Privy Council Appeal No. 14 of 1966

Philip Seevali Wijewardene – – – – – – *Appellant*

v.

George Benjamin Sirisena Gomes and others – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH JULY 1967

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD WILBERFORCE
LORD PEARSON
SIR JOCELYN SIMON
SIR ALFRED NORTH

[*Delivered by* LORD WILBERFORCE]

This is an appeal from the judgment and decree of the Supreme Court of Ceylon dated 24th May 1963 dismissing an appeal from the judgment of the District Court of Colombo dated 30th May 1960. The proceedings relate to the estate of Tudugallege Don Richard Wijewardene who died on 13th June 1950 and whose will, dated 26th May 1950, was proved on 21st March 1951. The proving Executors made an application under section 729 of the Civil Procedure Code for the judicial settlement of the accounts of their administration up to 31st December 1957. The present appellant, who is the eldest son of the Testator and a legatee under his will, raised certain objections to these accounts. He succeeded with regard to one only in the District Court and appealed unsuccessfully to the Supreme Court of Ceylon as regards the remaining objections. As regards that objection on which he had succeeded, the executors lodged a cross-appeal and succeeded in the Supreme Court in reducing the amount awarded to the appellant. The appellant now appeals to their Lordships against the rejection of his objections and against the reduction in the amount awarded to him in respect of the matter on which he was successful.

The appeal, as presented to their Lordships, related to six matters; but as regards two of these namely (*a*) certain fees payable to the firm of Proctors acting for the executors and (*b*) the cost of a passage from Canberra for a person named in the Will as executor, Counsel for the appellant properly and inevitably conceded that these were not matters which could be raised on an appeal to this Board. According to their Lordships' practice, recently restated in *Vander Poorten v. Vander Poorten* ([1963] 1 W.L.R. 945) appeals concerned with the taking of an account will not be entertained where questions of fact rather than principles of law are involved.

There remain four other questions relating to individual and unconnected matters and their Lordships will deal separately with them.

1. The appellant claims to be entitled to a quarter share of a holding of 1,000 ordinary shares in the Associated Newspapers of Ceylon Ltd. The validity of this claim depends in the first instance upon whether the 1,000 shares in question devolved under the will of the Testator or formed part of the Trust Fund under a Voluntary Settlement made by the Testator on 28th February 1950. The Testator, who was the principal shareholder and managing director of the company, was the registered owner in 1950 of 8,026 shares of Rs.100/- each out of a total ordinary share capital of 11,500 shares. A meeting of the directors was held on 9th February 1950 at which it was resolved to issue 2,000 ordinary shares at par, such shares to be offered to members in proportion to their existing holdings. On 16th February 1950 a circular letter was sent out to the members, including the Testator, containing an offer from the company to each member in accordance with the resolution. The number of shares of the new issue to which the Testator was entitled under this offer was 1,396. There was attached to the circular letter a form of request for allotment to be completed and returned to the company together with a payment of Rs.50/- a share before 15th March 1950. The remaining Rs.50/- were to be paid on allotment on or before 15th September 1950. On 28th February 1950, that is to say after receipt of the offer but before he had taken any action upon it, the Testator executed a Voluntary Settlement for the benefit, in the main, of his youngest son. The Settlement was, according to a schedule, to include 6,000 ordinary shares in the company of which the Testator was the registered owner and 1,000 further ordinary shares which " had been issued but not yet allotted and which the Settlor is about to cause to be allotted into the names of the Trustees ". On the same day the Testator executed a transfer to the Trustees of the Settlement of 6,000 shares of which he was the registered owner. On or about 7th March 1950 the Testator applied to the company for an allotment of 1,396 new ordinary shares and sent to the company a cheque for Rs.69,800/- being the amount payable on application. The company, on 7th March 1950, acknowledged the receipt of this application. A meeting of the directors of the company was held on 6th April 1950 at which the applications for allotment of the new shares were recorded and agreed to. On 26th May 1950 the Testator executed his last will in which he made certain dispositions of shares in the company but he expressly excluded from those dispositions any shares which had formed the subject of the Voluntary Settlement. He died on 13th June 1950 before any allotment of the shares of the new issue had been made. In due course the 1,396 shares to which the Testator was entitled were allotted to the executors on payment by them of the final amount due.

