

9, 1969

1.

IN THE PRIVY COUNCIL

No. 9 of 1968

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

BETWEEN :

DON PETER MELLAARATCHY of "Reigate",  
Nuwara Eliya, and presently of "Craigvar",  
Nuwara Eliya  
(Defendant-Appellant)  
Appellant

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
- 2 MAR 1970  
25 RUSSELL SQUARE  
LONDON, W.C.1.

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- and -

J.A. NAIDOO of Messrs. Julius & Creasy,  
Colombo, Executor of the Last Will and  
Codicil of R.J.G. Marley deceased  
(Plaintiff-Respondent)  
Respondent

CASE FOR RESPONDENT

Record

1. This is an Appeal from the Judgment and  
Decree of the Supreme Court of the Island of  
Ceylon (H.N.G. Fernando, S.P.J. and A.W.H.  
Abeyesundere J.) dated the 7th day of September  
1966, dismissing with Costs the Appellant's  
Appeal from the Judgment and Decree of the  
District Court of Nuwara Eliya (E.F. De Zilva,  
District Judge) dated the 29th day of January 1965  
whereby the said District Court ordered and  
Decreed that the Appellant pay to the Respondent  
the sums of Rs.68,171/84, Rs.8,502/- and  
Rs.52,812/50 claimed by the Respondent in the  
action, together with interest on the said sums  
and the Costs of the action as taxed by the  
Officer of the Court.

pp.180-182  
pp.179-180

pp.155-173  
pp.173-174

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pp.14-18  
p. 321

2. The Respondent commenced THE PRESENT PROCEEDINGS by Plaint dated the 21st November 1963, suing as executor of the estate of H.J.G. Marley deceased (who died on the 26th February, 1963).

He pleaded that by Agreement No. 541 dated the 6th August 1960 the Appellant and Eileen Florence Marley, the wife of H.J.G. Marley, had agreed to purchase an estate known as Maha Borakanda Division situate at Karandeniya for the sum of Rs.425,000/-.

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The Appellant and Mrs. Marley having requested Mr. Marley to provide certain monies needed by them for the completion of the agreement to purchase, it was agreed between them and Mr. Marley:

(a) that Mr. Marley should through his bankers, Mercantile Bank Ltd., lend and advance to them jointly in equal shares the sum of Rs.125,000/- to be repaid by them with interest as demanded and on such terms as might be stipulated by the Bank.

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(b) that Mr. Marley should lend them such monies as should be required for legal and other expenses connected with the purchase.

(c) that the Appellant would be liable to repay a half share of the monies so lent and advanced to them.

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The Respondent pleaded:

"5. That in pursuance of the said Agreement and at the request of the said H.J.G. Marley and upon the personal guarantee and security given to the said Mercantile Bank Limited by him, the said Bank in or about November 1960 lent and advanced to the Defendant and the said Eileen Florence Marley jointly a sum of Rs.125,000/- which was applied in part

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pp.15-16.

payment of the aforesaid purchase price at the execution of the Deed of Transfer No. 1419 dated 29th November 1960 attested by S. Gunasekera, Notary Public, in favour of the Defendant and the said Eileen Florence Marley. The said sum of Rs.125,000/- was repayable to the Bank together with interest at five per centum per annum or at such rate as may from time to time be fixed or charged by the Bank, and for securing such repayment the said H.J.G. Marley assigned to the said Bank a sum of Rs.150,000/- held by it in fixed deposit to the credit of the said H.J.G. Marley.

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6. That the said H.J.G. Marley in pursuance of the aforesaid Agreement also paid a sum of Rs.17,004/- on account of the legal and other expenses connected with the purchase as aforesaid of the estate by the Defendant and the said Eileen Florence Marley.

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7. That by reason of the facts hereinbefore pleaded the Defendant became liable to repay to the said H.J.G. Marley:-

(a) the sum of Rs.62,500/- together with interest thereon as stipulated;

(b) a sum of Rs.8,502/-.

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.....

9. There was due and owing to the said Mercantile Bank Limited from the Estate of the said H.J.G. Marley deceased, as at 31st May 1963, on account of the aforesaid advance of Rs.125,000/-, a sum of Rs.136,343/69 on account of principal and interest, and in satisfaction of the said debt, the said Mercantile Bank Limited lawfully appropriated an amount equivalent thereto out of the said sum of Rs.150,000/- held in fixed deposit and assigned to it as aforesaid by the said

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H.J.G. Marley.

