

~~SL 19.2~~

21 / 463

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED STUDIES
 19 JAN 1964
 25 ROSEBURY SQUARE
 LONDON, W.C.1.

IN THE PRIVY COUNCIL

No.31 of 1962

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

74123

B E T W E E N:

MRS. HILDA VANDER POORTEN
 of No.20, Alfred Place,
 Colpetty, Colombo (Plaintiff) Appellant

- and -

10 JOSEPH VANDER POORTEN of
 No.63, Wilpenna Street,
 Eden Hills, South Australia (Defendant) Respondent

C A S E FOR THE RESPONDENT

Record

1. This Appeal is from a Judgment of the Supreme Court of Ceylon dated the 14th December, 1960, whereby the said Court set aside a Judgment of the District Court of Colombo dated the 29th August, 1958, and dismissed an action by the Appellant (hereinafter called "the plaintiff") claiming an account and payment to her of monies alleged to be due as her share of income from certain properties of which she and the Respondent, her husband (hereinafter called "the Defendant"), were co-owners. pp.156-7
pp.143-8
- 20
2. The properties in question were two groups of estates known respectively as (i) The Vander Poorten Estates and (ii) Mr. and Mrs. J. Vander Poorten Estates (otherwise the Greenwood Group). The Plaintiff, as between herself and the Defendant owns a 1/9th share in respect of both groups of estates and the Defendant owns an 8/9ths share. The period in respect of which the claim was made was from the 1st December, 1940, until the 31st March, 1954. At first the Defendant managed the properties but later they were managed by Messrs. Aitken, Spence & Co. - The Vander Poorten Estates from January 1st, 1951, the Greenwood Group from April 1st, 1949. p.56 L.23
- 30

Record

p.57 L.4	3. The District Court (Sirimanne, A.D.J.)	
	after considering the relevant accounts and the	
p.146 L.10	oral evidence adduced on behalf of the Defendant,	
	decided that there was a balance due to the	
p.144 LL.21-49	Plaintiff of Rs.31,622/-. In arriving at that	
	decision the learned District Judge declined to	
	take into account certain sums admittedly paid	
	by the Defendant, apparently on the grounds that the	
	said sums ought not to be regarded as paid to	
	the Plaintiff or on her account and therefore could	10
	not properly be debited against the Plaintiff's	
	share of income from the properties. The	
p.145 L.7	learned Judge also declined to accept the contention	
	put forward on behalf of the Defendant that payment	
	of sums received by the Defendant as income from the	
	properties into a joint account in the names	
	of the Plaintiff and the Defendant constituted	
	payment to the Plaintiff of her share of income.	
	4. The Supreme Court (Basnayake C.J., and H.N.G.	
p.157	Fernando J.) took the view that as the accounts	20
	show that the Defendant had disbursed on account	
	of the Plaintiff a sum far in excess of the amount	
	claimed by her, the learned District Judge was	
	wrong in holding that the sum of Rs.31,622/- was	
	still due.	

In these circumstances the questions which arise for consideration upon this Appeal appear to be as follows:-

- (i) Whether there is any good reason why the said decision of the Supreme Court on issues of fact should be reversed. 30
- (ii) Whether the Supreme Court was right in taking the view that sums in excess of Rs.31,622/- had been paid by the Defendant on account of the Plaintiff and (if so) whether such sums can properly be debited against the Plaintiff's share of income from the properties.
- (iii) Whether on the accounts and the evidence the decision of the Supreme Court is right. 40
- (iv) Whether payment of income from the said properties into the said joint account constituted payment to the Plaintiff in respect of her share of income.

5. The suit was instituted by a Plaint in the District Court dated the 25th January, 1955. By the said Plaint, as subsequently amended, the Plaintiff put forward (inter alia) the following allegations:-

p.17

p.41

(i) That the Plaintiff and the Defendant became co-owners of the properties in question in November, 1940 in the proportion of 1/9th to 8/9ths.

p.41 L.15

(ii) That the Defendant undertook to manage the properties and acted as the Plaintiff's Agent in respect of her share.

p.41 L.23

(iii) That the Defendant entered into possession and managed and received the rents and profits from the Plaintiff's share as from the 1st December 1940 to date.

p.41 L.28

(iv) That the Defendant had failed and neglected to render a true and correct account of the rents and profits received by him.

p.42 L.1

(v) That the Plaintiff had received only a sum of Rs.118,514/04 on account of her share of profits and that the estimated balance due was Rs.50,000/- free of income tax from the 1st December 1940 to date.

