27/1954

No. 41 of 1953.

In the Privy Council.

38102

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

ASSENA MARIKAR MOHAMED FUARD (Defendant) *Appellant*

AND

ALFRED RICHARD WEERASURIYA (Plaintiff) . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of the Island of Ceylon dated 27th May 1952 by which an appeal from a judgment of the District Court of Colombo dated 19th August 1949 was allowed and judgment entered for the Respondent against the Appellant in the sum of Rs.20,000 and costs. p. 96. p. 82.

2. The Appellant is a notary and proctor practising in Colombo Ceylon and the action related to alleged breaches of his professional duty towards the Respondent who was his client. The sum of Rs.20,000 mentioned above was awarded by the Supreme Court as damages in respect of breaches of duty which the Supreme Court, differing from the District Court, considered to have been established.

3. The Respondent is a former railway official who retired on pension in 1941, possessed of capital to an amount of approximately Rs.13,000 for which he desired to find investment. He was introduced to the Appellant by a relation and the Appellant in turn introduced him to one Wiswasam who desired a loan. p. 36, l. 23. p. 36, l. 29. p. 36, l. 33.

The Respondent lent to Wiswasam Rs.13,000 on a short term secured loan on which he was paid interest at 13½ per cent. but in September 1942 Wiswasam repaid the loan. The Respondent thereupon was anxious to obtain a fresh investment at a high rate of interest and the Appellant told him that he knew of an owner of a tea estate wao desired to borrow Rs.25,000. The Respondent had not Rs.25,000 to lend. The next suggestion came from one Shamsudeen, a broker and land agent who is a brother or brother-in-law of the Appellant and used his offices for some purposes. Shamsudeen suggested that the Respondent might lend p. 36, l. 38. p. 37, l. 4. p. 37, ll. 9, 40.

p. 38, l. 1. Rs.15,000 to one Samaratunge. Samaratunge was the owner of two estates, first an estate of some 146 acres planted with tea and cardamoms known as Fincham's land, and secondly a property, or collection of properties of some 18 acres, together with a house, known as Panwila. Fincham's land
Exhibit P35, p. 139. was at this time subject to a first mortgage to secure Rs.35,000 in favour of one Moolchand, an Indian merchant, and to a second mortgage for Rs.6,000 in favour of Shamsudeen and the Appellant's wife. Panwila was
Exhibit P41, p. 169. subject to a mortgage on which about Rs.5,000 were due in favour of one Naina Marikar, a cousin of the Appellant. It was recommended by Shamsudeen that the Respondent should lend Rs.15,000 on a first mortgage of Panwila and a second mortgage of Fincham's land, and he suggested that the Respondent should go and inspect the land and satisfy himself
Exhibits P48 and P49, p. 182. as to its value. The two letters dated 17th November 1942 and 23rd November 1942 in which Shamsudeen made these recommendations
p. 74, l. 39. were written on notepaper belonging to the Appellant but there was no evidence that the Appellant knew of Shamsudeen's actions and the
p. 38, l. 20. Appellant denies that he did. The Respondent did on 29th November 1942 go and inspect Fincham's land together with Shamsudeen, and after doing
p. 38, l. 31. so decided that it was unnecessary also to inspect Panwila. The Respondent agreed to lend the money, and instructions were given to the Appellant to draw up the deeds. The Appellant did so and on 3rd December 1942 Samaratunge, in consideration of Rs.15,000 lent him
Exhibit P1, p. 184. by the Respondent executed a primary mortgage over Panwila and a second mortgage over Fincham's land; the rate of interest payable was 15 per cent. reducible to 10 per cent. on punctual payment. The existing second mortgage on Fincham's land in favour of Samaratunge and the Appellant's wife was discharged and Naina Marikar was repaid the greater part of his debt secured upon Panwila, the balance of Rs.1,000 being left on second mortgage.

p. 39, l. 10. 4. Three months' interest on the Respondent's loan was paid by Samaratunge at the time the loan was made, but Samaratunge never
Exhibit P38, p. 205. thereafter paid any interest. On 3rd September 1943 Moolchand, the first mortgagee of Fincham's land, sued upon his bond, making the Respondent a defendant as a puisne encumbrancer, and obtained a decree
p. 216. on 6th December 1943. Fincham's land was then put up for sale but
p. 41, l. 32. instead of the sale taking place, as is usual, on the spot, the sale took
p. 19, l. 34. place in the auctioneer's office in Colombo. Moolchand and the Respondent and a few others were present at the sale and the property was purchased
p. 23, l. 2. by Moolchand for Rs.16,000, and by him resold two weeks later for
Exhibit P46, p. 225. Rs.30,000. Thereafter the Respondent on 1st June 1944 commenced proceedings on his second mortgage on Panwila and obtained a decree on 27th June 1944. The land was sold for Rs.2,250. The Respondent had thus lost the greater part of his money.

