

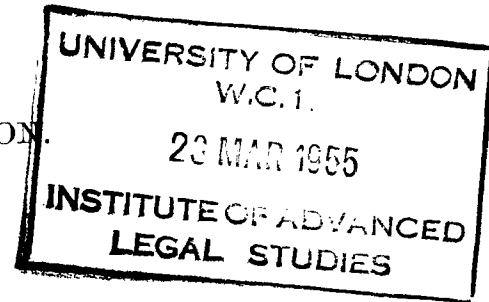
27, 1954

No. 41 of 1953.

In the Privy Council.

38103

ON APPEAL
FROM THE SUPREME COURT OF CEYLON.



BETWEEN

ASSENA MARIKER MOHAMED FUARD
(Defendant)

Appellant

AND

ALFRED RICHARD WEERASURIYA (Plaintiff) *Respondent.*

10

CASE FOR THE RESPONDENT

RECORD.

1. This is an appeal from a judgment and order of the Supreme Court of Ceylon, dated the 27th day of May, 1952, setting aside a judgment and order of the District Court of Colombo, dated the 19th day of August, 1949, whereby the District Court dismissed an action by the Respondent against the Appellant for Rs. 20,000 damages for fraud and breach of duty as legal adviser to the Respondent.

2. The principal issue in this appeal is the extent of the Appellant's duty as legal adviser to the Respondent to disclose circumstances within his knowledge which were material to the Respondent's decision to invest
20 money on a mortgage and to advise the Respondent in relation thereto.

3. The Appellant is a Proctor who, at the time when these proceedings began, had been in practice for about 23 years. The Respondent was for 31 years in Government service from which he retired in 1941. From a date shortly after such retirement the Appellant acted as the Respondent's professional adviser. In May, 1941, acting on the Appellant's advice, the Respondent invested Rs. 13,000 in a secondary mortgage on an estate owned by one Visvasam. The said sum was returned to the Respondent in September, 1942.

4. On the 3rd December, 1942, acting on the Appellant's advice the
30 Respondent lent one Samaratunge the sum of Rs. 15,000 on a mortgage bond (P.1) carrying interest at 10 per cent. per annum. The bond was

attested by the Appellant as Notary and by the Appellant's brother, one Shamsudeen, as witness. The security covered by the bond was a primary mortgage of a property known as Panwila and a secondary mortgage of a property known as Fincham's Land.

5. The previous history of Samaratunge's dealings with these properties was as follows :—

pp. 169-174. (A) On the 20th August, 1941, Samaratunge borrowed Rs. 3,750 on a primary mortgage of the Panwila property (P.41) from one Naina Marikar, the first cousin of the Respondent and Shamsudeen who were the attesting notary and witness respectively. At the same time the parties entered into a contemporaneous agreement whereby the said debt of Rs. 3,750 was to be liquidated by the delivery of tea coupons. Such coupons were not, however, delivered and on the 20th February, 1942, the Appellant, acting for the said Naina Marikar, filed a Plaint in the District Court of Colombo claiming as against Samaratunge Rs. 4,990 together with interest and costs or alternatively that the Panwila property be sold and the proceeds of the sale applied towards the payment of the said sum. On the 17th August, 1942, Samaratunge consented to judgment and a decree was recorded on the 12th September, 1942, whereby the Panwila property became liable for sale in default of payment before 12th March, 1943. 10

pp. 175-179.

p. 99, l. 15.

pp. 146-155.

(B) By a mortgage bond dated 2nd June, 1941, Samaratunge mortgaged Fincham's Land to one Khemchend Moolchand for the sum of Rs. 35,000. This deed also was attested by the Appellant and witnessed by Shamsudeen.

(C) On the same date Samaratunge borrowed from Shamsudeen and Mrs. Umma Ryhan (the Appellant's wife) Rs. 3,500 on a secondary mortgage on the same property.

6. On the 17th November, 1942, Shamsudeen wrote the following letter on the Appellant's headed letter paper to the Respondent :— 30

p. 182, l. 1.

“ A. M. SHAMS,
C/o A. M. FUARD,
Proctor and Notary.

130, Huldsdorf Street,
Colombo.
17th November, 1942.