p.42 L.4

The prayer was for an account to be taken and payment to the Plaintiff of the amount found due or alternatively for judgment in the sum of Rs.50,000/- free of income tax, in each case plus interest. The claim in respect of Rs.50,000/- was later limited to the sum of Rs.42,974/-.

p.42 L.19

p.44 L.39

6. The Defendant by his Answer dated the 16th September, 1955, stated (inter alia) as follows:-

p.19

(i) That the Plaintiff became the owner of her rights in respect of the properties in question by virtue of a deed of gift executed in her favour by the Defendant.

p.19 L.25

(ii) That the Defendant did not at any time undertake to look after the properties as the Plaintiff's Agent or collect her share of income as alleged but that since about the year 1932 during the lifetime of his father the Defendant was looking after the

p.19 L.30

Record

properties and that he continued to do so either by himself or through his Agents accounting for the income thereof.

- p.19 L.41 (iii) That up to the 7th July, 1951, when the Defendant left Ceylon accounts were rendered by him to the Plaintiff personally and that accounts were always available to her.
- p.20 L.2 (iv) That the Plaintiff had been drawing and been paid various sums of money and that various amounts had been paid out on her account and at her request by the Defendant and or his attorneys and agents against the amount due to her by way of income for her share of the properties. 10
- p.20 L.7 (v) That the Defendant denied that the Plaintiff had received only Rs.118,514/04.
- p.20 L.9 (vi) That the Defendant is entitled to credit in the sum of Rs.371,984/- on account of various sums of money drawn by the Plaintiff, paid to her and others at her request and on her behalf, and also on account of various sums of money expended on her account and at her request, together with various sums of money collected by her as income, and on account of produce appropriated by her from the properties belonging to the Plaintiff and the Defendant. 20
- p.20 L.15 In support of the figures pleaded in his Answer
pp.21-37 the Defendant filed as part of his pleading an account marked "X". According to this account the Plaintiff was entitled to be credited in the sum of Rs.161,488/- as her share of income from the properties in question. As against this sum the account shows how the sum of Rs.371,984/- claimed as a credit by the Defendant is made up. 30
- p.21
- p.22
- pp.27-37
6. The principal items set out in the account "X" as payments made to the Plaintiff by the Defendant and/or on her account are the following (Statement 2, forming a part of the account "X"):-
- pp.27-37
- p.27 L.2 (i) Half share of the price of a house property called "Preston", at 20, Alfred Place, Colombo, 3. - Rs.42,034/20. 40
- p.27 L.19 (ii) Payments made for the purchase of shares for the Plaintiff. - Rs.28,436/-.

- | | | <u>Record</u> |
|----|---|---|
| | (iii) A 1/9th share of the purchase price of two estates forming part of the Mr. & Mrs. J. Vander Poorten Estates - Rs.22,030/30. | p.27 L.25 |
| | (iv) The costs of a defamation case between the Plaintiff and one Henry Poorten. - Rs.7,243/90. | p.27 L.40 |
| | (v) A 1/9th share of the cost of certain partition actions relating to the Greenwood Group of estates. Rs. 2,073/42. | p.28 L.5 |
| 10 | (vi) The value of rubber and cocoa appropriated by the Plaintiff from one of the Estates Rs.92,032/97. | p.28 L.23 |
| | (vii) Income tax paid by the Defendant in respect of the Plaintiff's share of income (estimated) Rs. 30,000/-. | p.29 L.2 |
| | (viii) Certain itemised payments. - Rs.24,931/30. | p.29 L.7 |
| | The item in respect of income tax was quantified by the evidence as amounting to Rs.28,940/-. | p.50 L.12 |
| 20 | 7. The Defendant claimed in reconvention the sum of Rs.210,496/-. At the hearing this claim was not pressed. | p.20 L.25
p.143 L.9 |
| | 8. By a Replication dated the 4th November, 1955 the Plaintiff joined issue with the Defendant on his Answer and denied the claim in Reconvention. | p.38 |
| 30 | 9. The hearing took place on various dates between the 28th May, 1956, and the 5th August, 1958. The Plaintiff accepted the figure of Rs.161,488/- shown in the account "X" as correctly stating the amount of 1/9th share of the income during the period in question. On the basis of that figure and her admission of having received the sum of Rs.118,514/- the Plaintiff restricted her claim to Rs.42,974/-. It was admitted on behalf of the Defendant that he acted as the Plaintiff's Agent and entered the properties and collected the rents and profits. | pp.43-143
pp.44 p.35
p.44 & 39
p.45 & l. |
| 40 | 10. Witnesses were called on behalf of the Defendant to prove the figures set out in the account "X" and produce other relevant documents. These witnesses were the following:- | |