10. That thereupon the Defendant above-named became liable to repay to the Plaintiff as Executor as aforesaid a sum of Rs.68,171/84 on that account, which said sum or any part thereof the Defendant has failed and neglected to repay though thereto demanded. "

The Respondent further pleaded that on or about the 7th November 1960 Mr. Marley lent the Appellant a sum of Rs.50,000/- which the Appellant agreed to repay on demand together with interest thereon at 2½ per cent per annum, that the total sum due in respect of principal and interest was Rs.52,812/50 and that the Appellant had failed to pay any part of this sum although thereto demanded.

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The Respondent prayed:

pp.17-18

"(a) for judgment against the Defendant in a sum of Rs.68,171/84 together with legal interest thereon from date hereof till date of decree and thereafter on the aggregate amount of the decree till payment in full;

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(b) for judgment against the Defendant in a further sum of Rs.8,502/- together with legal interest thereon from date hereof till date of decree and thereafter on the aggregate amount of the decree till payment in full;

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(c) for judgment against the Defendant in a further sum of Rs.52,812/50 together with interest at the rate of 2½ per centum per annum on the sum of Rs.50,000/- from the 7th November 1963 till date of decree and thereafter with legal interest thereon on the aggregate amount of the decree till payment in full;

(d) for costs of suit. "

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3. The Appellant's Answer dated the 29th May 1964 contained a general denial of the loans and advances alleged in the Statement of Claim and of the agreement pursuant to which they were said to have been made.

10 The Appellant claimed that Agreement No. 541 of the 6th August 1960 was entered into by him at the express request of Mr. Marley and his wife Mrs. Eileen Florence Marley, that the estate known as Maha Borakanda Division was "to be bought in the names of Eileen Florence Marley and the Defendant, each being entitled to a half share" but that by agreement between Mr. Marley and his wife and the Appellant the greater part of the consideration for the purchase, viz. Rs.275,000/-, was to be provided by Mr. Marley and his wife. The Appellant was to provide only Rs.25,000/-, which he was to borrow from the Bank of Ceylon on a guarantee furnished by Mrs. Marley, and the remaining 20 Rs.125,000/- was to be provided by the Appellant and Mrs. Marley granting a mortgage of the estate to the Borakanda Estate Co. Ltd. (the vendors) to secure the payment of this sum.

30 The Appellant alleged that by reason of the agreement between the Marleys and himself, he was to be in sole management of the estate after the purchase was completed, that he was to "manage the same with care and diligence, as though the property was the Defendant's own", and out of the net income was to pay off the mortgage debt, pay the sum of Rs.275,000/- "to H.J.G. Marley and/or Eileen Florence Marley" (payments under this head to be credited to a separate account at the Mercantile Bank) and maintain an account for such moneys as would be necessary for running the estate.

40 The Appellant averred that by a Deed of Transfer No. 1419 of the 29th November 1960 the vendors transferred the estate of Mrs. Marley and himself in equal shares, that Mrs. Marley and he entered into Agreement No. 564 of the 29th November 1960 with the vendors to grant a mortgage of the estate to secure the sum of Rs.125,000/-, that thereupon he entered into the

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sole management of the estate and continued so until the 20th February 1962, by which time he had expended and paid various monies.

The Appellant further pleaded that on the 20th February 1962 Mr. and Mrs. Marley wrongfully took forcible possession of the estate from him, Mrs. Marley at the instigation of her husband removing certain produce therefrom and that on the same day Mrs. Marley "fraudulently purported to lease the entirety of Maha Borakanda Division by Indenture of Lease No.3341". Thereafter, the Appellant "acting on legal advice took the necessary steps against Eileen Florence Marley and H.J.G. Marley to regain possession".