Dear Mr. A. R. Weerasuriya,

After I met you at Main Street in Colombo, when I went to office in the noon I was surprised to find the client of ours whose business I casually suggested you. This client is one Mr. K. R. Samaratunge a long standing client of ours for the last nearly ten years or so. And he will pay interest very regularly and do good business. Now he want Rs. 15,000/- on a primary mortgage of his house property with 3 acres of land and 15 acres fully planted tea near his home. This bungalow where he is reside now, it is a good one with water services, etc. These two properties were situated at Medakotuwa, Panwila, is only 13 miles from Kandy. Title is Crown. Further Mr. Fuard had suggested me to get another large estate of 146 acres tea belonging to him near about Kandy as 40

10 secondary mortgage as an additional security, this estate is worth over Rs. 80,000/- it has a primary mortgage of Rs. 40,000/- and interest have been paid up to date. Out of this Rs. 15,000/- a sum of Rs. 5,000/- will be repaid to you in six months time and the balance money will be paid back after an year. As he returning the money early in instalment he had agreed to pay you an int. of 9 (nine) per cent. This is a good business, he will be very regular in paying you the interest should you accept this. If so please let me know when you can conveniently inspect the land, I shall make all arrangement. This security does not appear as it sufficient enough, but if you will go to see you will realise. In the other hand the borrower is absolutely good and you will be more than satisfied.

Thanking you in anticipation.

Yours truly,

(Sgd.) Illegibly."

On the 23rd November, 1942, Shamsudeen wrote the following further letter on the Appellant's headed letter paper to the Respondent :—

p. 182, l. 31.

20 " A. M. SHAMS. 130, Hultsdorf Street,
A. M. FUARD. Colombo.
Proctor and Notary. 23rd November, 1942.
A. R. Weerasuriya, Esq.,
' Sirisevene,'
Ambalangoda.

Dear Mr. Weerasuriya,

30 I am in receipt of your letter dated the 18th instant and I immediately communciated with my client having consulted Mr. Fuard. I have fixed up to inspect these properties of Mr. Samaratunge at Kandy on this Sunday the 29th inst. Please be in Colombo at the Kandy bus stand at 5th Cross Street near the Municipal latrine between 7 and 8 in the morning. We got to inspect this property definitely on this Sunday. From Colombo we have to go by bus to Kandy and Mr. Samaratunge will be meeting us at the bus stand positively at Kandy and we will have to take breakfast at Kandy and then proceed to the estate by car.

Mr. Fuard highly recommends this loan.

With kind regards,

Yours sincerely,

(Sgd.) Illegibly."

40 7. At the time of the execution of the mortgage bond of 3rd December, 1942 (P.1), the Respondent handed over to the Appellant two cheques for Rs. 375 and Rs. 14,625. The former was endorsed by Samaratunge and handed back to the Respondent. As found in the judgment of Gratiaen J. in the Supreme Court the balance of Rs. 14,625 was distributed by the payment of Rs. 4,500 to Naina Marikar in satisfaction of his decree, p. 46, l. 46.

Rs. 2,500 to Shamsudeen, the Respondent's brother, in full settlement of his claim on the Bond D.2, Rs. 3,500 to Mrs. Umma Ryhan, the Appellant's wife, in full settlement of her claim on Bond D.2 and Rs. 3,750 to Samaratunge personally.

8. By a Plaint dated the 23rd October, 1947, the Respondent instituted

THE PRESENT SUIT

claiming payment of Rs. 20,000 with interest thereon. The Plaint included the following paragraphs :—

p. 8, l. 21.

“ 7. The plaintiff states that though the defendant was employed as his legal adviser and agreed and undertook to act for and on behalf of the plaintiff he was in the transaction referred to above in paragraph 4 furthering the interests of others whose interests were adverse to those of the plaintiff which fact was not known to the plaintiff at the time and had been fraudulently concealed from him by the defendant. The plaintiff states that he came to know of the facts set out in this paragraph on or about December, 1945. 10

“ 8. The plaintiff further states that the defendant was fully aware of facts and circumstances which rendered the security offered by Samaratunge to plaintiff inadequate and doubtful but that the defendant in breach of his duty to plaintiff not merely failed to declare them but even recommended and advised the plaintiff to accept the said security. The plaintiff states that he came to know of the facts set out in this paragraph in or about December, 1945. 20

“ 9. The plaintiff states that by reason of the circumstances set out in paragraphs 6 and 7 there has been on the part of the defendant an intentional and deliberate dereliction of his professional duty and a breach of his contract of employment as legal adviser to the plaintiff to the latter's detriment and loss.” 30

p. 16, l. 10.

