fraud and collusion and challenged the validity of the latter decree on various grounds not now material since the Appellant conceded that it was not binding on the Respondent (see paragraph 12 above). He alleged that Somawathie was estopped by the purchase and mortgage referred to in paragraph 8 above and by her administration of Bandara Menika's estate from impeaching the validity of the 1930 Settlement. He pleaded Bandara Menika's gift to him and the partition decree and alleged that the question whether Bandara Menika had right and title to convey to him the share she obtained under the settlement was *res judicata* by the decree against Somawathie, because she was a party to the partition action, had the opportunity to plead the p. 11.

trust alleged by the Appellant, did in fact plead that Bandara Menika had no right or title to convey her share to the Respondent and did, unsuccessfully, attempt to plead that she herself was entitled to all the land in dispute by virtue of the decree purporting to set aside the 1930 settlement. He also alleged that the Appellant was estopped by his application to amend the interlocutory decree for partition without contesting the rights thereby decreed to the Respondent and had acquiesced in the entering of the final decree which allotted to the Respondent the land which is the subject of this appeal.

16. The action went to trial on 40 issues and the District Judge 10
heard evidence on behalf of the Appellant from a friend of Edward Banda,
from the high priest of a temple frequently visited by Edward Banda
and Bandara Menika, from the Appellant himself, from a clerk to Bandara
Menika's proctor and from the record keeper of the District Court at
Kurunegala, and evidence on behalf of the Respondent from the printer
of the notice of the auction referred to in paragraph 8 above.

pp. 20-21.

pp. 21-22.

pp. 22-46.

pp. 46-54.

p. 54.

p. 55.

17. The only evidence which had any bearing on the crucial issues
of fraud or abuse of fiduciary duty was given by one Karunanayaka who
had been a clerk in the office of Mr. Wanduragala, the proctor acting for
the said Bandara Menika. He said in chief there had been a discussion 20
in the office at a time when Appuhamy, Bandara Menika, Mr. Ambahera
(on behalf of Ran Menika) and the Respondent (at that time also a clerk
in the office) had been present, the suggestion being that the land should
be divided into four. Mr. Wanduragala was against this proposal, but
later there was in fact a settlement on the basis of a 1/4th share each.
In cross-examination he said Mr. Wanduragala was a senior practitioner
with a large practice. He was a person who was thoroughly honest in
his dealings and would not have countenanced anything inequitable.
Later he said "Ran Menika, Bandara Menika and Kuma Kumarihamy 30
all claimed rights. They were stating that Somawathie was not the adopted
child . . . Mr. Wanduragala questioned the people who had come before
him . . . I did not follow the entire conversation. I picked up scraps . . .
Mr. Wanduragala was not agreeable to the settlement. Parties went
away without reaching a settlement. I know that subsequently a settle-
ment was reached. I do not know under what circumstances that
happened." And again "I know the reason for which parties came to
Mr. Wanduragala's office first. They came to discuss a settlement in
respect of the case . . . the discussion was that they should divide the
assets into 4 parts. I do not know whose suggestion it was at first . . .
Wanduragala inquired from Appuhamy whether he could prove that 40
Somawathie had been adopted by Edward Banda. The other parties there
disputed that she had been adopted as a child. Even in Mr. Wanduragala's
office there was a dispute. Mr. Wanduragala therefore said that he could
not consent to the matter being settled. He refused to file a motion.
I said that Mr. Wanduragala said he would have to go to jail when I was
questioned on the matter . . . I do not know why he said so. Nothing
fraudulent was suggested in my hearing. Nor did anything suspicious
take place in my presence. Appuhamy said that Somawathie should get
the whole inheritance. Mr. Wanduragala did not want to enforce the
settlement . . . Mr. Wanduragala in my hearing did not accuse anybody 50

p. 47, ll. 15-22.

p. 48, l. 20.
p. 49, ll. 40-45.

p. 50, ll. 20-40.