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The final paragraph of the Appellant's Answer was as follows:-

" 13. Thereupon Eileen Florence Marley with the concurrence, approval and knowledge of and together with H.J.G. Marley acting by their Proctor Mr. Welikala and others, entered into negotiations with the Defendant as a result whereof the Defendant was discharged from all obligations to pay any moneys to H.J.G. Marley or Eileen Florence Marley and the Agreement No.227 dated 2nd March 1962 attested by R.M.S. Karunaratne, Notary Public, was entered into between Eileen Florence Marley and the Defendant. The copy of the said Indenture of Agreement is annexed hereto marked "A" and pleaded as part and parcel of this Answer. The Defendant thereafter and in consequence thereof abandoned all steps taken by him and referred to above, and gave up all claims against Eileen Florence Marley and H.J.G. Marley and was thus and otherwise absolved and released by H.J.G. Marley and Eileen Florence Marley from all or any liability to pay any sum of money to H.J.G. Marley or to Eileen Florence Marley. In the circumstances aforesaid, H.J.G. Marley was estopped and barred from making any claim and the Plaintiff has no cause

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of action against the Defendant. "

4. The trial Court found that the Appellant did receive the advances and incur the liabilities alleged in the Statement of Claim and its Judgment was affirmed by the Supreme Court.

10 The principal questions which arise for determination in this Appeal are whether the said Agreement No.227 of the 2nd March 1962 operated as a discharge or release by Mr. Marley of the Appellant from the debts and liabilities in respect of which the action was brought, in spite of Mr. Marley not being himself a party to the Agreement, and whether the Respondent, suing as Mr. Marley's executor, was by virtue of such Agreement disentitled to make any claim.

20 5. At the trial the Respondent adduced a large body of documentary and some oral evidence to prove that the Appellant incurred the debts, to recover which the action was brought.

M.T. Jayawardena, the Chief Clerk, Securities Department, Mercantile Bank of India Ltd., Colombo, testified that Mr. Marley had been a customer of the Mercantile Bank. He produced a Letter of Guarantee given by Mr. Marley to the Mercantile Bank dated the 4th November 1960 (P.1). By this document Mr. Marley guaranteed the re-payment of loan facilities up to a sum of Rs.125,000/-. He also, in accordance with the terms of this document (Clause 4), deposited with the Mercantile Bank a Fixed Deposit Receipt (P.2) for Rs.150,000/- in order that all monies due thereunder should be appropriated and set off against all sums of money due and payable under the guarantee. As a result of P.1 and P.2 a loan of Rs.125,000/- was made to Mrs. Marley and the Appellant. Mrs. Marley and the Appellant signed the prescribed letter to the Bank for opening the loan account, which the witness produced as P.3. He also produced the joint loan account of Mrs. Marley and the Appellant (P.4). With the opening of the loan

pp.28-43  
pp.219-222  
p. 188  
pp.242-243  
pp.243-244

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- p. 243 account a cheque book was issued and Mrs. Marley and the Appellant on the 29th November 1960 drew a cheque for Rs.125,000/- payable to the Mercantile Bank (P.5). On the same day the Mercantile Bank in turn drew a cheque for
- p. 245 Rs.257,500/- in favour of Borakanda Estate Co. Ltd. (P.6). The sum of Rs.257,500/- was made up of the loan account of Rs.125,000/- together with various other monies which had been furnished by Mrs. Marley and the Appellant. These amounts were held in a Suspense Account until the payment of the cheque. 10
- p. 200 The witness produced a cheque No.V.591427 (P.7) drawn by Mr. Marley for Rs.50,000/- in favour of the Appellant which the Appellant endorsed and which was cleared through his bankers, the Bank of Ceylon, Nuwara Eliya.
- p. 231 The witness also produced a cheque for Rs.17,004/- (P.8) drawn by Mr. Marley in favour of Messrs. de Silva and Mendis. 20
- pp.320-341 Mr. Marley died and the Mercantile Bank repaid itself what was due on the loan account from the fixed deposit. The sum so repaid was Rs.136,343/69 and a receipt (P.9) was issued by the Bank to the executors of Mr. Marley's estate.
- pp.43-75 6. The Respondent also called David Maartensz who was senior partner of Messrs. F.J. and G. de Saram from 1948 to 1962 and Mr. Marley's lawyer from 1960 to 1962. As a result of a telephone conversation with Mr. Marley he became aware of a proposal to purchase Borakanda Estate. At the first interview in August 1960 Mr. Marley, Mrs. Marley and the Appellant were present and the whole arrangement was discussed. Mr. Marley was to lend part of the purchase money to Mrs. Marley and the Appellant - viz. Rs.50,000/- to each. At first the Agricultural and Industrial Credit Corporation of Ceylon was to lend part of the purchase price. Later they were not going to do so and Mr. Marley had to guarantee the Mercantile Bank's loan of Rs.125,000/- to Mrs. Marley and the Appellant. Mr. Marley sent a cheque for Rs.50,000/- in favour of the Appellant 30
- pp.43-44;  
p. 52, l.20;  
p. 55, l. 1 40



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and asked the witness to instruct Messrs. de Silva and Mendis, who were acting for Mrs. Marley and the Appellant in the purchase, to apply the cheque as part of the purchase price.

