

~~GLI. 42~~

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INSTITUTE OF ADVANCED  
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25 LINCOLN SQUARE  
LONDON, W.C.1.

HER MAJESTY'S PRIVY COUNCIL

No.31 of 1962

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

74122

MRS. HILDA VANDER POORTEN (Plaintiff) Appellant

- and -

JOSEPH VANDER POORTEN (Defendant) Respondent

C A S E FOR THE APPELLANT

Record

- 10 1. This is an Appeal, by leave of that Court, from a Judgment of the Supreme Court of Ceylon delivered on the 14th day of December, 1960, and the Decree of the same date pursuant thereto allowing an appeal from the Judgment delivered on the 29th day of August, 1958, and the Decree of the same day of the District Court of Colombo whereby it was ordered that the Respondent (Defendant) do pay to the Appellant (Plaintiff) the sum of Rs. 31,622/- and costs Pp.162-3  
Pp.156-157
- 20 2. The Appellant and the Respondent, who are husband and wife, but who separated in or about July 1951, have at all material times been interested in two separate estates namely (i) the Vander Poorten Estates, owned by members of the Vander Poorten Family, in which the Appellant has at all material times had a 1/20th share and the Respondent an 8/20th share, and (ii) the Mr. and Mrs. Vander Poorten Estates, in which the Appellant has at all material times had a 1/9th share and the Respondent an 8/9th share. P.143 Ll.23-31
- 30 The Appellant sold her interest in a portion of the Vander Poorten Estates on the 9th day of January, 1953; nothing turns on this fact. Both sets of estates have at all material times been managed by the Respondent, who acted as the agent of the Appellant in respect of her share in each estate. The Respondent has, by himself or since 1951, his agents Messrs. Aitken Spence & Company, at all P.18 Ll.12-14  
P.19 Ll.30-37  
P.86 Ll.9-12

Record

material times collected the rents and profits of the said estates.

- Pp.17-18 3. The present action was commenced by the Appellant in the District Court of Colombo on the 25th day of January, 1955, asking for an account of the rents and profits of the said estates received by the Respondent from the Appellant's share of the said estates from the 1st day of December, 1940, up to the date of the commencement of the said action, and payment of the amount found due together with interest, or, in the alternative, for judgment in a sum of Rs. 50,000/- and interest this being the sum which, making the best estimate the Appellant was able, she calculated to be due to her on account of the said rents and profits. 10
- P.47 Ll.22-24 4. During the course of the action it appeared that the last date to which the accounts of the said estates had been duly audited was the 31st day of March, 1954, which date was accordingly adopted as a suitable accounting date for the purposes of the action. It was shown by the said audited accounts, and accepted by the Appellant, that the total amount of income due to her down to the said 31st day of March, 1954, was the sum of Rs. 161,488/-. The Appellant also admitted the receipt during this period from the Respondent of a sum of Rs. 118,514.08. Accordingly at the trial she limited her claim to the difference between these two figures - namely the sum of Rs. 42,974/-. 20
- P.47 Ll.20-21
- P.42 Ll.4-5
- P.139 Ll.15-18
- Pp.19-20 5. The Respondent (who delivered his Defence and Claim in Reconvention on the 16th day of September, 1955) sought to show that he had discharged his liability to account to the Appellant for the aforesaid sum by reason of payments made by him either to her or on her behalf, and there was produced on his behalf at the trial a Statement (marked "X") purporting to show that such payments amounted to some Rs.371,984/-. Since this sum was in excess of the amount due to the Appellant, the Respondent by his Defence in the action made a Claim in Reconvention for the balance, but did not press any such claim, which would in any event have been barred by the provisions of the Prescription Ordinance (Ch.68 - Legislative Enactments of Ceylon 1956 reprint) the last payment having been made by him in the year 1950. 30 40
- Pp. 21-37
- P.22 L.13
- P.143 L.9
- P.145 Ll.24-29