p. 52, ll. 4-39

of doing anything unfair." Later he said "Mr. Wanduragala spoke angrily and loudly when he said he would have to go to jail and I listened carefully . . . Mr. Wanduragala did not drive them away. He advised them. Ultimately he agreed to present a motion, but not readily . . . Mr. Wanduragala would not have consented to anything that was wrong." This evidence is, it is submitted, wholly inadequate to establish any sort or kind of fraud against anybody. It established no doubt, if it was accepted, that the parties were disputing vigorously, even in the proctor's office, the rights respectively claimed by them, that proposals for settlement were made by somebody but the proctor refused to force anybody into a settlement against his or her wishes, that he declined at one stage to agree to any settlement and at another stage protested angrily and said something about going to jail, and that ultimately the parties, after the proctor had advised them, reached agreement composing their differences. It made plain, however, that nothing fraudulent or suspicious was being suggested and that the proctor would not agree to anything which was wrong.

18. The District Judge held in answer to the main issues as follows :—

- 20 (A) Somawathie was the adopted daughter and sole heir both of Edward Banda and of Bandara Menika and the Appellant was the sole heir of Somawathie. This is not disputed by the Respondent. p. 53, ll. 30-40.
p. 64, ll. 1-22.
p. 67, l. 34-p. 68, l. 5.
- (B) The 1930 settlement was a fraudulent and collusive arrangement entered into between the four parties to it, including Bandara Menika. p. 68, l. 6.
p. 64, l. 23-p. 65, l. 24.
- (C) Bandara Menika was in a fiduciary capacity to Somawathie and took advantage of it, so that section 90 of the Trusts Ordinance (The Legislative Enactments of Ceylon, vol. II, Chapter 72, page 250) applied to the division of Edward Banda's estate under the 1930 settlement and she held her share of it thereunder as a constructive trustee in trust for Somawathie by the terms of the section. p. 68, ll. 7-10, 24-27.
p. 65, ll. 18-23.
Appendix A
- 30 (D) The division under the 1930 settlement was not binding on the Appellant because no sanction of the Court was obtained for it under section 500 of the Civil Procedure Code (The Legislative Enactments of Ceylon, Vol. II, Chapter 86, page 560). p. 57, l. 41-p. 58, l. 21.
p. 65, ll. 25-27.
p. 68, l. 11.
Appendix C.
- (E) The Respondent had notice of this fraudulent and collusive settlement and was indeed himself a party to it. The Appellant conceded in the Supreme Court that he could not support the "fanciful theory" that the Respondent was himself a party to the alleged fraud. p. 68, ll. 12-16.
p. 64, l. 30-p. 65, l. 6.
p. 78, l. 23.
- 40 (F) The Respondent, as a donee from Bandara Menika, had no better rights than hers and therefore held his share of the land which is the subject of this appeal in trust for Somawathie and the Appellant, her successor in title, and the Appellant was entitled to a conveyance of it. p. 68, ll. 16-23.
p. 66, ll. 37-46.
p. 67, ll. 30-33.
p. 70, ll. 28-33.
- (G) The consent order of 21st August, 1944, was valid and effectual to declare Somawathie sole heir of Edward Banda, was p. 68, l. 28-p. 69, l. 5.

p. 70, ll. 13-17.

binding on the Respondent as a volunteer, and could be relied on by the Appellant to prove the trust which he asserted in this action. The Appellant conceded in the Supreme Court that this order did not bind the Respondent.

p. 77, l. 26.

p. 69, l. 21-p. 70, l. 8.

(H) Somawathie did not ratify the 1930 settlement by any of the steps relied on by the Respondent, because they were taken when she was a minor and/or was unaware of the true facts about the settlement; and the purchase and mortgage from Ran Menika relied on were suspicious transactions.

p. 70, ll. 13-17.
p. 65, l. 40-p. 66, l. 28.

(I) The partition decrees were not *res judicata* on any material question such as the Respondent's title to the land which is the subject of this appeal free of the alleged trust, because it was held in *Marikar v. Marikar* [1920] 22 N.L.R. 137 that section 9 of the Partition Ordinance (The Legislative Enactments of Ceylon, Vol. II, Chapter 56 page 95) will not extinguish a trust or preclude a beneficiary from claiming that his trustee holds the partitioned land in trust for him. 10

Appendix B.

p. 70, ll. 19-25.
p. 65, l. 40-p. 66, l. 28.
p. 66, ll. 38-46.

