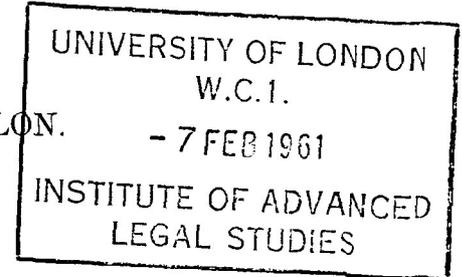


7, 1960

No. 19 of 1959.

In the Privy Council.

**ON APPEAL**  
FROM THE SUPREME COURT OF CEYLON.



BETWEEN—

S. A. SUPPIAH of Hethersett Estate, Kandapola 50391  
*Plaintiff—Appellant*

v.

J. J. KANAGARATNAM of Nuwara Eliya (dead)  
*1st Defendant*

- |    |  |
|----|--|
| 10 | 1. LILY GNANARATNAM KANAGARATNAM of Nuwara Eliya   |
|    | 2. BALARATNAM KANAGARATNAM   |
|    | 3. JAYARANIE KANAGARATNAM  |
|    | 4. THIAGARATNAM KANAGARATNAM   |
|    | 5. KIRUPAIRATNAM KANAGARATNAM  |
|    | 6. THEIVARANEE KANAGARATNAM, the 2nd to 6th (minors) all of Kondavil, Jaffna, by their Guardian— <i>ad-litem</i> |
| 20 | 7. JAMES ALBERT NAVARATNAM of Nuwara Eliya - <i>Substituted—Defendants—Respondents</i>                           |
|    | 8. S. R. THAMBIAH of Clifford Road, Colpetty<br><i>2nd Defendant—Respondent</i>                                  |
|    | 9. S. S. SELLIAH PILLAI of Kandapola<br><i>3rd Defendant—Respondent.</i>   |

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## CASE

### FOR THE SUBSTITUTED—DEFENDANTS—RESPONDENTS.

1. The Appellant (the Plaintiff in D.C. Nuwara Eliya No. 3181) appeals from the Judgment and Decree of the Supreme Court dated the 28th of June, 1957, whereby the Supreme Court allowed the appeal of the  
30 1st Defendant (now deceased, and in whose place the 1st-7th Defendants—Respondents above-named have been substituted) against

RECORD.

pp. 133-137.

p. 121, l. 10-  
p. 126, l. 25.

the Judgment and Decree of the District Court of Nuwara Eliya dated the 5th February, 1954.

2. This appeal involves the consideration of three matters of law, namely (a) the nature and scope of the right of *Jus Superficiarium*, (b) the nature and scope of an action for use and occupation of land in cases where there is no notarial agreement and (c) the interpretation of Section 772 of the Civil Procedure Code (Ordinance No. 2 of 1889) in so far as it relates to cross-objections that may be lodged by a Respondent to an appeal to the Supreme Court.

p. 25, l. 30-  
p. 27, l. 15.

3. By his Plaint dated the 19th June, 1950, the Appellant, as 10  
Plaintiff, instituted an action against the 1st Defendant (now deceased) praying:—

(a) that he be declared entitled to one-fourth share of the subject matter of the action, namely the Theatre called and known as Tivoli Theatre, Nuwara Eliya and of the plant and machinery thereof;

(b) that he be placed in quiet possession of the said one-fourth share;

(c) that the 1st Defendant be ordered to account to him for the Plaintiff's share of the rents and profits from June, 1948, up to the 20  
date of action;

(d) for judgment against the 1st Defendant in such sum as may be found due to the Plaintiff on such accounting; and

(e) for costs.

The 2nd and 3rd Defendants—Respondents above-named were added as co-owners but no relief was claimed against them.

4. The cause of action was set out in the plaint in the following terms:—

p. 26, l. 22.

“a cause of action has thus arisen to sue the 1st Defendant for  
“Declaration of Title to and possession of the said Tivoli Theatre, 30  
“Nuwara Eliya and for mesne profits and rents . . . . .”

5. The facts alleged in the plaint as giving rise to the cause of action were:—

p. 26, l. 9.

(a) that the “Plaintiff and the Defendants built the said  
“theatre . . . . . and equipped it with plant and machinery and the  
“Plaintiff and the three Defendants became entitled to the said  
“theatre together with the said plant and machinery in the propor-  
“tion of one-fourth share to each”.

(b) that the 1st Defendant as such co-owner had since June, 1948, been in possession and had managed the said theatre and 40  
collected the rents and profits for the benefit of himself and the other co-owners.