6. The major payments with which the Respondent sought to debit the Appellant were as follows:-

- (a) A sum of Rs. 42,034.20 in connection with the purchase in the year 1944, and subsequent running expenses until 1948, of a dwellinghouse known as "Preston" in the joint names of the Respondent and Appellant, and a sum of Rs.2.900/- in respect of the rents thereof; P.27 Ll.6-17
- 10 (b) A sum of Rs.28,436/- in respect of shares purchased in 1947 by the Respondent for the Appellant; P.27 Ll.18-24
- (c) A sum of Rs. 22,030.30 in connection with the purchase between the years 1949 and 1951 of Estates known as "Weyweltaawa and Normandy" forming part of the Mr. and Mrs. Vander Poorten Estates; P.27 Ll.25-38
- 20 (d) A sum of Rs. 7,243.90 in connection with a defamation case between the years 1944 and 1948; P.27 Ll.39-42
- (e) A sum of Rs. 2,073.42 in connection with three Partition Actions between the years 1942 and 1950; P.28 Ll.6-13
- (f) A sum of Rs. 4,100/- in respect of rents collected between the years 1947 and 1950 by one Kenny and alleged to have been received by the Appellant; P.28 Ll.14-21
- 30 (g) A sum of Rs. 33,397.39 in respect of rubber alleged to have been appropriated in February 1951 by the Appellant; P.28 Ll.22-25
- (h) A sum of Rs. 58,635.58 in respect of cocoa alleged to have been appropriated in February 1951 by the Appellant; P.28 Ll.26-28
- (i) A sum of Rs.33,655.45 alleged to have been paid to the Appellant out of the income from the estate between the years 1950 and 1953; P.28 Ll.29-33
- 40 (j) A sum of Rs. 1,930.29 alleged to have been drawn by the Appellant for her own use and account from the Mercantile Bank, London between the years 1943 and 1951; P.28 Ll.34-37

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- P.28 Ll.39-41 (k) A sum of Rs. 70,710 alleged to represent the value of furniture and belongings left behind by the Respondent in or about July 1951 at "Preston";
- P.29 Ll.3-7 (l) A sum of Rs. 30,000/- alleged to have been paid by the Respondent in respect of income tax on the Appellant's income up to 31st March 1950 included in his assessment;
- P.29 Ll.8-27 (m) A sum of Rs. 26,643.68 in respect of miscellaneous payments made to the Appellant between the years 1947 and 1950. 10
- Pp.44-46 7. The issues as finally framed in the action were as follows:-
1. From 1940 up to date has the defendant been looking after the said properties by himself and through his Agents and Attornies only accounting for the income therefrom?
2. Has the plaintiff been paid various sums of money on her account and at her request by the defendant or his Agents on his behalf against the amounts due to her by way of income from her share of the aforesaid lands? 20
3. Was the plaintiff entitled to receive from the defendant a sum of Rs.161,488/- as her proportionate share of income up to 31st March, 1954, from the lands referred to in the Plaint?
4. If Issues 1 to 3 or any one or more of them are answered in the plaintiff's favour:-
- (a) is the plaintiff entitled in law to an accounting from the defendant, in respect of her proportionate share of the income from the said lands? 30
- (b) is the plaintiff entitled to recover from the defendant any sum of money and if so what sum?
5. Is the defendant as such Agent holding any income from the lands in question in trust for the plaintiff?
6. Is the defendant entitled to debit the plaintiff with the amounts set out in Statement II filed of record which is now marked X? 40

7. What sum if any is due to plaintiff from the defendant or from defendant to plaintiff?

8. (a) Is the defendant's claim against the plaintiff or any part of it prescribed?

(b) If so is the defendant entitled to judgment in any sum against the plaintiff?

(c) Is the defendant's right to claim credit in any one of the items set out in the said Statement X prescribed?

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9. In law can the defendant maintain his alleged claim for credit as against the plaintiff in any of the sums shown in Statement X?

8. The onus of proving that he had discharged himself in respect of the said sum of Rs. 161,488/- to the extent to which the Appellant had not admitted receipt of the same being upon the Respondent, there were called at the trial the following witnesses on his behalf (none were called on behalf of the Appellant) namely:-

P.45 Ll.23-26

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(a) One D. Ramaswamy, a Chartered Accountant, who produced the said statement marked "X". In cross examination this witness admitted that he could not vouch for the accuracy of any of the figures relating to the sums alleged to have been paid to or on behalf of the Appellant therein contained, which figures had been supplied to him by others. He did know who had paid the Income Tax

P.47.L.57  
P.47 L.12

P.53 Ll.23-25

P.64 Ll.11-12

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(b) One T.H.B. Saldin a Clerk in the Mercantile Bank, Colombo who produced two letters (not reproduced in the Case) relating to the opening of Joint Accounts;