9. By his Answer, dated 19th December, 1947, the Appellant pleaded (*inter alia*) that the security was adequate in fact though he (the Appellant) did not recommend either the security or the borrower. Issues were framed as follows :—

p. 17, l. 2.

“ 1. Did the plaintiff employ the defendant as his legal adviser and to act for and on his behalf in connexion with the investment of Rs. 15,000 in or about November, 1942 ?

“ 2. In pursuance of such employment did the defendant invest the said sum of Rs. 15,000 with K. R. Samaratunge on Bond No. 2308 of 3.12.42 ? 40

“ 3. Did the defendant recommend to the plaintiff—

(A) the title of K. R. Samaratunge to the premises mortgaged as sound ?

(B) the value of the security as sufficient ?

(C) the borrower K. R. Samaratunge as reliable ?

“ 4. If Issue 3 (A) and/or (B) and/or (C) are answered in the affirmative, did the defendant do so (A) well knowing that the security was inadequate and of doubtful value (B) and/or with a view to furthering the interests of others whose interests were adverse to that of the plaintiff ?

“ 5. Has defendant fraudulently concealed material facts within his knowledge relative to the investment with a view to inducing the plaintiff to make the said investment ?

10 “ 6. Has the plaintiff thereby committed (A) a breach of contract of employment with the plaintiff and/or (B) an intentional dereliction of professional duty relative to this investment ?

“ 7. What damages, if any, is plaintiff entitled to ?

“ 8. Was the security in fact inadequate ?

“ 9. Did the defendant ever have knowledge that the security was inadequate in fact ?

“ 10A. What were the interests of others referred to in Issue No. 4 ?

“ 10B. If so, were such interests adverse to those of the plaintiff ?

20 “ 10C. Did the defendant have any knowledge of such adverse interests ?

“ 10D. Did the defendant suppress such knowledge from the plaintiff ?

“ 11. Do the facts pleaded in the plaint disclose a cause of action against the defendant ?

“ 12. Is the plaintiff's claim, if any, prescribed ? ”

10. Shamsudeen was called as a witness for the Respondent and deposed (*inter alia*) that the letters referred to in paragraph 6 hereto had been written from the Appellant's office but that he had not in fact p. 53, l. 41.
30 discussed the matter with the Appellant as stated in the letters.

11. In cross-examination the Appellant deposed (*inter alia*) that at the time of the proceedings in 1942 he had realised that Samaratunge was p. 69, l. 14.
not a man who kept his promises. He further deposed as follows :—

“ Plaintiff was aware that my wife along with Shamsudeen had p. 75, ll. 44-45.
a secondary mortgage over the land, because that morning he said that he had heard that my wife had lent money and that my brother had lent money on that land. I did not therefore tell plaintiff that my wife had a mortgage, plaintiff knew about the mortgages.”

12. The judgment of the learned District Judge included the following
40 passages :—

“ It would appear that when negotiations were going on for p. 86, l. 26.
Samaratunge to borrow this sum of Rs. 15,000 from the plaintiff,

there was subsisting a secondary mortgage over Fincham's land in favour of defendant's brother, Shamsudeen, and defendant's wife, Mrs. Fuard, for a sum of nearly Rs. 6,000."

* * * * *

p. 88, l. 36.