(J) The Appellant did not acquiesce in the entering of the final decree for partition, because he could not and did not in those proceedings for partition assert a trust but only refrained from claiming legal rights, not equitable rights, in the land to be partitioned. 20

p. 71.

19. On 10th February, 1953, a decree of the District Court was entered in accordance with the foregoing judgment, declaring that the Respondent held the land which is the subject of this appeal in trust for the Appellant, and ordering that the Respondent should execute a conveyance thereof in favour of the Appellant or that the said conveyance should be executed by the Secretary of the Court, that the Appellant should be placed and quieted in possession thereof and that the Respondent should pay to the Appellant all costs of the action. 30

pp. 72-75.

20. From this judgment and decree the Respondent appealed to the Supreme Court of Ceylon by Petition dated 19th February, 1953, in which the grounds of appeal are recorded.

pp. 75-81.

21. The Supreme Court on appeal (in a reserved judgment delivered by Gratiaen, J., on 15th February, 1955, with which Sansoni, J., agreed: 56 N.L.R. 529) allowed the Respondent's appeal and dismissed the Appellant's action with costs in both courts. A decree was entered on 15th February, 1955, in accordance with that judgment.

22. In his judgment Gratiaen, J., made no express finding upon (A) but clearly assumed that Somawathie was the sole heir of Edward Banda and of Bandara Menika and the Appellant of Somawathie. 40

p. 78, l. 30-p. 80, l. 4.
p. 78, l. 37-p. 79, l. 3.

As to (B) he held that the Appellant had wholly failed to establish that Bandara Menika was guilty of express fraud. The allegation of fraud was made belatedly in an action brought when Bandara Menika, Mr. Wanduragala (who acted as her proctor), Mr. Gomis (who acted as proctor for Kuma Kumarihamy and Ran Menika), Somawathie and

Appuhamy, her natural father and guardian *ad litem* who consented to the 1930 settlement on independent advice, were all long dead. The only direct evidence was the testimony of Mr. Wanduragala's clerk, who claimed to have overheard and to recollect 23 years later limited portions of vague conversations in Mr. Wanduragala's office; even this evidence did not suggest any fraud on the part of Bandara Menika; and all the evidence was consistent with the view that in the honest opinion of Bandara Menika, shared by honest and experienced lawyers well aware of the difficulty of establishing by oral evidence adoption for purposes of inheritance (as distinct from adoption which would not constitute Somawathie the sole heir of her adoptive father Edward Banda) under Kandyan law in the highly controversial state in which it then was, a settlement of the dispute between his widow, his adopted daughter and his two sisters was in the best interests of Somawathie, who if unsuccessful in litigating her claim to be sole heir would have been disentitled to any rights in his estate.

p. 79, l. 4-p. 80, l. 4.

As to (c), the learned Judge held that Bandara Menika stood in a fiduciary position towards Somawathie (which the Respondent does not dispute), but that the Appellant had wholly failed to establish that Bandara Menika had abused her fiduciary position and thereby derived a pecuniary advantage at the expense of Somawathie. He was very far from satisfied that Bandara Menika did gain any demonstrable pecuniary advantage from the 1930 settlement: she had a life interest in the entire estate of Edward Banda and by the settlement waived her legal right to receive an assured income from a 3/4ths share of it; Somawathie, on the other hand, had thereby gained the title to and income from 1/4th of the estate in exchange for the possibility, or even probability, of ultimately becoming owner of the entirety but without any right to any income until the death of Bandara Menika (then only about 50 years of age). It would have required an actuary to predict then the financial advantages and disadvantages which would flow from the settlement, and even now it was uncertain that the settlement was unwise. He therefore held that section 90 of the Trusts Ordinance had no application and that no constructive trust was imposed on Bandara Menika's 1/4th share of the land or on the Respondent's land which is the subject of this appeal.

p. 80, l. 7-p. 81, l. 15.
p. 78, ll. 31-36.

p. 80, l. 27-p. 81, l. 5.

p. 81, ll. 17-18.
Appendix A.