p. 7. 5. On 23rd October 1947 the Respondent commenced proceedings against the Appellant in the District Court of Colombo. After alleging that the Appellant had advised the Respondent to invest Rs.15,000 with Samaratunge and recommended the borrower and the title and the value of the properties, the Respondent pleaded that the Appellant was furthering the interests of others whose interests were adverse to those of the Respondent which fact was fraudently concealed by the Appellant,

that the Appellant though fully aware of facts and circumstances which rendered the security inadequate and doubtful failed to declare them and recommended and advised the Respondent to accept the security and that there had been on the part of the Appellant an intentional and deliberate dereliction of his professional duty. The Respondent claimed Rs.20,000 damages.

6. In his answer the Appellant denied the Respondent's allegations, said that he had told the Respondent that he (the Respondent) must satisfy himself about the value and adequacy of the security and that the Respondent did so, that the security was in fact adequate, and pleaded prescription. p. 15.

7. After issues had been stated and approved by the Court the case came on for trial before District Judge H. A. de Silva on 9th May 1949. The Respondent called as his witnesses (*inter alia*) Moolchand, Samaratunge, Shamsudeen and Naina Manikar and himself gave evidence. The Appellant gave evidence and called four auctioneers or valuers, including those who had sold the mortgaged lands. Of these Col. Vandersmagt testified that he had valued Fincham's land for purposes of sale under Moolchand's mortgage at Rs.45,000, and a Mr. McHeyzer that he advised the Appellant that the tea portion of the land, which was 80 acres, was worth Rs.1,000 an acre or more. Mr. Krishnarajah said he had valued Panwila for sale in the Respondent's suit at Rs.21,150. p. 16. p. 59, l. 32. Exhibit D1, p. 219, at p. 223. p. 61, l. 38. p. 63, l. 3.

8. On 19th August 1949 the District Judge gave judgment dismissing the action. His findings on the stated issues included the following :— p. 82. p. 91.

(A) That the Appellant did not recommend the value of the security or the reliability of Samaratunge as borrower.

(B) That the Appellant did not act with a view to furthering the interests of others whose interests were adverse to those of the Respondent.

(C) That the security was not in fact inadequate.

(D) That the Appellant had not fraudently concealed material facts within his knowledge relative to the investment with a view to inducing the Respondent to make the investment.

(E) On the issue whether the Appellant had thereby committed a breach of contract of employment with the Respondent or an intentional dereliction of professional duty the learned judge stated that this did not arise in view of his answer to the issue referred to under (D).

(F) That while the Appellant knew that there was a secondary mortgage over Fincham's land in favour of Shamsudeen and the Appellant's wife and a primary bond in favour of Naina Marikar over Panwila he did not suppress such knowledge from the Respondent.

9. In his reasons for judgment, the learned judge referred to the Respondent's evidence that he had, at the Appellant's suggestion, gone to inspect Fincham's land and that after he had made his inspection he p. 82.

was satisfied. He held that when people lend money they have got to satisfy themselves upon the value of the security that was offered and that there was no suppression of facts by the Appellant at any stage. The judge also referred to the evidence of Shamsudeen that the Respondent was made fully aware that Rs.35,000 was due to Moolchand on a primary mortgage, that Rs.6,000 was due to him (Shamsudeen) and the Appellant's wife on a secondary mortgage, and that the Respondent knew that part of the Rs.15,000 advanced by him was to be utilised for the payment of Naina Marikar's debt. The Appellant, as proctor, was undoubtedly expected to pass title but there was no proof that the title as passed by the Appellant was defective. As to value, the evidence of the auctioneers was that Fincham's land was worth Rs.45,000 when the order to sell was issued, and that Panwila was worth Rs.21,150. The Appellant did not claim to be a valuer. The Respondent was very keen to earn interest and so far as title to the land was concerned there was no evidence that the low price realised was the result of bad title. As to the Appellant's plea of prescription, the learned judge held that time would have started to run from the time that the Respondent became aware that the Appellant had acted to his detriment. This date the judge fixed as about December 1945. The question did not however in his view arise as the Appellant had not acted in any way detrimental to the interests of the Plaintiff.

p. 92. 10. The Respondent appealed to the Supreme Court against the dismissal of the action by the trial judge and on 27th May 1952 the p. 96. Supreme Court gave judgment allowing the appeal and entered judgment for the Respondent for Rs.20,000 damages and costs.

11. In his reasons for judgment (with which Gunasekara, J., concurred) Gratiaen, J., in dealing with the evidence said :—

p. 98, l. 1. " I cannot accept the artificial proposition that merely because " Shamsudeen was in a sense the Appellant's (the present " Respondent's) witness the Appellant (the present Respondent) " is necessarily bound by every false statement which Shamsudeen " took the opportunity of making in the witness box."