(c) that as from June, 1948, the 1st Defendant had unlawfully appropriated all the profits and refused to give the Plaintiff his share.

p. 27, l. 17-  
p. 28, l. 42.

6. On the 8th September, 1950, the 1st Defendant filed his answer praying for the dismissal of the Plaintiff's action and pleaded:—

(a) that the Plaintiff and the Defendants were not co-owners.

(b) that the 1st Defendant is the lessee of the land on which the Tivoli Theatre stood and that he was entitled to possession thereof.

(c) that the Plaintiff and the Defendants contributed money and put up the building with a view to running a theatre.

(d) that there was no notarial writing giving any shares to the Plaintiff and to the 2nd and 3rd Defendants and that the Plaintiff could not, therefore, maintain the action.

7. On the 29th February, 1952, the parties went to trial on the following issues:—

p. 30, l. 1-  
p. 31, l. 15.

(1) Did the Plaintiff and Defendants build the Tivoli Theatre and equip it with plant and machinery?

(2) If so, are the Plaintiff and Defendants co-owners of the said theatre together with the plant and machinery?

(3) Has the 1st Defendant been in possession of the said theatre from June, 1948, and collected the rents and profits?

(4) If so, have the rents and profits been collected on behalf of the other co-owners as well?

(5) How much rents and profits have been collected by the 1st Defendant from June, 1948, up to date?

(6) Has the 1st Defendant appropriated to himself all the rents and profits from June, 1948?

(7) Is the 1st Defendant liable to account to the Plaintiff for his share of the rents and profits?

(8) If so, what sum is due to the Plaintiff from the 1st Defendant in respect of such rents and profits?

(9) Is the Plaintiff entitled to a declaration of title to and possession of an undivided quarter share of the Tivoli Theatre?

(10) Can the Plaintiff ask for a declaration of title without a notarial writing giving him any share of the premises?

(11) Was the said business carried on by the Plaintiff and the three Defendants in fact a partnership business?

(12) If so, was the capital of the said business over Rs. 1,000/-.

(13) If issue No. 12 is answered in the affirmative in the absence of a writing can the Plaintiff maintain this action for the accounting?

(14) Is the plant and machinery installed in the premises the property of the Transport and General Finance Company Limited?

(15) If so, is the Transport and General Finance Company Limited a necessary party to this action?

8. There was a change of judges in the course of the trial and the parties agreed that the trial should be had *de novo* before the new judge upon the issues formulated on the 29th February, 1952. A further issue suggested by Counsel for the 1st Defendant was accepted by the learned District Judge:—

p. 49, ll. 15-20.

(16) Can the Plaintiff have and maintain this action without making the Transport and General Finance Company a party to this action?

pp. 49-94.

9. In support of the Plaintiff's case the evidence of the 2nd Defendant, 3rd Defendant and of the Plaintiff was led on the 6th March, 1953, the 8th March, 1953, the 10th June, the 11th June and the 31st July, 1953.

p. 95, ll. 3-7.

10. After the case for the Plaintiff was closed, Counsel for the Plaintiff moved to raise a fresh issue:—

“Is the 1st Defendant in possession of the Tivoli Theatre partly on his own behalf and partly on behalf of the Plaintiff and the 2nd and 3rd Defendants as Trustee?”

p. 95, ll. 23-31.

11. Counsel for the 1st Defendant objected to the fresh issue and the learned Judge adjourned the trial for the purpose of hearing argument on the matter of the suggested issue as well as on a matter raised by the learned District Judge, namely whether in view of Section 35(1) of the Civil Procedure Code the Plaintiff could, without leave of Court, ask for a declaration of title to a share of Tivoli Theatre and join with that prayer a claim to a share of the profits of the business carried on in the premises.

12. Section 35(1) of the Civil Procedure Code is as follows:—

“35. (1) In an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the court, except—

“(a) Claims in respect of mesne profits or arrears of rent in respect of the property claimed;

“(b) Damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and

“(c) Claims by a mortgagee to enforce any of his remedies under the mortgage.

“EXAMPLES.—A sues B to recover land upon the allegation that the land belongs to C, and that he (A) has bought it of C. A makes C a party defendant; but he cannot, without leave of the court, join with this claim an alternative claim for damages against C for non-performance of his contract of sale.”

p. 97, l. 30-  
p. 104, l. 40.