"There was no suppression of facts by the defendant at any stage, defendant told the plaintiff that at the date he was negotiating this loan there were two mortgages on Fincham's land, one in favour of Moolchand and another one for Rs. 5,000 or Rs. 6,000. It made no difference to the plaintiff whether the secondary mortgage was in favour of Shamsudeen and defendant's wife or in favour of some other parties. What the plaintiff was concerned about was that his mortgage should be a secondary mortgage of Fincham's land and that secondary mortgage the plaintiff got without any flaw in title. Shamsudeen, who has been called by the plaintiff, has stated to Court that plaintiff was made fully aware that Rs. 35,000 was due to Moolchand on a primary mortgage and that Rs. 6,000 was due to him (Shamsudeen) and defendant's wife on a secondary mortgage. Shamsudeen also says that plaintiff knew that part of the Rs. 15,000 he was going to lend to Samaratunge was to be utilised for the payment of Naina Marikar's debt." 10

p. 91, l. 9.

The learned Judge held that the Respondent's action failed and answered the issues as follows :— 20

" 1. Yes.

" 2. Yes.

" 3. (A) Yes.

" (B) No.

" (C) No.

" 4. This issue does not arise in view of my answer to issues 3 (B) and 3 (C) but I wish to state that the defendant did not act in this matter with a view to furthering the interests of others whose interests were adverse to that of the plaintiff. 30

" 5. No.

" 6. This does not arise in view of my answer to issue No. 5.

" 7. No.

" 8. The security was in fact adequate.

" 9. No.

" 10. (A) The interests referred to in issue 4 were those of Shamsudeen, defendant's wife and Naina Marikar.

" (B) No.

" (C) Defendant knew that there was a secondary mortgage over Fincham's land in favour of Shamsudeen and defendant's wife and a primary bond in favour of Naina Marikar over Panwila lands. 40

" (D) No.

" 11. No.

" 12. No.

“ With regard to the question which is raised in issue No. 12, prescription actually would run in this particular case from the time that plaintiff became aware that defendant had acted to his detriment. Plaintiff became aware of that fact about December, 1945. That is on the assumption that defendant had committed the wrong acts complained of by the plaintiff, but I do not in this case hold that defendant has acted in any manner detrimental to the interests of the plaintiff.”

13. The principal judgment in the Supreme Court was delivered by
10 Gratiaen J. and included the following passages :—

“ For the reasons which I shall later indicate, it seems to me 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. As I read the judgment under appeal, the learned District Judge, in disposing of issue 5, seems to take the view in this particular case that the respondent had sufficiently complied with his duty by informing the appellant of the existence only of the subsisting mortgages on Fincham’s land and the Panwila property respectively (without disclosing the identity of the mortgagees). Accordingly, he holds, ‘ it made no difference to the (appellant) whether the secondary mortgage was in favour of Shamsudeen and the (respondent’s) wife or in favour of some other parties.’”

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30
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“ With great respect, I cannot subscribe to this view. ‘ A solicitor who accepts such a post puts himself in a false position ; if he acts for both (parties), he owes a duty to both, to do the best that he can for both.’ Per Farwell, J., in *Powell v. Powell* (1). It was the plain duty of the respondent to have made it very clear to the appellant 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 unambiguously have warned the appellant of the extent to which the situation created a conflict between his interest and his duty in order that, being thus forewarned, the appellant might have the opportunity of preferring to consult an independent and disinterested lawyer before making a final decision in the matter. Indeed, I take the view that he should have insisted that the appellant should obtain his legal advice from someone else.”

Gratiaen J. held that the trial judge’s answer to issue 5, although it quite explicitly disposed of the allegation of fraud, was clearly not intended to express the view that the Respondent had in fact disclosed every fact known to him. He was, however, of the opinion that the acquittal of the

Appellant on the issue of actual as opposed to constructive fraud did not conclude the case against the Respondent since the Respondent's cause of action, shortly stated, was that the Appellant was liable to indemnify him for his loss because the Appellant had failed to perform his professional duty in regard to the transaction. As regards the letters from Shamsudeen the learned Judge stated :—

p. 108, l. 11.