<p><u>Record</u> pp.47-67</p> <p>pp.193-198</p> <p>pp.59,60</p> <p>pp.193,6,8 p.199</p>	<p>(i) D. Ramaswamy a Chartered Accountant who had prepared the account "X". He also produced a statement of account of the Vander Poorten Estates for the period 1st December, 1940 to the 13th December, 1950 and showing the Plaintiff's share of income from both groups of estates up to 31.3.1956 (document D.1.) This document was prepared from books in the possession of the Agents Messrs.Aitken, Spence & Co. It showed <u>inter alia</u> cash payments to the Plaintiff of Rs.6,250; Rs.1380/80; and Rs.125,141. In addition he produced a statement of account showing income tax paid on behalf of the Plaintiff for the period in question amounting to Rs.29,940/-</p>	<p>10</p>
<p>p.68</p> <p>p.164</p> <p>p.165</p>	<p>(ii) T.H.B. Saldin, a Clerk employed by the Mercantile Bank, Colombo. He produced an Application made in August 1940 by the Plaintiff and the Defendant to the bank to open a joint account (No.1 Account), and a similar Application dated the 19th November, 1946 to open a second joint account (No.2 Account).</p>	<p>20</p>
<p>pp.68,69</p> <p>p.168</p> <p>pp.168,9</p> <p>p.69 L.16</p> <p>p.68 L.34</p>	<p>(iii) D. D'Zilva an employee of Messrs. Aitken, Spence & Co., Agents. This witness produced a letter from the Plaintiff to the Defendant dated the 30th January, 1951, agreeing to the Greenwood Group of estates being handed over to Messrs. Aitken, Spence & Co., and containing a reference to the partition cases. He also produced two cheques drawn by Messrs. Aitken, Spence & Co., in favour of the Plaintiff for Rs.3,000/- and Rs.15,000/- respectively which he said represented payments in respect of part of the profits of the Vander Poorten Estates. These cheques were dated 19th January, 1951 and 12th November, 1951 respectively. The witness mentioned another payment of Rs. 13,697/20 and stated that the cheque for this payment had been destroyed.</p>	<p>30</p> <p>40</p>
<p>pp.69-82</p> <p>p.69</p>	<p>(iv) E.B. Perera, a Bookkeeper employed by Messrs. Aitken, Spence & Co. This witness produced the accounts relating to both groups of estates. He also had with him the ledgers maintained by Messrs.Aitken, Spence & Co. He gave evidence of the appropriations of cocoa</p>	

Record

and rubber by the Plaintiff referred to in statement 2 of the account "X".

p.70
p.28

(v) C.S. Sayakkara. A Chief Clerk of the Greenwood Estate who gave evidence of payments during the period 1942 to 1947 as income from the estate to the Defendant. He also gave evidence of the cocoa and rubber appropriations by the Plaintiff. This witness brought to Court the ledgers maintained on the estate.

pp.83-85
pp.84,85
p.86 L.27
p.83

10

(vi) E.V.Fernando, a Clerk employed by the Defendant. This witness gave evidence as to how the No.1 joint account was operated by the Plaintiff and the Defendant. He stated that the Defendant had no private banking account and that both the Plaintiff and the Defendant drew cheques on the No.1 Account. He produced bank pass books for this account for the period from the 2nd August, 1940, until the 13th May, 1943, and also produced counterfoils of paying-in slips. The witness produced a number of cheques on the joint account drawn by the Plaintiff. He gave evidence that the purchase price of the house property "Preston" was debited against the No.1 Account and that in 1947 when the Plaintiff and the Defendant were in the United Kingdom this property was rented out by an Agent on behalf of the Plaintiff, and the rents were credited to the Plaintiff's private account. He gave evidence of the purchase of the shares for the Plaintiff and of the purchase of two of the estates in the Greenwood Group. The witness produced a number of cheque counterfoil books covering the period from 16th December, 1941, to the 18th February, 1951. He explained that the No.2 Joint Account was used for the working of the Greenwood Estate. In cross-examination this witness stated inter-alia that when the No.1 Joint Account was closed in April 1950 it was overdrawn in the sum of over Rs.79,000/-. He further stated that the monies that went into the No.1 Joint Account were all the profits from the Vander Poorten Estates. He agreed that housekeeping expenses and other living expenses of the Plaintiff and the Defendant were drawn out of this account.

