

~~Ch 102~~

27, 1952

Appeal No. 24 of 1951.

31414

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON
W.C.1.
21 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN
ARUMUGAM NAGALINGAM of Polikandy (Plaintiff)

AND

- 1. ARUMUGAM THANABALASINGHAM
- 2. KANDAVANAM VADIVELU
- 10 3. KANDAVANAM CHELLIAH
- 4. KANDAVANAM KANDASAMY, all of Polikandy
(Defendants) Respondents.

Case

FOR THE SECOND, THIRD AND FOURTH NAMED RESPONDENTS.

RECORD.

1. This is an appeal by special leave from a judgment of the Supreme Court of Ceylon dated the 13th October 1948 which (A) allowed with costs p. 96. the appeal of the second, third and fourth-named Respondents from a judgment and decree of the District Court of Jaffna, held at Point Pedro, dated the 7th March 1947, and (B) dismissed with costs the appeal of the p. 80. Appellant from such judgment and decree.

2. The question for determination in this appeal is the ownership of certain land at Polikandy called Mungodai and Mavattai, which the Appellant claimed to be the absolute property of himself and the first-named Respondent, his brother, in equal shares, and which these Respondents (claiming to be the children of a deceased brother of the Appellant named Kandavanam or Kanthavanam—which the Appellant disputes) claim to be the absolute property of them in equal shares. The said judgment of the District Court of Jaffna decided that the Appellant p. 80. and the first-named Respondent were each entitled to a four-ninth share of the said land and that these Respondents were entitled to the remaining one-ninth share. Such apportionment of the shares was not in accordance with the claims of the respective parties as aforesaid but the District Judge held that it was incumbent on the Court to examine the title of all p. 84, l. 6. parties and not merely to decide the contests as raised by them, which finding of law these Respondents do not challenge. The apportionment

p. 83, l. 39.
p. 84, l. 3.
p. 96.

of a one-ninth share to these Respondents by the District Judge was accounted for by his holding that they were the children of the said Kandavanam and as such entitled to the share as co-heirs with the Appellant and the first-named Respondent of one Poopalasingham, another deceased brother of the Appellant. The said judgment of the Supreme Court of Ceylon, given in cross-appeals from the said judgment of the District Court of Jaffna, decided that these Respondents were, as they claimed, entitled to the whole of the said land absolutely in equal shares.

p. 113.
p. 140.
p. 143.
p. 113.

3. The determination of the said question of ownership involved in particular consideration of the validity and effect of three deeds relating to the said land, namely Deed No. 5825 dated the 1st April 1896 (Document P4), Deed No. 799 dated the 6th July 1908 (Document P5) and Deed No. 800 also dated the 6th July 1908 (Document P6). The position as to these Deeds may be shortly stated as follows—by Deed No. 5825 (P4), the execution of which is not in dispute, the father and mother of Kandavanam (whom these Respondents claim to be their father) donated the said land and other land to him: the Appellant contends that such Deed was invalid because the donation was not validly accepted on behalf of Kandavanam, who was then a minor, and these Respondents contend that the Deed was valid and was validly accepted: by Deed No. 799 (P5), the execution of which is not in dispute, the said donors purported to revoke the donation but the said donee was not a party to the Deed: the Appellant contends that the revocation was valid and effective: and these Respondents deny that it was valid or effective: by Deed No. 800 (P6), the execution and genuineness of which is in dispute, the said donors purported to re-donate the land in question to the said donee but subject to certain conditions, whereby in the event of the death of the donee the property should devolve upon the donee's brothers, namely the Appellant, the first-named Respondent and Poopalasingham (since deceased): the Appellant relies upon Deed No. 800 (P6) as being valid and as giving him and the first-named Respondent title to the said land, whereas these Respondents deny the execution. validity and alleged effect of such Deed.

p. 140.
p. 143.

p. 13.

4. The Appellant made his claim by Plaint filed on the 23rd August 1944 in the District Court of Jaffna and sought thereby that the said land should be declared the absolute property of himself and the first-named Respondent, his brother, in equal shares and should be partitioned between them pursuant to Chapter 56 of the Ceylon Legislative Enactments. The first-named Respondent was the only person made a defendant to the said claim by the Appellant. The first-named Respondent filed no answer thereto and so far as he took part in the subsequent proceedings supported the case advanced by the Appellant.

p. 1, l. 34.
p. 16.