In these circumstances the question arose whether the Settlement Trustees were entitled to call upon the executors to transfer to them 1,000 of the allotted shares. In fact the executors transferred to the Trustees, by agreement with three of the Testator's children, or at least without objection by them, 750 of these shares; but, on objection being made by the appellant, they retained 250. The appellant contends that the 1,000 shares in question do not belong to the Settlement Trustees but ought to devolve under the will.

Under the Trusts Ordinance of Ceylon (Cap. 87) Section 6, for an effective trust to be created there must (unless the Settlor is himself to be the Trustee) be either a testamentary disposition or a transfer of the trust property to the Trustee.

The learned District Judge held that a valid trust had been constituted because the Voluntary Settlement of 28th February 1950 was effective as a transfer to the Trustees of the rights of the Settlor in the 1,000 shares and constituted a valid declaration of trust in respect of those shares. The contention that the Settlement amounted itself to a transfer appears to their Lordships to involve considerable difficulties both on the form of the Settlement and having regard to the facts relating

to the shares. Moreover, such a contention was expressly disclaimed in argument before the District Court; nor does it appear to have been contended before the Supreme Court. Furthermore, if and so far as it is suggested that the Settlor had declared himself a Trustee of the shares, or of the rights in them, this was inconsistent with the form of the Settlement, and with the well-known principle that where a trust is intended to be effected by means of a transfer of property to trustees, and no such transfer takes place, effect cannot be given to the trust as a declaration by the Settlor that he himself holds the property as Trustee (see *Milroy v. Lord* (1862 4 De G F & J, 264 per Turner L.J. at p. 274). These particular contentions were in fact not supported in argument by learned Counsel appearing for the surviving Settlement Trustee. Nor did Counsel endeavour to justify an alternative line of argument relied on by the learned District Judge which was to the effect that the (admittedly effective) gift of the 6,000 shares in the company carried with it, as the fruit of that holding, the rights to the new shares issued in 1950. On this point too the facts were against him since the Testator himself had separated the rights from the main holding, transferring the one but not the other.

In place of these arguments, on which the judgment of the District Court was based, the respondents contended that the Testator should be regarded as having formally agreed with the Trustees to have allotted, or to transfer, to them the 1,000 new shares. Such an agreement, under the law applicable in Ceylon, would, it was argued, be legally enforceable, without the necessity of consideration such as English law would require. Consequently, so soon as the new shares came to be allotted, the Trustees of the Voluntary Settlement were in a position to enforce the promise made by the Testator.

Their Lordships express no opinion whether, if the necessary basis of fact were shown to exist, an effective trust could be constituted in this manner under the law of Ceylon, for they are satisfied that the respondents have failed to show that any such promise was made. That, at the time of making the Settlement, it was the policy and intention of the Settlor to vest in the Trustees both 6,000 of the existing shares and 1,000 of the new shares to be allotted, there can be no doubt, but more than a mere manifestation of intention is required in order to constitute a promise enforceable in law. No evidence was given that any such promise was made to, or relied on by, the Trustees, and the respondents were, consequently, driven to rely upon the terms of the Settlement itself. But these, though again they are evidence of the Settlor's intentions, and also indicate upon what trusts the shares are to be held once vested in the Trustees, cannot be construed as amounting either expressly or by implication to a promise. The words most relied on, which appear both in recital (*c*) and in the Schedule paragraph (2) are that the Settlor " is about to cause to be allotted into the names of the Trustees ", but these are words which declare an intent and fall far short of amounting to a promise. In the absence therefore of the requisite factual substratum their Lordships must hold that this argument fails. It follows that the appellant succeeds, on this objection, in showing that the 1,000 shares the subject of the new issue in 1950, do not pass to the Trustees of the Voluntary Settlement.