P.68

(c) One D. D'Zilva, a Sub-Assistant with Aitken Spence & Co. the Respondents Agents, who proved two payments to the Appellant out of the profits of the Estates on the 19th January and 12th November, 1951;

P.68-69

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(d) One E.B. Perera, a Book-Keeper with Messrs. Aitken Spence & Co., Colombo, the Agents of the Respondent. This witness admitted in cross examination that he had nothing to do with the books and ledgers of the said

Pp.69-82

P.71 Ll.11-12

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- P.76 Ll.20-26 estates or of the Respondent and the Appellant until about two years previously. He also admitted that in Messrs. Aitken Spence & Co.'s Accounts the Appellant had been debited with the value of the said Rubber and Cocoa, he knew nothing about it personally, and even so there was a credit balance in Messrs. Aitken Spence & Co.'s books in favour of the Appellant; 10
- P.73 Ll.10-15
- Pp.83-85 (e) One C.C. Sayakkara, the Chief Clerk of the Vander Poorten Estates from 1942 to 1950. This witness proved payments on account of the income of the estates paid to the Respondent, but stated that he had no record of any separate payments to the Appellant. This witness remembered the alleged sales of Rubber and Cocoa, but had no record of them in the books of the estate, and could not say of his own knowledge that any money was paid to the Appellant in respect thereof. 20
- P.83 L.13 -  
P.84 L.20  
P.84 L.28  
P.84 L.29 -  
P.85 L.34
- Pp. 86-138 (f) One E.V. Fernando, a Clerk under the Respondent. This witness proved that the Respondent and the Appellant had two joint bank accounts, No.1 Joint Account and No.2 Joint Account, in the Mercantile Bank of India. 30
- P.86 Ll.25-26  
P.87 Ll.10-13
- P.93 Ll.3-6
- P.111 L.29  
P.112 L.1
- In cross examination this witness admitted:-
- (i) That the Respondent had filed in the District Court of Colombo an action against the Appellant for the recovery of Rs. 70,710/- being the value of the articles which he said he had left behind in "Preston" the plaint being filed after the Respondent's answer in the present action; 40

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- (ii) That the Appellant had not drawn any cheque on any joint Account after April, 1950; P.116 Ll.11-14
- (iii) That the No.2 Joint Account was operated exclusively first by the Defendant and then by his agents Messrs. Julius & Creasy, and the Appellant had nothing to do with it; P.122 Ll.16-19
- 10 (iv) That the Appellant never drew a single cheque on the No.1 Joint Account after the 16th day of June, 1947; P.122 Ll.17-22
- (v) That during their stay in England, every cheque on the Joint Account in England was drawn by the Appellant, because the Respondent was so ill that he could not write cheques; P.129 L.29 - P.130 L.3
- (vi) That the shares referred to in 6(b) above and the half interest in "Preston" referred to in 6(a) above had been given to the Appellant; P.133 Ll.3-6
- 20 (vii) That he did not know what the said Kenny had done with the rents referred to in 6(a) above. P.133 Ll.15-19

9. No evidence was led at all in relation to the items set out in Paragraph 6 of this Case under (c), (d), (e). No primary documents relating to (1) were produced to the Court. No satisfactory evidence was led relating to any of the other payments.

30 10. The intention of the Respondent to make gifts of:- Pp. 173-176

- (i) The Estates known as "Weyweltalawa and Normandy";
- (ii) A half interest in "Preston"; and
- (iii) The said shares;

appear from an Affidavit of his Attorney Harold William Robshaw Burton filed in a Divorce Case No. 3115 District Court of Colombo which said Affidavit was in evidence in this action.

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11. On the 29th day of August, 1958, the District Court of Colombo (A.L.S. Sirimanne, A.D.J.) delivered its Judgment. The learned Judge divided the period in respect of which the account was claimed into two - up to 1950, when the parties were living together as husband and wife, and after 1950, when they had separated. As regards the first period he found as follows:-