“ 2. Notwithstanding the protestations of Shamsudeen and Samaratunge, it is very clear from the documents P48, P49 and P50 that the loan and the proposed borrower Samaratunge were in the first instance recommended to the appellant by Shamsudeen. These 10 letters not only contain many false statements as to the nature of the security and the integrity of the borrower, but they also expressly purport to associate the respondent with those statements. The appellant, who was not cross-examined on this point, has stated that these letters were shown by him to the respondent, and this fact has not been denied by the respondent. I regret that, in spite of my admitted disadvantages as an appellate Judge, I do not believe that the respondent could have unambiguously removed the false impression which Shamsudeen had given as to Samaratunge's personal unsuitability as a debtor. This point was not suggested 20 to the appellant in cross-examination, nor did the respondent claim to have so acted in any of his earlier letters addressed to the appellant or the appellant's proctor. It is inherently improbable that the appellant would have proceeded with the business if he had been made to realise that Shamsudeen's written encomiums of Samaratunge, purporting to have been endorsed by the respondent himself, were deliberately false ; in this respect also the respondent has failed in his professional duty.”

p. 108, l. 36.

The learned Judge held that the Appellant's warning to the Respondent that he must satisfy himself as to the value of Fincham's Land and that 30 it was safer to regard this property as the substantial security for the proposed loan, did not even nearly approximate to the kind of professional advice which the situation demanded. He was of the opinion that the Appellant should have disclosed the fact that his close relatives, for whom he was acting, were Samaratunge's creditors and stood to benefit if the transaction went through. He found himself unable to accept as valid or truthful the excuse for non-disclosure which had not been suggested to the Respondent in cross-examination. The learned Judge arrived at the following conclusion :—

p. 110, l. 10.

“ Examined in this way, the respondent's conduct in the 40 transaction under consideration 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. Putting the case against him at the very lowest, he did not disclose to the appellant the extent to which his relatives stood to gain if the transaction went through ; he did not sufficiently advise the appellant as to the safe margin which should be insisted on if the main security for the loan was to be a secondary mortgage of Fincham's land—having regard particularly to the appellant's known

10 inability to purchase the property himself at a forced sale in order to protect himself ; Samaratunge was a debtor of proved unreliability whose financial position had by the beginning of December, 1942, become well-nigh desperate ; and the respondent did not sufficiently, if at all, refute the recommendation of the borrower with which Shamsudeen had deliberately associated him in the letters P48, P49 and P50. In other words, he refrained from communiating to his client many circumstances within his knowledge which were material to his client's decision. It was a breach of duty in the facts of the present case to withhold any information as to the special risks attending the proposed transaction.

“ In any view of the matter, the respondent's conduct has fallen short of the high standard of conscientious duty exacted by well-defined principles of the Common Law. The appellant has lost his money in consequence and is in my opinion entitled to claim an indemnity for the loss which he has sustained.”

He was therefore of opinion that the judgment under appeal should be set aside and a decree entered in favour of the Respondent against the Appellant as prayed for, with costs in both Courts. Gunasekara J. agreed. p. 111, l. 14.
20 A decree was passed accordingly. p. 111, l. 19.

14. Conditional leave to appeal to Her Majesty in Council was granted on 12th June, 1952, and final leave on the 28th August, 1952. p. 113.
p. 115

15. The Respondent respectfully submits that this Appeal should be dismissed with costs and the Judgment of the Supreme Court of Ceylon upheld for the following amongst other

REASONS

- 30 (1) BECAUSE the Supreme Court were right in holding that the advice given by the Appellant to the Respondent did not even nearly approximate to the kind of professional advice which the situation demanded.
- (2) BECAUSE the Supreme Court were right in holding that the Appellant should have disclosed to the Respondent the fact that his (the Appellant's) close relatives, for whom he was acting, were Samaratunge's creditors and stood to benefit if the transaction went through.
- 40 (3) BECAUSE the Supreme Court were right in holding that the Appellant's conduct fell far short of the duty imposed on him by contract and also of the duty of particular obligation imposed on him by the special fiduciary relationship.
- (4) BECAUSE the Supreme Court were right in holding that the Appellant's conduct had fallen short of the high standard of conscientious duty exacted by well-defined principles of the common law.

- (5) BECAUSE the Supreme Court were right in holding that the Respondent had lost his money in consequence of the Appellant's conduct and was entitled to indemnity for the loss which he had sustained.
- (6) BECAUSE the judgments and decree of the Supreme Court were right.

DINGLE FOOT.

T. O. KELLOCK.

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Solicitors for the Respondent.

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