The sale of the estate was completed by Deed of Transfer No.1419 dated the 29th November 1960 (P.13).

pp.246-252

10 The arrangement between Mr. Marley and the Appellant regarding the repayment of the monies advanced was that Rs.50,000/- was to be a loan repayable in 2 or 3 years with interest at 2½ per cent., the interest to be paid quarterly. The witness came to know about the agreement regarding legal expenses after the transaction was completed.

20 The witness also testified as to subsequent correspondence and a meeting with the Appellant in which the Appellant had not denied his liability to Mr. Marley on any of the loans.

p. 45, 1.11  
p. 46, 1.19  
pp.267-269

7. The Appellant on his side adduced evidence as to a purported lease by Mrs. Marley of the whole estate to a G.A.W. Jayatilleke on the 20th February 1962 (D.31) and as to his forcible dispossession on this date by the Marleys.

pp.75-77

pp.282-287  
p. 90, 1.22  
pp.98-99

30 Clarence Llewellyn Silva was another witness called by the Appellant. He was a Crown Proctor who acted on behalf of Mrs. Marley in proceedings in the District Court, Balapitiya, which she instituted against the Appellant by Plaint dated the 6th February 1962 (D.37). The Appellant did not appear on the return date and evidence was led ex parte. Thereafter the Appellant moved to have the ex parte Order vacated. The Order was vacated and the case fixed for trial. After the decree was vacated the Appellant filed an Answer.

pp.78-80

pp.275-279

40 Another Proctor, R.M.S. Karunaratne, was called by the Appellant to produce Agreement No. 227 of the 2nd March 1962 (D.5) relied upon by the Appellant in his Answer. He did not have

pp.89-93

pp.294-301

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anything to do with the preparation of this Agreement but said that on the 2nd March 1962 Mr. Welikala, a Proctor, came to his bungalow and told him he had drawn up the Agreement on instructions from the Marleys and the Appellant. The Agreement was signed by Mrs. Marley and the Appellant, and the witness attested their signatures.

p.294, l.33 - 8. Agreement No.227 of the 2nd March 1962  
p.295, l. 8 (D.5) provided for the sale by the Appellant to Mrs. Marley of his undivided half share of the estate for Rs.100,000/-.

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pp.295, The Agreement included the following  
296 provisions:

"3. The vendor shall forthwith upon the execution of this Agreement apply at his cost and expenses to the Tea and Rubber Estates (Control of Fragmentation) Board for Authority to transfer his ownership of the said premises in terms of the Tea and Rubber Estates (Control of Fragmentation) Act No.2 of 1958 to the purchaser and shall take all such steps with reasonable diligence as may be necessary to obtain the authority of the Board as aforesaid but the Vendor shall not be liable in any way if the said Board shall refuse such permission.

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4. . In the event of the said permission being granted the purchase shall be completed by the purchaser within a period of two weeks from the date of grant of the Tea and Rubber Estates (Control of Fragmentation) Board's Authority to transfer the ownership of the said premises by:-

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(a) paying to the vendor the purchase price of Rs.100,000/- and

(b) tendering to the vendor for execution at the office of M/s. Welikala & Fernando, Baillie Street, Colombo, a Transfer of an undivided one half share of the

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said premises in favour of the purchaser in the customary form which shall have been previously approved by the vendor.

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10 7. That all outstanding debts and liabilities accruing in respect of moneys advanced by Herbert Goddard Marley for the purchase of the said premises shall be borne by the purchaser, who shall also be solely liable for the payment of the sum of Rs.125,000/- which may become due upon an Agreement to Mortgage executed by the vendor and the purchaser and the said mortgage in respect of the said sum of Rs.125,000/- shall be executed in favour of the Borakanda Estate Company Limited by the vendor and the purchaser before the execution of the transfer  
20 herein mentioned.