P.144 Ll.21-  
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"The plaintiff and defendant were living  
"together as husband and wife prior to 1950, and 10  
"I find no reliable evidence of any payments made  
"to her out of her share of the income during this  
"period. The items set out in statement 2 of the  
"document X which the defendant seeks to treat as  
"payments made to the plaintiff out of her share of  
"the income cannot in my view be regarded as such,  
"e.g. the husband, a wealthy man, had purchased  
"a house (Preston) for their residence in the name  
"of both himself and his wife. Now, half the  
"purchase price, a similar share of the stamp duty 20  
"on the deed, Notary's fees, alleged expenses for  
"maintaining the building, including taxes, etc.  
"(vide statement 2a), are said to constitute  
"payment to her of her share of the income from the  
"estates. Similarly, in 1947, he appears to have  
"purchased certain shares for her. Credit for the  
"value of these shares is also claimed now by the  
"defendant. Then there is an item of Rs.2073/42 as  
"1/9th share of costs incurred in three partition 30  
"cases - on the footing that the total costs in these  
"three cases amounted to Rs.18,660/80. The  
"maximum pro-rata costs recoverable from a 1/9th  
"owner under the partition Act for all three actions  
"(assuming that all three lands exceeded Rs.50,000/-  
"in value) would be 1/9th of Rs. 4,500/- i.e.  
"Rs. 500/-. If pro rata costs are due to him the  
"defendant can recover whatever is due from the  
"plaintiff by issue of writ in those cases - he  
"cannot say that these sums constitute a payment  
"to her of her share of the income of the joint 40  
"estates. There is also a sum of Rs. 7,243/90  
"(statement 2b) made up of various sums paid to  
"lawyers, witnesses, etc., for a defamation case, of  
"which very little is known. One also notices a  
"claim for a sum of Rs. 70,710/- being the value  
"of furniture and articles in Preston. They  
"include the value of such articles as watches,  
"links, studs and even old clothes (statement 2f).  
"Admittedly there is an action D C. 36982 pending  
"over this disputed claim and I do not think that 50  
"the defendant can be permitted to treat this figure



"as payment to the plaintiff."

12. The learned Judge next dealt with the Respondent's submission that payment into a Joint Account in the names of himself and the Appellant during this period was equivalent to payment of the Appellant's share of income, and rejected it for the following reasons:-

10 "One of the two co-owners who gets the income P.145 Ll.7-11  
"of the joint property into his hands can pay it  
"into a Joint Account and immediately draw it out  
"himself. Mere payment into the joint account will  
"not, in my view, absolve the receiver of the income  
"from his duty to account to the other for the  
"latter's share."

13. He then proceeded to analyse the actual pay- P.145 Ll.12-16  
ments made out of the Joint Account, and came to  
the conclusion that such payments were for  
expenses of a household for which the husband would  
ordinarily be liable. It was, he found, the  
20 Husband who had the real control of the funds. The P.145 Ll.20-24  
learned Judge also found that the expenses incurred  
by the parties in England did not fall to be  
debited to the Appellant, being again payments for  
household necessities.

14. The learned Judge then proceeded to note in P.145 Ll.25-29  
passing that the claim in re-convention was in  
respect of payments every single one of which was made  
prior to February, 1951, and all such claims were  
prescribed.

30 15. He then proceeded to deal with the period P.145 L.30 -  
subsequent to the end of 1950, and found that P.146 L.10  
although the payments made to the Appellant during  
this period had not been strictly proved, since  
they were all shown in books kept in the ordinary  
course of business by the agents managing the  
estates, the Appellant ought specifically to have  
challenged any items which she disputed. On this  
basis he found that the Respondent had discharged  
40 himself of a sum of Rs. 129,866/-. Deducting this  
sum from the agreed figure of Rs. 161,488/-, there  
was a balance of Rs. 31,622/- due to the Appellant.

16. The learned Judge accordingly answered the P.146 Ll.11-23  
issues set out in paragraph 7 hereof as follows:-

1. Yes - but he has accounted for the income only after 1950.

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2. Yes - a sum of Rs. 129,866/-.
  3. Yes.
  4. (a) Yes - The defendant has endeavoured to do so in this action.  
(b) Yes - a sum of Rs. 31,622/-.
  5. Yes.
  6. No.
  7. Nothing is due from plaintiff to the defendant.
  8. (a) Yes. 10  
(b) No.  
(c) Yes.
  9. No.
- P.147 17. In pursuance of the said Judgment, a Decree was entered on the same day whereby it was ordered and decreed that the Respondent do pay to the Appellant the sum of Rs. 31,622/- and costs.
- P.147-148 18. From this Judgment and Decree the Respondent appealed to the Supreme Court of the Island of Ceylon, on the following grounds:- 20
- P.148 (a) that the said judgment was contrary to law and against the weight of evidence;
- (b) that the learned District Judge misdirected himself in refusing to allow the defendant-appellant's issue of prescription on the grounds of inconsistency with the admission;
- (c) that the learned District Judge misdirected himself in holding that a payment into the joint account did not in the circumstances of this case amount to a payment to the plaintiff-respondent especially as the money in the joint account had been utilised for joint investments as well as separate investments for the plaintiff-respondent and the payment of her income tax; 30