As to (d), he held that judicial approval was given to the 1930 settlement and dismissed as fanciful the suggestion that "the very experienced" District Judge had sanctioned some different settlement from the settlement dividing Edward Banda's estate into four undivided shares; and he held that the subsequent transactions including the partition decree negatived this theory—which is impossible to reconcile with the Record of Proceedings in the District Court on 9th September, 1930 (D.29), and the learned District Judge's signature to the Consent Motion filed therein on 9th October, 1930 (D.30).

p. 76, ll. 27-38.
p. 80, ll. 18-26.

pp. 136-137.

pp. 137-138.

As to (e), the Appellant appears to have abandoned before the Supreme Court the other fanciful theory that the Respondent had himself been a party to the fraud. The Respondent does not dispute that he had notice of the 1930 settlement, but that did not of course affect him with notice of non-existent fraud or collusion in connection with it.

p. 78, ll. 23-36.

As to (F), the learned Judge did not expressly hold that the Respondent had no better rights, as a donee, than Bandara Menika, the donor ; but this was not and is not disputed by the Respondent. As she did not hold the land she gifted to the Respondent in trust for Somawathie, neither did he hold his allotted share of it in trust for Somawathie or the Appellant, nor was the Appellant entitled to a conveyance of it.

p. 77, ll. 26-27.

As to (G), it was conceded by the Appellant before the Supreme Court that the order of 21st August, 1944 (P.23), to set aside the 1930 settlement did not bind the Respondent.

p. 76, l. 39-p. 77, l. 1.

As to (H), the learned Judge pointed out that the 1930 settlement was acted upon by all the parties and was assumed to be valid even after Somawathie attained her majority ; but he made no finding of acquiescence or ratification or estoppel.

p. 81, ll. 17-35.

As to (I), he found that Somawathie had put in issue the validity of any rights or title which the Respondent claimed by virtue of the settlement, and had attempted unsuccessfully to set up the rescission of the settlement by the order of 21st August, 1944, as a bar to his title. He stated that he would therefore have been prepared to hold, if necessary, distinguishing *Marikar's* case, that the partition decree in favour of the Respondent was by Section 9 of the Partition Ordinance conclusive and operated as *res judicata* against the Appellant and precluded him from attacking the validity of the settlement on which the decree was based.

Appendix B.

As to (J), the learned Judge made no reference to the Appellant's acquiescence in the final partition decree, but it is perhaps legitimate to infer from the opinion he expressed on (I) above that he regarded the District Judge's view that only legal rights were put in issue by Somawathie in the partition action as wrong and so would have regarded the Appellant as having withdrawn any claim to equitable as well as legal rights against the Respondent before the final decree.

Appendix B.

23. Both the District Court and the Supreme Court appear to have given too little weight to the plain words of section 9 of the Partition Ordinance. The conclusiveness of a partition decree has recently been reasserted in the judgment of the Privy Council in *Adamjee v. Sadeen* [1957] 2 W.L.R. 67 ; and the Respondent submits that, in view of the later decisions cited by Mr. T. Nadaraja in *The Roman-Dutch Law of Fideicommissa* (1949) pp. 181-7, the right of a beneficiary to assert a trust over land allotted by such a decree was too widely stated in *Marikar's* case.

24. The Respondent humbly submits that the said judgment of the Supreme Court should be affirmed and that this appeal should be dismissed for the following amongst other

REASONS.