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10. The purchaser shall withdraw all proceedings and suits filed against the vendor in the District Court of Balapitiya in respect of the said premises.

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30 12. If the purchaser shall fail to complete the purchase as provided in Clause 4 hereof, then in that event this Agreement shall forthwith be deemed to be cancelled and of no effect and thereupon the purchaser shall become liable to pay forthwith to the vendor a sum of Rs.100,000/- as liquidated damages and not by way of penalty, subject however to the conditions that the Tea and Rubber Estates (Control of Fragmentation) Board has granted its Authority for a sale of the said premises in terms of paragraph 3  
40 hereof. "

Record  
pp.102-143

9. The Appellant gave evidence in support of his case. His version of the Borakanda Estate transaction was as follows:

p.103,  
ll. 1-6

" Q. How was it that you yourself became a party to this agreement?

A. Mr. Marley said that he would provide the money and wanted me to manage the place and he told me that, if I managed the place and paid off his money, he would give me a half share of the properties once I paid off the debt. "

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pp.103, 104,  
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The Appellant said that he had not contributed any of the consideration for the purchase except for a sum of Rs.25,000/-, which was a loan from the Bank of Ceylon, Nuwara Eliya, granted to him on the guarantee of Mrs. Marley. Apart from this Rs.25,000/- and the sum of Rs.125,000/- borrowed from Borakanda Estate Co., the whole of the consideration for the purchase was contributed by Mr. Marley. The Appellant said he had never agreed to provide Rs.50,000/- towards the purchase price and denied that the Rs.50,000/- cheque given to him by Mr. Marley and which he had credited to his account was a loan or that Mr. Marley had lent him any money at all.

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p.111

10. The Appellant in the course of his evidence described how he was forcibly dispossessed from the estate on the 20th February 1962 and how thereafter he met Mr. Marley. He described the events leading up to the signing of the Agreement of the 2nd March 1962 in the following terms:

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p.111, l.33 -  
p.112, l.16

"I went there and Mr. Marley was there. Mr. Marley said that it is useless to try to settle this and 'my wife wants to remain here and why not settle this'. Then we went through the accounts and the books were also there. Then I told Mr. Marley the expenses that I had incurred before the purchase. Then I showed him the monies that I had borrowed from Mr. Soya. Then I told him to

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pay me Rs.125,000/- if they wanted me to give them my share of the property.

10 The Superintendent of the Estate had taken monies from Mr. Soyza oft and on. I demanded Rs.125,000/-. Mrs. Marley was all the time coming in and going out and scolding me. Mr. Marley said that he would settle me. Then he wanted me to meet his Proctor, ~~one~~ Mr. Welikala. I could not make up my mind because the matter was in the hands of my lawyers Mr. Adv. Thurairatnam and Mr. David Perera. Then he said I must go and see Mr. Welikala. On the 28th I spoke to Mr. Thurairatnam and told him this is what Mr. Marley is saying. On Mr. Thurairatnam's advice, I was agreeable to get rid of the bother on receipt of Rs.125,000/-. Mr. Marley agreed and asked me to go and see Mr. Welikala and he wanted me to discuss the details with him. I went and saw Mr. Welikala a day or two after. Then I met him and he gave me a draft and with Proctor De Silva I went and saw Mr. Adv. Neville Samarakoon and after some corrections were made, I brought and gave it to Mr. Welikala.

The agreement (D.5) was signed by me. (Shown D.5). "

pp.294 - 301

30 The Appellant added that after the Agreement was signed he gave up his claims and abandoned all steps against the Marleys. In pursuance of the Agreement (D.5) he got a Fragmentation Board Certificate, which he produced (D.63), but the Agreement was not implemented. In spite of it, Mrs. Marley proceeded with the case in the Balapitiya District Court.

p.112, 1.30 -  
p.113, 1. 5

pp.304-305

40 According to the Appellant it was fully understood between Mr. Marley and himself that he was to be discharged of all obligations in respect of the property, otherwise he would not have signed.

p.113, 11.18 -  
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Record  
pp.155-173

p.167, l.39 -  
p.168, l. 1  
p.168, l.16-17  
p.169, l.11  
p.170, ll.40-41  
p.171, ll. 1-5

11. The District Court in its Judgment dated the 29th January, 1965 rejected the Appellant's account of the circumstances in which it was agreed to purchase the Borakanda Estate, of the nature of the agreement and of the financing of the purchase. The learned District Court Judge accepted the evidence of M.T. Jayawardene and David Maartensz and held upon their evidence and upon the documents that from the outset the Appellant was to be a half share owner of the Estate, that monies were advanced by Mr. Marley as claimed in the Statement of Claim and that these monies were loans.