5. These Respondents were added as defendants to the Appellant's action on the 20th October 1944, on their own application, made as claimants to the said land, and they filed their Answer on the 10th November 1944.

p. 2, l. 23.

6. Four intervenients, who claimed part of the said land, were added as further defendants to the said action on the 8th June 1945, on their own

application, but the said judgment of the District Court of Jaffna rejected their claim and they did not appeal against such judgment, so that they thereupon disappeared from the suit. It is undisputed that title to the part of the said land claimed by them follows the decision as to the remainder of the land. p. 84, l. 9.

7. The said judgment of the District Court of Jaffna was given after a re-trial, the first trial having been discontinued with the consent of all parties on the 14th December 1946 by reason of the transfer of the then District Judge. When the first trial was discontinued the Appellant—
10 whose evidence is of particular importance—had concluded his evidence and in the re-trial he gave evidence *de novo*. p. 80.
p. 40.
pp. 25-40.
pp. 41-57.

8. The appeals to the Supreme Court of Ceylon were (i) by these Respondents, by Petition dated the 17th March 1947, against so much of the said judgment and decree of the District Court of Jaffna as awarded eight-ninths of the said land to the Appellant and the first-named Respondent and apportioned the costs accordingly and (ii) by the Appellant, by Petition dated the 19th March 1947, against so much of the said judgment and decree as awarded one-ninth of the said land to these Respondents and apportioned the costs accordingly. p. 91.
p. 86.

20 9. In respect of the judgment of the Supreme Court of Ceylon dated the 13th October 1948 the Appellant on the 11th November 1948 lodged with the Supreme Court a Petition for conditional leave to appeal to the Privy Council, which Petition was opposed by these Respondents and which by a judgment given on the 3rd February 1949 was dismissed with costs, on the grounds of irregularity of procedure. The Appellant thereupon lodged on the 13th April 1949 a Petition for special leave to appeal to the Privy Council against the judgment and consequential decrees of the Supreme Court of Ceylon dated the 13th October 1948, and by Order of His Majesty in Council dated the 31st May 1949 such special leave to
30 appeal was granted. p. 96.
p. 103.
p. 104.
p. 107.

10. The facts material to this appeal can be shortly stated. It was common ground between the parties to this appeal (i) that the Appellant, the first-named Respondent, one Poopalasingham and one Kandavanam were the sons of Kooliar Arumugam and Walliammai, his wife; (ii) that Poopalasingham died without issue; (iii) that Kandavanam died in 1931; (iv) that Kooliar Arumugam—whose first name is spelled in various different ways throughout the Record—owned the land in question immediately prior to the making of Deed No. 5825 dated the 1st April 1896 (P4); (v) that by Deed No. 5825 (P4) Kooliar Arumugam and
40 Walliammai, his wife, donated the land in question and other land to Kandavanam, their eldest son; (vi) that Kandavanam was then a minor and by the said Deed No. 5825 (P4) his maternal uncle one Kanthar Sinnathamby accepted—or as the Appellant contended purported to accept—the donation on his behalf; and (vii) that on the same date as Deed No. 5825 (P4) was executed, namely the 1st April 1896, Kooliar Arumugam and Walliammai his wife executed similar Deeds of donation concerning other land in favour of their sons the Appellant and p. 246.
p. 113.

Poopalasingham respectively, and that these sons also being minors such donations were accepted on their behalf by the same maternal uncle as in the case of Deed No. 5825 (P4) namely Kanthar Sinnathamby.

p. 113.