pp.86-138
p.86
p.86 L.19
p.86 LL.26,28
p.87
p.88
p.93
p.96
p.97
p.98
p.100
p.86 L.27
p.115
p.118 L.21
pp.118,124,
127,128,130

20

30

40

<u>Record</u>		
p.138 L.26	11. No evidence was adduced on behalf of the Plaintiff.	
pp.143-6	12. The Judgment of the District Court was delivered on the 29th August, 1958. The learned District Judge first dealt with the contention put forward on behalf of the Defendant that he was entitled to credit in respect of the payments set out in Statement 2 of the account "X". He stated that these items could not be treated as payments to the Plaintiff out of her share of income. As for the payments into the joint account, the learned Judge stated that these did not constitute payment to the Plaintiff. He further decided that certain drawings by the Plaintiff from the joint account which were used for household necessities and other expenses for the Plaintiff and the Defendant should not be debited to the Plaintiff as coming out of the profits of her share of the properties. The learned Judge found that the total drawing by the Plaintiff up to the 31st March, 1954, as shown by D.1. the statement of accounts produced from the books of Messrs. Aitken, Spence & Co., amounted to Rs.129,866/-. After allowing for this sum against the total share of the Plaintiff's income of Rs.161,488/-, the learned Judge found that there was still a balance of Rs.31,622/- due to her. He therefore answered the issues which had been drawn up at the close of the pleadings as follows:-	10
p.144 LL. 21-49		
p.144 LL. 21-49		
p.145 L.7		
p.145 LL.12-23		
p.145 L.34		
pp.193,198		20
p.146 L.8		
p.146 L.10		
pp.44-45 p.146		
p.44	1. Issue. 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 ?	30
p.146	Answer. Yes, but he has accounted for income only after 1950.	
p.44	2. Issue, 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 ?	40
p.146	Answer. Yes - Rs.129,866/-	
p.44	3. Issue. 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 ?	

		<u>Record</u>
	Answer. Yes.	p.146
10	4. Issue. 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? and (b) Is the Plaintiff entitled to recover from the Defendant any sum of money and if so what sum?	p.44
	Answer. (a) Yes. The Defendant has endeavoured to do so in this action, and (b) Yes, Rs.31,622/-.	p.146
	5. Issue. Is Defendant as such Agent holding any income from the lands in question in trust for the Plaintiff?	p.45
20	Answer, Yes.	p.146
	6. Issue. Is the Defendant entitled to debit the Plaintiff with the amounts set out in Statement 2 filed of record which is now marked "X"?	p.45
	Answer. No.	p.146
	7. Issue. What sum if any is due to Plaintiff from the Defendant or from Defendant to Plaintiff?	p.45
	Answer. Nothing.	p.146
30	8. Issue. (a) Is the Defendant's claim against the Plaintiff or any part of it prescribed? and (b) If so is the Defendant entitled to Judgment in any sum against the Plaintiff? (c) Also is the Defendant's right to claim credit in any one of the items set out in the said Statement "X" prescribed?	p.45

Record
p.146

Answer. (a) Yes, and
(b) No, and
(c) Yes.

p.45 9. Issue. In law can the Defendant maintain his alleged claim for credit as against the Plaintiff in any of the sums shown in Statement "X"?

p.146 Answer. No.

p.156 - 7 13. The Supreme Court in reversing the Judgment of the District Court stated their finding in terms as follows:- 10

"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". 20

14. On the 16th June 1961 the Plaintiff was granted final leave to appeal to the Privy Council.

15. The Defendant submits that this Appeal should be dismissed with costs for the following amongst other 30

R E A S O N S

- (1) BECAUSE the Judgment of the Supreme Court is right, for the reasons therein stated.
- (2) BECAUSE on the accounts and the oral evidence the Judgment of the Supreme Court is right.
- (3) BECAUSE payment into the joint account of sums received by way of income from the properties in question constituted payment to the Plaintiff of her share of the income.

Record

- (4) BECAUSE the learned District Judge was wrong in declining to credit the Defendant with the payments to the Plaintiff and on her account which are set out in the account "X".

RALPH MILLNER

No. 31 of 1962

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:-

MRS. HILDA VANDER POORTEN Appellant

- and -

JOSEPH VANDER POORTEN Respondent

C A S E FOR THE RESPONDENT

DARLEY CUMBERLAND & CO.,
36, John Street,
Bedford Row,
London, W.C.1.