13. By his Interlocutory Order dated the 20th August, 1953, the learned District Judge held against the Plaintiff on both matters and allowed the Plaintiff time till the 4th September, 1953, to amend the Plaint by confining the action to one for a declaration of title to and possession of a quarter share of Tivoli Theatre and indicated that the Plaintiff's action would be dismissed if no such application was made.

p. 18, ll. 7-23.

14. On the 4th September, 1953, Counsel for the Plaintiff moved to amend the plaint by confining the action to one for a Declaration of Title to one-fourth share of the Theatre Building for possession of that share and for costs. In making this application Counsel for the Plaintiff indicated that he did so without prejudice to the Plaintiff's right to canvass the correctness of the Interlocutory Order of the 21st August, 1953, in the final appeal if necessary. The learned District Judge indicated that any attempt to canvass the Interlocutory Order would be

also without prejudice to the Defendants' right to object to the attempt being made out of time.

15. The Plaintiff did not appeal against the said order of the District Judge and the trial proceeded upon the amended plaint.

16. On the 5th February, 1954, the learned District Judge gave judgment declaring the Plaintiff entitled to a 42,559/145,185th share of the Tivoli Theatre building and its equipment and directing the 1st Defendant to pay the Plaintiff half costs of action up to the 20th September, 1953, and full costs thereafter.

p. 121, l. 10-  
p. 125, l. 21.

10 17. In the course of his judgment the learned District Judge held:—

(a) that there was no partnership prior to the completion of the building, and that the building itself was not an asset or liability of the partnership;

p. 123, ll. 31-40.

(b) that the Plaintiff contributed Rs. 42,559 out of the total sum of Rs. 145,185/70 on the building and equipment;

pp. 125, ll. 26-31.

(c) that the building was co-owned by the Plaintiff, 1st, 2nd and 3rd Defendants;

p. 123, ll. 25-26.

20 (d) that as a co-builder the Plaintiff is entitled to the fractional share as against the other co-owners of the building and that the right claimed had nothing to do with the right of superficies;

p. 123, ll. 15-19.

(e) that no notarial agreement was necessary for the purpose of enforcing the right claimed by the Plaintiff.

p. 126, ll. 12-15.

18. The 1st Defendant appealed to the Supreme Court against the judgment of the learned District Judge. The Plaintiff filed cross-objections dated the 25th day of 1926 which included the following:—

p. 127, l. 17-  
p. 132, l. 40.

(a) that the issue as to whether the 1st Defendant was trustee should have been accepted by the Judge;

Petition of  
Cross-Appeal  
p. 3.

30 (b) that the Plaintiff was entitled to judgment against the 1st Defendant as a trustee and to an order for accounting;

(c) that the learned District Judge should have in his judgment included an order for possession in favour of the Plaintiff in respect of the share to which he was declared entitled; and

(d) that the District Judge should have awarded to the Plaintiff full costs of the trial.

19. The Appeal was heard by Sansoni J. and L. W. De Silva A.J. who on the 28th June, 1957, gave judgment allowing the appeal and directing that the Plaintiff's action be dismissed with costs in both Courts.

pp. 133-136.

40 20. In the said judgment the Supreme Court held:—

(a) that at the time that the building was erected the Plaintiff had no interest in the land and that he could not possibly become the owner of the building in any sense because it became the property of the soil-owner.

p. 135, ll. 20-24.

(b) that the claim put forward on behalf of the Plaintiff at the hearing of the appeal, namely, that he was entitled to a *jus superficiesarium* could not be upheld because:—

p. 135, ll. 32-34.

(i) the Plaintiff could not be allowed to make out a case for a claim to a *jus superficarium* which was quite different from the right claimed in his plaint; and

p. 135, ll. 34-44.

(ii) the right of *jus superficarium* could not be acquired except by prescription or by a notarially attested agreement between the builder and the soil-owner.

p. 136, ll. 1-15.

(c) that the Plaintiff's action could not be regarded as an action for use and occupation of land on the authority of the decision in *Perera v. Fernando* (Ramanathan's Reports (1863-1868) 83) because such an action was one for compensation and lay as 10 between the builder and the soil owner.

p. 136, ll. 20-29.

(d) that the cross-objections filed by the Plaintiff were not objections to the decree appealed against but to an order made in the course of the trial and that in default of an appeal from that order, argument in support of the cross-objections could not be entertained.

21. Section 772 of the Civil Procedure Code reads as follows:—

“772. (1) Any respondent, though he may not have appealed “against any part of the decree, may, upon the hearing, not only “support the decree on any of the grounds decided against him in 20 “the court below, but take any objection to the decree which he “could have taken by way of appeal, provided he has given to the “appellant or his proctor seven days' notice in writing of such “objection.