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pp.294 - 301  
p.171, l.26 -  
p.172 l. 9

With regard to the Appellant's plea that the Respondent was estopped from making any claims against him by the Agreement No.227 of the 2nd March 1962 (D.5), the learned District Court Judge held that this plea failed. D.5 was an Agreement between Mrs. Marley and the Appellant only. Mr. Marley was present and one could not say that he did not acquiesce in the transaction but he was not made a party to the Agreement.

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Furthermore, the Agreement was a conditional one, as could be seen from paragraph 12 (which provided for cancellation of the Agreement if the purchaser failed to complete) and also paragraphs 3 and 4. The evidence showed that Mrs. Marley did not abide by the Agreement, because, despite paragraph 10, she went on with her case against the Appellant in the Balapitiya District Court.

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pp.22-24,  
25-27  
pp.172 - 173

12. The issues which had been framed in the suit, and the answers given thereto by the learned District Court Judge, were inter alia as follows:-

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"(9) Was Agreement No.541 to buy Borakanda Estate in the names of Eileen Marley and the Defendant entered into by the Defendant at the express request of H.J.G. Marley, deceased? No.

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- (10) Was it agreed between Marley, the deceased, and the Defendant that the consideration for the purchase of Borakanda Estate was to be provided:
- (a) in respect of Rs.25,000/- by the Defendant; No. - Rs.50,000/-
- (b) in respect of Rs.125,000/- by the grant of a mortgage for Rs.125,000/- to Borakanda Estate Co. Ltd., the vendors: Yes.
- (c) in respect of the balance Rs.275,000/- by Marley the deceased and his wife Eileen Marley. No.

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- (16) Was the Defendant wrongfully deprived of the possession and management of:-

(a) Borakanda Estate; Yes

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and

(b) of his belongings to the value of Rs.2,000/- on 20.2.62 by Marley, deceased, and Eileen Florence Marley; Yes.

- (17) Did the Defendant thereupon take necessary steps to regain possession of Borakanda Estate, the books of account, rubber coconuts etc., Yes.

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- (18) Did the deceased H.J.G. Marley thereupon agree with the Defendant whereunder:

(a) the Defendant was discharged of all obligations to pay any monies to H.J.G. Marley, deceased or Eileen Florence Marley, his widow; No.

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(b) Agreement No. 227 of 2.3.62 attested by R.M.S. Karunaratne, Notary Public was entered into between the Defendant and Eileen Florence Marley? Yes.

(c) the Defendant abandoned all steps taken against Eileen Florence Marley and H.J.G. Marley, deceased? Yes.

(19) (a) Has the Defendant been released and absolved from liability to pay any sum of money to H.J.G. Marley, deceased, or to Eileen Florence Marley? No. 10

(b) Is the Estate of H.J.G. Marley, deceased, estopped and barred from making any claim against the Defendant? No. "

p.173 1.28

Upon these findings the learned Judge entered Judgment for the Respondent with costs. 20

pp.174 - 179

13. By Petition of Appeal dated the 1st February 1965 the Appellant appealed to the Supreme Court of Ceylon.

The Appellant's grounds of Appeal were inter alia as follows:-

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p.179,  
ll. 1-21

"(iii) In particular the document D5, being an Agreement attested by R.M.S. Karunaratne, Notary Public, on the 2nd March 1962 and the events that preceded the Agreement and that followed subsequently, establish the Defendant-Appellant's case. 30

(iv) The learned Judge is wrong in stating that the Agreement D5 is a conditional agreement.

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(vii) The estate of Mr. Marley is estopped from suing the Defendant-Appellant by reason of his conduct established in the evidence accepted by the learned Judge.