- (d) that the learned District Judge had completely misunderstood the accounts and documents filed in Court;
- (e) that even if all the sums claimed in reconvention by the defendant-appellant were prescribed and irrecoverable the learned Judge had misdirected himself in failing to see if the moneys expended by the defendant-appellant upon the plaintiff-respondent against the sums claimed by her;
- (f) that the learned District Judge's conclusion did not take any account of the appropriations of produce made by the plaintiff-respondent and the other various items of accounts.

19. The Supreme Court of the Island of Ceylon by its Judgment on the 14th December 1960 and the Decree entered in pursuance thereof, allowed the Respondent's appeal. Pp.156-158

20. The Judgment of the Supreme Court (Basnayake, C.J., and H.N.G. Fernando, J) was delivered by the learned Chief Justice. The Judgment, so far as material, was in the following terms:- Pp.156-157

"The defendant also produced an account to show that he has disbursed on account of the plaintiff a sum far in excess of the sum of Rs. 50,000/- claimed by her. Of the chief items proved in the account produced by him are the purchase of a house called "Preston" and of shares to the value of Rs.28,000/- and the payment of income tax. The learned District Judge is wrong in holding that a sum of Rs.31,622/- is still due from the defendant. We therefore set aside the judgment of the learned District Judge and enter judgment dismissing the plaintiff's action with costs. P.157 Ll.4-13

" The appellant is entitled to the costs of the appeal."

21. From the said Judgment and Decree the present Appeal is proffered, final leave so to do having been granted by the Supreme Court on the 16th day of June, 1961. Pp.162-163

22. It is submitted that the Judgment of the Supreme Court was erroneous in that the evidence

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showed that the Respondent intended to make a gift of the interest in the house "Preston" and of the stocks and shares to which they refer. Alternatively, in default of any evidence to the contrary, of which there was none, the presumption of advancement would apply to the said purchases by the Respondent in the name of the Appellant. With regard to the payment of income tax, there was no evidence before the Court to show that any tax had been paid and in any event the liability to pay such tax was (in the absence of a request by either the Appellant or the Respondent for separate assessments) the exclusive liability of the Respondent. 10

23. The Appellant humbly submits that the decision of the Supreme Court is wrong and that this Appeal should be allowed and the Judgment and Decree of the District Court should be restored for the following among other

R E A S O N S

1. BECAUSE the evidence clearly established the intention of the Respondent to make a gift of half share in "Preston" and of the securities he purchased in her name to the Appellant. 20
2. BECAUSE even in the absence of such evidence the purchase of the interest in "Preston" and of the securities by the Respondent in the name of the Appellant must be presumed, in the absence of evidence to the contrary, to be intended as an advance to the Appellant.
3. BECAUSE there was no evidence that the Respondent had ever paid any income tax on behalf of the Appellant. 30
4. BECAUSE the liability to pay income tax was the liability of the Respondent and not of the Appellant.
5. BECAUSE the Respondent produced no admissible evidence of any payment made by him either to or on account of and at the request of the Appellant out of the income for which he was admittedly accountable prior to the end of the year 1950. 40
6. BECAUSE neither in fact nor in law were any of the payments alleged to have been made by the

Respondent on behalf of the Appellant such items as a Husband would either expect to be entitled to debit as against his Wife.

7. BECAUSE for the reasons therein given and upon the analysis of the evidence therein contained, the Judgment of the District Court of Colombo was correct.
8. BECAUSE the learned Judge of the District Court of Colombo correctly answered all the issues found at the trial.

E. F. N. GRATIAEN

RAYMOND WALTON

No. 31 of 1962

IN HER MAJESTY'S PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

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B E T W E E N:

MRS. HILDA VANDER POORTEN (Plaintiff)  
Appellant

- and -

JOSEPH VANDER POORTEN (Defendant)  
Respondent

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C A S E FOR THE APPELLANT

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