There remain certain points of detail. First it appears that since the death of the Testator there has been a bonus issue, on a one-for-one basis, of fully paid shares in the company, so that the 1,000 shares the subject of this issue are now represented by 2,000 shares. It was not disputed that the whole of this aggregate holding devolves together. Secondly their Lordships were informed that, of the 750 shares transferred to the Settlement Trustees, a number said to represent one-eighth part had been transferred to the appellant. The appellant must of course bring any of these shares into account in any distribution of the 1,000 (2,000) shares under the will. Thirdly, although it is now clear that the 1,000 (2,000) shares should pass under the will, it was contended

by the respondents that the question remains whether they devolve under clause 15 (1) or under clause 15 (7). Under the former clause the appellant would be entitled to one-quarter (250/500): under the latter to one-fifth (200/400). In view of the fact that the Testator's youngest son, who would be interested to argue for the second alternative, was not represented on the appeal, in order to avoid further litigation, Counsel for the appellant was instructed to agree to limit his claim to 200/400 out of the 1,000/2,000 shares in the company.

The appeal therefore succeeds on this issue and the accounts must be adjusted to give effect to the points above stated.

2. The appellant claims that a piece of land known as Field No. 1 of the Galpokuna Estate devolves to him under the terms of the will. Under clause 15 (1), a half share " of the Galpokuna Division of my Galpokuna Group " was devised to the appellant; the other half share of this division was devised under clause 15 (3) to the Testator's daughter Ranee, the fifth respondent. By clause 15 (2) of the will the Testator devised " all that divided portion known as the Udabaddawa Division of the group aforesaid " to his daughter Nalini, the fourth respondent. The issue is under which of these devises Field No. 1 passes. The question is one of identification upon which extrinsic evidence is admissible and in fact a considerable volume of evidence was led before the learned District Judge and considered by him. This evidence consisted in the main of the following matters: (*a*) The Testator acquired at separate dates two estates adjoining each other, the Galpokuna estate and the Udabaddawa estate. He combined these two into a single group called Galpokuna group. Field No. 1 originally formed part of Galpokuna estate. (*b*) On 5th October 1936 two maps were prepared by the same surveyor, a Mr. Pieris, who gave evidence at the trial. One of these maps (Exhibit P.21) showed the Galpokuna group as a whole and was entitled " Plan of Galpokuna group including Udabaddawa Division ". The field in question was depicted on this plan in a manner which appears to separate it from the Udabaddawa Division, and a tabular statement grouped it together with other Galpokuna fields and separately from the three Udabaddawa fields. However, the plan did not in terms make any reference to a Galpokuna Division. The other plan (Exhibit P.23D) purported to show Udabaddawa Division Galpokuna group: the area depicted included Field No. 1. Moreover, on the plan, under the words " Udabaddawa Division " there appear in smaller characters the words " including Field No. 1 of Galpokuna ". This plan therefore, on the face of it, appears to show the field in question as included in the Udabaddawa Division. (*c*) There was the evidence of a Proctor, Mr. Abeywardene, relating to the preparation of the plan Exhibit P.23D. He said that he had been instructed in 1936 by the Testator to prepare a statement relating to the title to the block of land included in Exhibit P.23D. Accordingly he obtained the relevant documents and bound all the title deeds relating to this block into one volume. On the cover page of that volume, in what was proved to be the handwriting of Mr. Abeywardene's clerk, appear the words " Title deeds of Udabaddawa Division Galpokuna group in extent A.183—R.2—P.1 ". The extent of this acreage was such as to include Field No. 1. Mr. Abeywardene was not able to say precisely for what purpose this volume was assembled though he did say that it was not in connection with any proposed will. The plan (Exhibit P.23D) was amended on 6th November 1941 by a surveyor so as to include certain new acquisitions. (*d*) Certain evidence was produced as to the management of the Galpokuna group by a firm of estate agents of which the Testator was himself a director. A crop disposals book (Exhibit D.35) showed that separate crop figures were maintained in relation to each field in the group as a whole and Field No. 1 was there recorded together with 10 other fields of Galpokuna as distinct from the three fields of Udabaddawa. But in the statements sent to the Testator during his lifetime no separate crop figures of Galpokuna Division and Udabaddawa Division were given and the Testator never asked for separate returns in respect of the two divisions.