“(2) Such objection shall be in the form prescribed in “paragraph (e) of section 758.”

22. It is respectfully submitted that the judgment of the Supreme Court is right for the reasons stated therein.

23. Assuming the Supreme Court to be wrong in refusing to entertain the cross-objections, it is submitted that a consideration of the 30 cross-objections would not have led to a different result. The learned District Judge's decision not to allow the fresh issue suggested by the Counsel for the Plaintiff was right, not only for the reason given by the learned Judge, namely, that it was not relevant but also for the reason that, if allowed, it would have altered the nature and scope of the action as fixed by the pleadings.

24. It is respectfully submitted that, in any event, the rejected issue, even if admitted, had to be answered against the Plaintiff—Appellant for the following reasons:—

p. 152, ll. 39-42.

(a) The consideration of Rs. 3,000/- for the lease was paid by 40 the 1st Defendant. Neither the Plaintiff—Appellant nor the other Defendants in the case contributed towards the consideration.

p. 54, ll. 21-24.

(b) The evidence does not establish that the 1st Defendant acted as agent of the Plaintiff in obtaining the lease 1.D.1. The evidence of the Plaintiff is that he did not know the 1st Defendant until sometime after the execution of the lease.

p. 90, ll. 4-10.

(c) The 1st Defendant's right to possess the land and to build upon it was based upon his right as sole lessee.

(d) Section 92 of the Trusts Ordinance on which Counsel for the Plaintiff relied in the trial Court does not apply because the 1st Defendant was not a person having, *vis-a-vis* the Plaintiff, a limited interest in the land, and also for the reason that the 1st Defendant cannot be regarded as a person availing himself of his position as a person with a limited interest.

25. Section 92 of the Trusts Ordinance (Chap. 72 of the Revised Legislative Enactments 1938 Ed.) reads as follows:—

10 “92. Where a co-owner, mortgagee, or other person with a “qualified interest in any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the “other persons interested in the property, or where any such person, “as representing all persons interested in such property, gains any “advantage, he must hold, for the benefit of all persons so “interested, the advantage so gained, but subject to repayment by “such persons of their due share of the expenses properly incurred, “and to an indemnity by the same persons against liabilities “properly contracted, in gaining such advantage.”

20 26. It is respectfully submitted that this appeal should be dismissed with costs throughout for the following amongst other:—

#### REASONS.

1. BECAUSE the judgment of the Supreme Court is right.
2. BECAUSE the ownership of a building apart from the land on which it stands is not recognised by the law of Ceylon.
3. BECAUSE it is not open to the Plaintiff to base his claim on the *Jus Superficiarium*.
4. BECAUSE the Plaintiff's action cannot be regarded as an action for the use and occupation of land upon the authority of the decision in *Perera v. Fernando*.
- 30 5. BECAUSE the learned District Judge was right in disallowing the issue as to whether the 1st Defendant possessed the Tivoli Theatre as a trustee for the Plaintiff and the 2nd and 3rd Defendants.
6. BECAUSE the decision of the Supreme Court to reject the cross-objections was right.
7. BECAUSE, in any event, the evidence does not support the rejected issue.

WALTER JAYAWARDENA.

In the Privy Council.

**ON APPEAL**

FROM THE SUPREME COURT OF CEYLON.

---

BETWEEN—

S. A. SUPPIAH of Hethersett Estate, Kandapola  
*Plaintiff—Appellant*

**v.**

J. J. KANAGARATNAM of Nuwara Eliya (dead)  
*1st Defendant*

1. LILY GNANARATNAM KANAGARATNAM of Nuwara Eliya
  2. BALARATNAM KANAGARATNAM
  3. JAYARANIE KANAGARATNAM
  4. THIAGARATNAM KANAGARATNAM
  5. KIRUPAIRATNAM KANAGARATNAM
  6. THEIYARANEE KANAGARATNAM, the 2nd to 6th (minors) all of Korlavil, Jaffna, by their Guardian-ad-litem
  7. JAMES ALBERT NAYARATNAM of Nuwara Eliya  
*Substituted—Defendants—Respondents*
  8. S. R. THAMBIAH of Clifford Road, Colpetty  
*2nd Defendant—Respondent*
  9. S. S. SELLIAH PILLAI of Kandapola  
*3rd Defendant—Respondent.*
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**CASE**

for the **Substituted—Defendants—  
Respondents.**

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LIGHT & FULTON,  
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London, W.C.1,

*Substituted—Defendants—Respondents’  
Solicitors.*