11. It was the Appellant's case *inter alia* that Deed No. 5825 (P4) was invalid for want of proper acceptance, and various authorities were cited on his behalf in support of the contention that acceptance of a gift by a maternal uncle on behalf of a minor is invalid as he is not the natural guardian of the minor. It was and is the contention of these Respondents that Deed No. 5825 (P4) was valid and was validly accepted by the donee's maternal uncle particularly in view of the fact that the donors were the two parents of the donee. It was further and alternatively contended by these Respondents that it was open to the donee himself subsequently to accept the donation and that on the facts he did so. The District Judge by his said judgment held in the Appellant's favour that Deed No. 5825 (P4) was invalid for want of a valid acceptance, and it is submitted by these Respondents that he was wrong in law and on the facts in so deciding and that the judgment of the Supreme Court of Ceylon which held that the Deed was valid and was validly accepted is right. 10

p. 83, l. 33.

p. 99, ll. 25-30.

p. 140.

p. 113.

p. 140, ll. 8-22.

12. It was further the Appellant's case that by Deed No. 799 dated the 6th July 1908 (P5) Kooliar Arumugam and Walliammai, his wife, validly revoked Deed No. 5825 (P4) for the reasons stated in the recitals to Deed No. 799 (P5), namely that Kandavanam had married without their consent an unsuitable wife not of their caste. The Appellant contended that Kandavanam was present when Deed No. 799 (P5) was executed and though not a party or witness to it approved it. These Respondents did not dispute that Deed No. 799 (P5) was executed but denied that it validly revoked Deed No. 5825 (P4) for the reasons that Kandavanam was not a party to it and did not consent to it and was not present when it was executed. These Respondents relied as strong evidence against any such consent upon the recitals, which they contended were entirely wrong in fact and would not have been accepted by Kandavanam. One of the witnesses to Deed No. 799 (P5), namely Sinnathamby Vallipuram, gave evidence on behalf of the Appellant to the effect that Kandavanam was present when that Deed was executed and approved its contents, but another of the witnesses to the Deed, namely Kanthar Saravanamuttu, gave evidence on behalf of these Respondents to the effect that Kandavanam was not present when the Deed was executed or at any material time. 20 30

p. 140, ll. 8-22.

pp. 57-61.

pp. 74-77.

p. 83, ll. 37-40.

13. The District Judge in his judgment made no express findings in respect of Deed No. 799 (P5) and stated that in view of his finding that Deed No. 5825 (P4) was invalid he need not consider that aspect of the case, and he proceeded to hold that the Appellant and the first named Respondent made out title to the land in question under a subsequent Deed No. 800 (P6) of the same date as Deed No. 799 (P5), namely the 6th July 1908. It would seem that by implication the District Judge accepted that Kandavanam was present on the occasion of the execution of Deed No. 799 (P5), but he expressly stated that it was not necessary for him to decide the question of whether Kandavanam consented to Deed No. 799 (P5). The Supreme Court of Ceylon found that Deed 40

p. 143.

p. 140.

No. 799 (P5) was invalid and in giving judgment, Mr. Justice Canekeratne said : “ It is clear that (P5) which is called a deed of revocation was the unilateral act of the donors, it was not executed by Kandavanam and it cannot affect the title that Kandavanam had acquired to the land years before. It is only in 1907 when Arumugam’s feelings against the family to which his daughter-in-law belonged before her marriage had become embittered that he thought of finding an excuse for ‘ revoking ’ the gift ; most of the reasons he gives seem obviously inconsistent with the facts.” It is submitted by these Respondents that such finding by the Supreme Court of Ceylon in regard to Deed No. 799 (P5) was right and that quite apart from their contentions as to Kandavanam not in fact having consented to it the undisputed fact that the Deed was executed only by the donors and not by him was sufficient to render it invalid as a revocation of Deed No. 5825 (P4).

p. 99, l. 30.

p. 140.

p. 113.

14. It was a further essential part of the Appellant’s case that immediately after the execution of Deed No. 799 (P5) on the 6th July 1908 another Deed of that Date No. 800 (P6) was executed whereby the said land was again donated to Kandavanam but this time subject to certain conditions, which on the Appellant’s contention entitled himself and the first-named Respondent to the said land by virtue of the rule of *jus accrescendi*. It was the Appellant’s case that Deed No. 800 (P6) was executed by Kooliar Arumugam and Walliammai, his wife, as donors and also by Kandavanam as donee subject to the said conditions. These Respondents disputed the genuineness of Deed No. 800 (P6) and in particular contended that Kandavanam did not sign the same. The original of Deed No. 800 (P6) was not forthcoming at the trial, the Appellant stating in evidence that it was lost when in his possession. The document P6 is a certified copy produced in evidence by the Appellant. A duplicate of the original in the same terms as P6 was produced in evidence by the Record-Keeper of the Land Registry, Jaffna, called as a witness on behalf of the Appellant and was marked Document P6A. It is not included in the Record because it is identical with Document P6, but request has been made on behalf of the Appellant that it be transmitted to the Privy Council.

p. 140.

p. 143.

p. 25, l. 33.

p. 42, l. 9.

p. 57.