In addition to these matters of extrinsic evidence, there was a clause in the will itself from which it was sought by either side to draw support. This was clause 21 which declared that in each appropriation to the Testator's children of estates, plantations and premises or divisions or portions thereof, there should be included " not only all land depicted in the most recent plan of the property appropriated as may be in existence at the date of my death, but also " all further or additional land purchased prior to the Testator's death.

These matters, which their Lordships have only summarised as they are very fully set out in the judgment of the District Court, were carefully considered and weighed by the learned District Judge, who came to the conclusion upon the evidence as a whole that the intention of the Testator in clause 15 of his will was to include Field No. 1 in the Udabaddawa Division. In doing so he also took into account the fact that, if this were so, the four elder children of the Testator (the appellant and his three sisters) would receive approximately equal values of land, whereas if the appellant's contention was correct there would be a considerable inequality as between the appellant and two of the daughters on the one hand and the third daughter (Nalini) on the other. The learned judge deduced from the terms of clause 15, subclauses 1–4, of the will an intention both in relation to the number of shares in the Associated Newspapers of Ceylon Ltd., and in relation to immoveable property that the children should be treated alike. Their Lordships are in agreement with the learned judge in attaching some significance to this consideration.

The matter can not be resolved solely as one of construction of the provisions in the will, or merely by a decision as to what constitutes the most recent plan referred to in clause 21. In the first place that clause was designed not so much to lay down what was to be conclusive or decisive evidence as to the extent of land previously devised, as to make it plain that subsequent additions were to be included. Any plan shown to be the " most recent " would be an element to be taken into consideration, but in conjunction with other material evidence as to the Testator's intention. But, secondly, it appears to their Lordships impossible to say with any certainty that the most recent plan there referred to was Exhibit P.21 on the one hand or P.23D on the other. They were contemporaneous, and if P.21 may be said to designate the estate as a whole, or possibly, the two separate divisions. the plan which designated Udabaddawa Division was P.23D.

The identity of the property designated by the Testator therefore fell to be determined upon consideration of the other pieces of extrinsic evidence to which reference has been made. It was on a balance of these that the learned District Judge reached his conclusion that the field devolves as part of the Udabaddawa Division.

In such a matter their Lordships would be reluctant to interfere with the findings of the trial judge, more particularly when these were, as in the present case, concurred in by the Supreme Court. To justify such interference it would be necessary to show that some substantial misdirection or error in law had occurred. After a careful consideration of the judgment of the learned District Judge their Lordships are fully satisfied that no such error or misdirection can be shown and indeed their Lordships find themselves in substantial agreement with his findings. They therefore find that the appellant does not succeed with this objection.

3. This objection relates to a painting to which the appellant claims to be entitled under the will but which has not been made over to him by the executors. The painting was one which was commissioned by the Testator during his lifetime from a Mr. Floyd, who, it appears, was invited by the Testator from England in order to execute a number of paintings for him. Mr. Floyd in fact did paint a number of pictures during his stay in Ceylon. The disputed picture was one depicting the scene at the Assembly Hall on Independence Day, 4th February 1948, and showed His Royal Highness the Duke of Gloucester handing over the grant of independence to the Prime Minister of Ceylon. Under the

will, in consequence of a nomination made by the Testator's widow, the appellant became entitled to the Testator's pictures and paintings. The case made by the executors at the trial was that the painting did not belong to the deceased and therefore did not pass under his will. They called certain evidence to substantiate this which was rejected by the learned District Judge and it is not now disputed that the painting should have passed to the appellant and that he was entitled to have it made over to him. It is further not now in dispute that the executors wrongly handed it over to a third person. The only question now in issue relates to the value for which the executors are accountable to the appellant in the event of the painting itself not being forthcoming. In his original objections to the executors' accounts the appellant placed an arbitrary value upon the painting of Rs.12,500/-. At the trial, through his counsel, he indicated his willingness to accept Rs.10,000/- and this was the figure awarded by the learned judge. On appeal this amount was reduced to Rs.1,340/-. The appellant now submits that the Supreme Court was not justified in making this reduction and seeks to have the original award restored.