The learned judge then turned to the evidence of Samaratunge and after referring to his unsatisfactory title to Panwila, to the loan of Rs.3,750 p. 99, l. 25. made to him by Naina Marikar and to the efforts of the latter to recover his loan, said that no doubt Naina Marikar and others interested in his welfare were in a state of some despondency as to the prospects of recovering the money which he had lent on unreliable security. He continued :—

p. 100, l. 21. " Samaratunge was called as a witness at the trial by the " Appellant's (the present Respondent's) counsel for reasons which " are certainly obscure. He too, like Shamsudeen, took the " opportunity of making many statements, some of them patently " false, unfavourable to the Appellant's (the present Respondent's) " case. Here again, I reject as artificial the argument that the " Appellant (the present Respondent) must necessarily be regarded " as bound by the falsehoods to which Samaratunge gave utterance " while he was in the witness box."

He then summarised the financial position of Samaratunge in November 1942 and the events, including the letters written by Shamsudeen to the Respondent recommending the loan, and the subsequent history of the security. He then stated :—

" For the reasons which I shall later indicate, it seems to me p. 105, l. 45.
" that the learned District Judge has not paid sufficient regard to
" the very high standard of conscientiousness which a Court of Law,
" ' exercising jurisdiction as a Court of conscience,' must always
" demand from legal advisers to whose contractual obligations there
" are superadded certain ' duties of particular obligation ' arising
" from a fiduciary relationship of a special nature—such as, for
" instance, where a proctor is invited to act professionally for a
" client in a transaction from which either the proctor or his close
" relatives stand to benefit materially."

In his view it was the plain duty of the Appellant to have made it p. 106, l. 19.
very clear to the Respondent that his wife, his brother and another close relative, for all of whom he was also acting and in whose financial advantage he had a special concern, were particularly interested in the proposed loan to Samaratunge going through. He should have insisted that the Respondent should obtain his legal advice from someone else. The acquittal of the Appellant on the issue of actual (as opposed to constructive) fraud did not conclude the case against the Respondent. It still had to be considered whether the facts as proved established a breach of fiduciary duty as laid down in *Nocton* v. *Ashburton* [1914] A.C. 932. The learned p. 107, l. 42.
judge then enumerated points which had particularly weighed with him in reaching the conclusion that the liability of the Appellant had been established even if the view were taken least unfavourable to his professional honour :—

(1) The Appellant was the legal adviser in the transaction and p. 107, l. 46.
the Appellant did tender " certain professional advice." In considering the sufficiency of that advice, it was proper to pay special regard to the Appellant's statements in certain letters written to the Respondent in 1945 rather than to " certain statements " made by him in the witness box.

(2) The recommendations as to the proposed borrower by p. 108, l. 12.
Shamsudeen contained many false statements and purported to associate the Appellant with those statements. In spite of his admitted disadvantages as an appellate judge, the learned judge did not believe that the Appellant unambiguously removed the false impression which Shamsudeen had given. In this respect the Appellant failed in his duty.

(3) The professional advice given by the Appellant was p. 108, l. 33.
inadequate. He should have advised that the security of a secondary mortgage could in the event of a forced sale prove to be virtually negligible unless its realisable value left over an ample margin to meet that contingency.

(4) The Appellant should have disclosed the fact that his close p. 109, l. 17.
relatives for whom he was acting were Samaratunge's creditors.

The learned judge did not accept as valid or as truthful the Appellant's evidence that the Respondent had told him that he (the Respondent) had heard that the Appellant's wife and brother had lent money on the land. The Appellant's conduct in the transaction fell far short of the duty imposed on him by contract and also of the duty of particular obligation imposed on him by his special fiduciary relationship.

The learned judge did not make any reference to the plea of prescription although this was maintained before the Supreme Court.

p. 110, l. 36. Finally Gratiaen, J., dealt with the claim for damages and held that the amount of Rs.20,000 claimed was not excessive.

12. The Appellant submits that the Supreme Court ought not to have reversed the decision of the trial judge. The findings of the learned trial judge were pronounced upon definite issues which had been stated by the parties and which were themselves based upon the pleadings. On those issues the learned judge found unequivocally in favour of the Appellant. In accordance with the pleadings and issues stated the only case which the Appellant had to meet was that he had committed a deliberate and intentional dereliction of his professional duty and breach of contract by :—

(A) Furthering the interests of others whose interests were adverse to those of the Respondent and fraudulently concealing this from the Respondent.

(B) Being fully aware of the facts and circumstances which rendered the security offered by Samaratunge inadequate, failed to declare them and advised the Respondent to accept the security.