- (1) BECAUSE the evidence wholly failed to establish that the settlement of 9th October, 1930, in Testamentary Case No. 3714 in the District Court of Kurunegala was fraudulent or collusive ;

- (2) BECAUSE the evidence wholly failed to establish that the said settlement was an agreement or compromise entered into on behalf of the said Somawathie by her guardian without the leave of the said District Court, or that the Court was deceived in approving it ;
- (3) BECAUSE the evidence wholly failed to establish that Somawathie's said guardian, in agreeing to the said settlement, acted otherwise than honestly in her interests and on independent legal advice ;
- 10 (4) BECAUSE the evidence wholly failed to establish that the Respondent was a party to any fraud or collusion in the making of the said settlement or had any notice of any such fraud or collusion ;
- (5) BECAUSE the decree in Case No. 3714 of the said District Court dated 21st August, 1944, was ineffective to set aside the said settlement and was not and is not binding on the Respondent ;
- 20 (6) BECAUSE the evidence wholly failed to establish that Bandara Menika in agreeing to the said settlement had availed herself of her position as a person bound in a fiduciary character to protect Somawathie's interests in order to gain for herself a pecuniary advantage ;
- (7) BECAUSE the evidence wholly failed to establish that the said Bandara Menika had gained for herself any pecuniary advantage by obtaining an undivided 1/4th share in Edward Banda's estate in exchange for her life interest in the whole of the said estate ;
- 30 (8) BECAUSE apart from section 90 of the Trusts Ordinance no ground was ever alleged for holding that Bandara Menika's 1/4th share in the land became impressed with any trust ;
- (9) BECAUSE section 90 of the Trusts Ordinance, even if it became applicable, operated to impress a trust only on the pecuniary advantage shown to have been gained by the said Bandara Menika and not on the interest obtained by the said Bandara Menika in 1/4th of the said land ;
- 40 (10) BECAUSE as regards the 1/12th share in the said land bought by the said Bandara Menika from the said Ran Menika, no grounds were alleged or established for holding that this land was impressed with a trust either in the hands of Ran Menika or in the hands of Bandara Menika ;
- (11) BECAUSE the said decree for partition was good and conclusive against all parties thereto, including Somawathie and the Appellant, and the Appellant is

thereby estopped *per rem judicatam* from asserting that the said land which is the subject of this appeal is subject to the alleged trust in his favour ;

- (12) BECAUSE the said settlement was acted upon and accepted as being valid by all parties including the said Somawathie and the Appellant, and the said Somawathie and the Appellant ratified and acquiesced in the said settlement and/or in the said partition and are estopped from challenging the said settlement or the said partition and from asserting that the land 10 allotted to the Respondent by the said decree for partition is subject to a trust in favour of the Appellant ;
- (13) BECAUSE the Judgment of the District Court was wrong and ought not to be restored ;
- (14) BECAUSE the Judgment of the Supreme Court was right and ought to be affirmed.

STEPHEN CHAPMAN.

JOHN STEPHENSON.

APPENDIX A.

TRUSTS ORDINANCE

SECTION 90.—Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit
10 of such other person the advantage so gained.

Illustrations.

- (A) *A*, an executor, buys at an under-value from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.
- (B) *A*, a trustee, retires from his trust in consideration of his successor paying him a sum of money. *A* holds such money for the benefit of his beneficiary.
- 20 (C) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.
- (D) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.
- (E) *A* and *B* are partners. *A* dies. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A*'s legal representative for the profits arising from *A*'s share of the capital.
- 30 (F) *A*, an agent employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.
- (G) *A*, a guardian, buys up for himself incumbrances on his ward *B*'s estate at an under-value. *A* holds for the benefit of *B* the incumbrances so bought, and can only charge him with what he has actually paid.

APPENDIX B.

PARTITION ORDINANCE.

SECTION 9.—The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whosoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been hereby awarded in severalty :

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Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued.

APPENDIX C.

CIVIL PROCEDURE CODE.

SECTION 500.—(1) No next friend or guardian for the action shall, without the leave of the court, enter into any agreement or compromise on behalf of a minor with reference to the action in which he acts as next friend or guardian.

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(2) Any such agreement or compromise entered into without the leave of the court shall be voidable against all parties other than the minor.

In the Privy Council.

ON APPEAL
from the Supreme Court of Ceylon.

BETWEEN

**TENNEKOON MUDIYAN-
SELAGE TIKIRI BANDA
AMUNUGAMA (Plaintiff) *Appellant***

AND

**HERATH MUDIYAN-
SELAGE TIKIRI BANDA
HERATH (Defendant) *Respondent.***

Case for the Respondent

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