It is unfortunate that the evidence as to the value of this picture is, on any view, exiguous. This is no doubt because it formed a small item in relation to the estate as a whole and because the main dispute at the trial was whether it formed part of the estate or not. Indeed even so late as the time when the executors lodged their objections against the decision of the District Court no clear issue had been stated as regards the picture's value. In these circumstances their Lordships are reluctant to reach the conclusion that the finding of the District Court should be disturbed. Nevertheless they find it impossible to escape from the conclusion that the evidence before it was insufficient to justify the valuation of Rs.10,000/-. The figure was based upon the evidence of one Atukorale (a witness found to be unreliable) that he had been asked by Mr. Floyd to sell it for Rs.10,000/-, an insufficient basis for finding as the judge did find that this was its true value. Their Lordships therefore consider that the Supreme Court was justified in holding that this finding of the District Judge could not be maintained. The substituted figure of Rs.1,340/- which was accepted by the Supreme Court was arrived at on the basis of an insurance policy taken out in 1948 by the Testator in which the "Assembly Hall" was included and against which the figure of £100 was inserted. It appears that this figure was stated by the Testator himself in a signed list which he sent to the insurance company. No evidence was called to show that any valuation at this figure was made or as to the basis on which insurance cover was requested or given so that the figure appearing in the policy can hardly be accepted as satisfactory evidence of value. In the same policy a number of other paintings by the same artist were indifferently valued at £50.

The appellant sought to justify the higher valuation upon the well-known principle that where a wrong-doer has deprived a claimant of the opportunity of having an item of property appraised, he must submit to having it valued as an object of the highest quality of its kind. Admitting the general validity of the rule, it cannot help the appellant here, first because it was not satisfactorily shown that the painting could not have been valued—since its situation at about the time of the trial seems to have been known—and secondly because the appellant was unable to provide the court with a valuation on the highest quality basis. In view of the protracted litigation which has taken place, and the not very considerable sum of money involved, their Lordships are reluctant to remit this issue for a fresh valuation to be obtained but in the circumstances they consider that this is the only possible course to take, and that the decision of the Supreme Court must be varied accordingly. They express the hope that agreement may be possible between the parties interested which will make further proceedings unnecessary.

4. This claim relates to the date for distribution of the Testator's estate. The question arises under clause 15 of the will in which it was

directed that the gifts therein contained, which included gifts to the appellant, should take effect on the "date for distribution". The executors claim and their accounts have been submitted on the basis that the date for distribution was 31st December 1957. The appellant's claim (as amended) is that the correct date should be 31st March 1954. These differing dates are in each case related to the making of an assessment for purposes of estate duty. The earlier date contended for by the appellant is related to the fact that an assessment for estate duty was made on 3rd March 1951 and he contends that in accordance with estate duty legislation this assessment became final after three years, on 3rd March 1954, in the absence of fraud or evasion. Consequently it is said the executors could have distributed the estate on 31st March 1954 provided that they had sufficient money in hand. The appellant undertook to show from the accounts that in fact sufficient money was in the hands of the executors. The executors on the other hand contend that the assessment of 3rd March 1951 was a provisional assessment only (it is in fact so described) and the date contended for by them is related to a final assessment for estate duty purposes which was made on 4th June 1958. The effect of this assessment was communicated to the executors in August 1957 and it is consequently contended that distribution could not have been made before 31st December 1957.