Each of these claims and each element in it was categorically rejected by the trial judge. The Supreme Court was, in the submission of the Appellant, wrong to substitute its own view for that of the trial judge and wrong to substitute fresh issues for those fixed at the trial.

13. The Supreme Court arrived at the conclusion that the Appellant failed in his professional duty by the opinion which it formed as to the reliability of the principal witnesses called, an opinion which differed from that of the judge who heard them. Although Shamsudeen and Samaratunge were called by the Respondent, and although no doubt was cast on their evidence by the learned trial judge, their evidence was largely rejected by the Supreme Court. The Supreme Court also, in a number of respects rejected the Appellant's evidence, on which again, no doubt was cast by the learned trial judge. The Supreme Court on the other hand accepted the Respondent's unsupported evidence that he was not aware when he made the loan that there were outstanding mortgages in favour of the Appellant's relatives, in the face of first the evidence of Samaratunge, second the evidence of Shamsudeen, third the evidence of Naina Marikar, fourth the evidence of the Appellant, fifth the evidence of a document prepared on the date the Plaintiff's bond

p. 31, l. 39.
p. 36, l. 2.
p. 55, l. 25.
p. 57, l. 17.
p. 65, l. 27.
p. 75, l. 44.
Exhibit D4, p. 196.

was signed—which document was never referred to in the judgment of the Supreme Court—and sixth the finding of the learned trial judge that the Appellant, knowing that there was a secondary mortgage over Fincham's land in favour of Shamsudeen and the Appellant's wife and a primary bond in favour of Naina Marikar over Panwila did not suppress such knowledge from the Respondent. p. 91, l. 30.

This finding of fact by the Supreme Court was the principal basis for the conclusion of the Supreme Court that there had been a breach of the Appellant's fiduciary duty and the Appellant submits accordingly that there was no sufficient basis for any such finding. The Appellant further submits that in so far as the judgment of the Supreme Court was based upon a different view taken as to the sufficiency of the professional advice given by the Appellant, there was not sufficient reason to depart from the finding of the trial judge.

14. The Appellant further submits that in any event, on the view taken by the trial judge that the Appellant had not been guilty of any fraud, which was accepted by the Supreme Court, the Respondent's claim was barred by prescription. Sections 7, 9 and 10 of the Prescription Ordinance (Statutes of Ceylon c. 55) are set out in the Appendix to this case. Under those sections the prescription period is, for actions in tort, or for loss or damage, two years, and for actions in contract three years from the accrual of the cause of action. The plaint was filed on 23rd October 1947. The cause of action accrued either on the date when the Respondent's bond was signed (3rd December 1942) or shortly before when the alleged breach of duty was committed. Even if the cause of action was concealment by the Appellant of the interest of his relatives, that also arose on or shortly before 3rd December 1942, and even if the period did not begin to run until the Respondent discovered the fact of such interest the Respondent must be deemed to have discovered it at latest on 3rd October 1945 by which date extracts from all relevant incumbrances on Fincham's land had been filed at the Land Registry.

15. The Appellant submits that the judgment of the Supreme Court was wrong and ought to be reversed and the judgment of the District Court restored or a new trial ordered for the following amongst other

REASONS

(1) BECAUSE the findings of the trial judge were in accordance with the evidence and ought not to have been disturbed by an appellate court, or alternatively

(2) BECAUSE there was evidence upon which the findings of the trial judge could have been based and they ought not to have been disturbed by an appellate court.

(3) BECAUSE the Supreme Court ought to have determined the appeal upon the issues stated by the trial judge and based upon the pleadings and because upon those issues there was no sufficient reason for disturbing the findings of the learned trial judge.

(4) BECAUSE there was no sufficient evidence to justify a finding by the Supreme Court that the Appellant had been guilty of any breach of fiduciary duty or professional duty or breach of contract.

(5) BECAUSE the only duty of the Appellant as proctor and notary was to pass title to the property and there was no sufficient evidence to show that the Appellant ever undertook any other duty and in particular did not recommend the borrower or the security or that the title was defective.

(6) BECAUSE the Respondent's claim was barred by prescription.

R. O. WILBERFORCE.

APPENDIX.

LEGISLATIVE ENACTMENTS OF CEYLON.

PRESCRIPTION ORDINANCE.

STATUTES OF CEYLON C. 55.

SECTION 7. No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen.

SECTION 9. No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen.

SECTION 10. No action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued.

No. 41 of 1953.

In the Privy Council.

ON APPEAL

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BETWEEN

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(Defendant) . . . *Appellant*

AND

ALFRED RICHARD WEERASURIYA
(Plaintiff) . . . *Respondent.*

Case for the Appellant.

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