10 (viii) Apart from this fact, there was an Agreement between Mr. Marley and the Defendant-Appellant, whereby the Defendant-Appellant was released from his obligations if any, to pay any sum of money to Mr. Marley. "

14. The Appeal was heard on the 3rd, 4th and 7th September 1966, upon which last-mentioned date the Supreme Court entered a Decree dismissing the appeal with costs. pp.179-180

15. The Supreme Court gave its Reasons for Judgment on the 29th September 1966. pp.180-182

20 H.N.G. Fernando, S.P.J., who delivered the principal Judgment (with which A.W.H. Abeyesundere J. agreed), stated that the appeal had been pressed on the ground that an issue of estoppel should have been answered by the learned trial Judge in favour of the Appellant. The learned Senior Puisne Judge held, it is submitted correctly, that on the evidence in the case no question of estoppel arose or could arise. What the Appellant had sought to rely on at the trial was not estoppel but waiver or discharge. This had been raised clearly by Issue 18(a) which had been answered by the trial Judge against the Appellant. The Supreme Court saw no reason to disagree with that answer. p.181, l.33

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The Supreme Court was in complete agreement with the trial Judge in attaching significance to the fact that Mr. Marley was not a party to the Agreement of the 2nd March 1962 (D5). The learned Senior Puisne Judge added: p.182, ll. 9-17

40 "This Agreement (according to the Appellant) was approved by counsel of experience, who

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in our opinion would have advised that Marley should be a signatory to the Agreement if it was intended to operate as a discharge or waiver of Marley's rights against the Appellant. The fact that counsel gave no such advice raises the inference that he was not informed by the Appellant of any such discharge or waiver, or of even the Appellant's expectation that his own execution of the Agreement would operate to release him directly from his liabilities to Marley. "

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pp.184-185

16. On the 9th December 1966 the Appellant was granted Conditional Leave to Appeal to the Privy Council and on the 7th January 1967 Final Leave.

p.187

17. The Respondent respectfully submits that this Appeal should be dismissed and the said Decree of the Supreme Court of Ceylon dated the 7th September 1966 dismissing the Appellant's appeal from the said Judgment and Decree of the District Court of Nuwara Eliya dated the 29th January 1965, should be affirmed and the Appellant should be ordered to pay the costs of this Appeal, for the following amongst other

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R E A S O N S

1. BECAUSE the trial Court rightly found upon the evidence that monies were advanced and lent to the Appellant by H.J.G. Marley deceased as alleged in the Statement of Claim.
2. BECAUSE the trial Court rightly found upon the evidence that the said H.J.G. Marley had not waived or discharged his claim to recover the said monies from the Appellant.
3. BECAUSE the findings of fact of the trial Court were affirmed on Appeal by the Supreme Court of Ceylon and ought not to be disturbed.
4. BECAUSE the said H.J.G. Marley was not in any way a party to Agreement No. 227 of the

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2nd March 1962 (D.5), was not bound or affected by any stipulations that it contained and by no principle of law or equity is he to be deemed to have been so bound or affected.

- 10 5. BECAUSE on the face of it Agreement No.227 of the 2nd March 1962 (D.5) made no provision affecting the legal rights of the said H.J.G. Marley and did not purport so to do.
6. BECAUSE if the said H.J.G. Marley gave any undertaking or made any oral agreement with the Appellant on or about the 2nd March, 1962, his only obligation thereunder was to cause his wife to execute Agreement No.227 of the 2nd March 1962 (D.5), upon the execution of which his own obligation was discharged.
- 20 7. BECAUSE the purchase provided for in Agreement No. 227 of the 2nd March 1962 (D.5) was never completed and accordingly, as provided in Clause 12, the said Agreement was cancelled and of no effect, and the Appellant is in any event not entitled to the benefit of any release or discharge therein provided for.
- 30 8. BECAUSE the said H.J.G. Marley deceased was not, and the Respondent is not, estopped or barred from making the claims the subject matter of the action nor in any way disentitled to recover the sums claimed.
9. BECAUSE the Judgments of the Courts below were right for the reasons therein stated.

MONTAGUE SOLOMON.

No. 9 of 1968

IN THE 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 :

DON PETER MELLAARATCHY  
Appellant

- and -

J.A. NAIDOO, Executor of  
the Last Will and Codicil  
of H.J.G. Marley, deceased  
Respondent

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C A S E F O R R E S P O N D E N T

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FARRER & CO.,  
66, Lincoln's Inn Fields,  
London, W.C.2.