Before considering the relevant clause in the will it is necessary to examine the machinery adopted in Ceylon as regards assessment of estate duty. The present Estate Duty Ordinance (Cap. 241, which dates from 1938) does not make any provision for a provisional assessment. It requires that a return should be made by the executors, that estate duty should be assessed by the Commissioner of Estate Duty and that probate shall not issue until his assessment has been made and a certificate given that the appropriate estate duty has been paid. An additional assessment may be made at any time within three years after the original assessment, but not after this period unless there has been fraud or wilful evasion. This procedure evidently involves practical difficulties in relation to estates of any size or complexity and it was found by the District Court that a practice has been established whereby a provisional assessment is made by the Commissioner based on information supplied by the executors and whereby Letters of Administration or of Probate are issued upon the strength of a provisional certificate showing that duty in accordance with the provisional assessment has been paid. Later a final assessment is made on the basis of figures officially accepted. This procedure seems to have originated under the earlier Estate Duty Ordinance (No. 8) of 1919 as is confirmed by the case of *Saibo v. Commissioner of Stamps* (1938) 40 N.L.R. 374. The learned judge took the view that the same practice of making a provisional assessment was followed under the present Ordinance, that no final assessment takes place at this stage and that notwithstanding the provisional assessment it is open to the Commissioner to make a final assessment beyond a period of three years of the date of the provisional assessment.

Whether such a procedure, convenient though no doubt it is, is strictly consistent with the terms of the present Ordinance, is not a matter on which their Lordships need express any opinion. For the question for determination is not whether the right procedure has been followed, but what the Testator meant in his will. For this purpose, their Lordships agree with the learned District Judge that the existence *de facto* of the procedure of provisional assessment, followed by final assessment is relevant, and that it is this which has to be related to the relevant testamentary clauses. Their Lordships will deal with these briefly since the applicable dispositions are fully considered in the judgment of the learned District Judge, with which their Lordships are here in full agreement.

The relevant clauses in the will are clauses 14, 15 and 16. The scheme of these clauses is that the distribution which is directed to be made under clause 15 cannot be carried out until the executors have considered whether some adjustment or charge of the assets to be distributed to

individual children requires to be made under clause 16 in view of steps taken by the executors to provide for estate duties. These adjustments or charges, however, cannot themselves be decided upon until the value of the relevant properties has been "*finally assessed for estate duty purposes*". These latter words are those contained in clause 16 and it must be clear in the context of the practice referred to that they contemplate a final assessment made by the authorities rather than any provisional assessment which may have been made on figures supplied by the executors. It follows that the necessity or otherwise for adjustments or charges cannot be decided upon until the final assessment has been made and therefore that the date for distribution must wait upon that final assessment. From what has been said as regards the assessment procedure the conclusion appears inescapable that the date for distribution cannot be prior to, but on the contrary must be deferred until after, the final assessment, which in this case was not made until June 1958. Their Lordships are content to accept that, as the assessment figures were in fact communicated to the executors in August 1957, the date on which distribution could have been made can properly be taken to be 31st December 1957.

Their Lordships do not think it necessary to expand upon this particular objection for the reasons that they are fully satisfied with the careful analysis of the will and of the estate duty legislation made by the learned District Judge and with his conclusion. This objection therefore also fails.

To summarise:

1. The appellant was entitled to an appropriate share of the 1,000 Ordinary Shares in Associated Newspapers of Ceylon Ltd. referred to in the Note to Schedule I of the voluntary final account dated 16th July 1958; as well as of any bonus shares issued in respect of the said 1,000 shares since the death of the deceased. Such appropriate share shall be taken to be one-fifth less any part of the said 1,000 shares (and bonus shares) which the appellant may have already received. The Accounts are to be adjusted accordingly.

2. The Order of the Supreme Court is to be varied by directing that if the executors cannot deliver the painting of the Assembly Hall to the appellant, the executors shall pay him the value of the picture to be assessed by the District Court, the amount of such value to be paid by the executors personally and not out of the estate of the Testator. The proceedings will be remitted to the District Court for the purposes of such assessment.

3. As regards the other objections to the said voluntary account, the appeal is dismissed and the Order of the District Court affirmed.

Their Lordships will humbly advise Her Majesty accordingly.

The respondent executors are to pay to the appellant out of the estate of the deceased one-half of his costs of this appeal. The costs of the respondents are to be paid out of the estate of the deceased.

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In the Privy Council

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DELIVERED BY
LORD WILBERFORCE

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