15. The District Judge in his said Judgment found in favour of the Appellant that Deed No. 800 (P6) was genuine and valid and duly accepted by Kandavanam and that thereunder the Appellant and his brothers, the first-named Respondent and Poopalasingham, became entitled to the said land. The District Judge further held that Poopalasingham died leaving as heirs not only the Appellant and the first-named Respondent as alleged by the Appellant but also the children of Kandavanam, namely, these Respondents. It was for such reason that he awarded a one-ninth share of the said land to these Respondents, against which award the Appellant appealed to the Supreme Court of Ceylon. On that part of the case the District Judge said in his Judgment : “ It is probably with a view to exclude the contesting Defendants second to fourth altogether from this case that the Plaintiff persisted in denying that they were the children of Kanthavanam.”

p. 143.

p. 83, l. 43.

16. It is in the submission of these Respondents important to observe that on so controversial a matter as the genuineness and validity of Deed

p. 143.
p. 83, l. 4.

No. 800 (P6) the Appellant was a most important witness and that the burden of proof was upon him but that the District Judge in his Judgment said of the Appellant : " I do not for a moment concede that the Plaintiff's oral evidence is worthy of credit. I am certainly not prepared to accept his oral evidence unless it is supported by documentary or other evidence. The cross-examination of the Plaintiff shows that he is an experienced litigant and that his evidence is lacking in candour. But this case can be decided independently of the Plaintiff's oral testimony."

p. 143.
p. 57.

17. In support of his case as to the execution of Deed No. 800 (P6) the Appellant called as a witness Sinnathamby Vallipuram, who besides 10 giving evidence as aforesaid as to the execution of Deed No. 799 (P5) deposed to the execution on the same occasion of Deed No. 800 (P6) and to signing both Deeds as witness. He further deposed to Kandavanam being present during the execution of both Deeds and signing Deed No. 800 (P6) as a party thereto. These Respondents challenged the credit of Sinnathamby Vallipuram and it is in their submission important in judging his credibility to observe that Kanthar Saravanamuttu, who gave evidence on their behalf that only Deed No. 799 (P5) was executed on the 6th July 1908 and that Kandavanam was not present at all on that occasion (A) thereby materially contradicted the evidence of Sinnathamby Vallipuram 20 and (B) though himself undoubtedly a witness to Deed No. 799 (P5) was not a witness to the alleged Deed No. 800 (P6) of the same date and occasion.

p. 74.
p. 142.
p. 147.

p. 140.
p. 143.

18. The Appellant put in as evidence in support of his case as to the execution of Deed No. 800 (P6) various documents to show knowledge and approval on the part of Kandavanam as to Deed No. 799 (P5) and Deed No. 800 (P6). These Respondents put in evidence various documents to show the general unlikelihood and unreliability of the Appellant's version of events surrounding and connected with these Deeds.

p. 97, l. 33.
p. 143.
p. 113.
p. 140.

19. The Supreme Court of Ceylon found it unnecessary for the 30 purposes of the appeal to decide whether the Appellant had proved that Deed No. 800 (P6) was executed, and it is submitted by these Respondents that in view of the findings of the Supreme Court of Ceylon in their favour as to the validity of Deed No. 5825 (P4) and the invalidity of Deed No. 799 (P5) such conclusion was right, but it is further and in any event submitted by these Respondents that the Appellant had not in fact discharged the burden of proof upon him in respect of the alleged execution of Deed No. 800 (P6) and that the District Judge in holding that he had was wrong in law. In that regard these Respondents rely upon the views expressed by Mr. Justice Canekeratne in the Judgment of the Supreme Court of 40 Ceylon as to that part of the Judgment of the District Judge.

p. 143.
p. 99, l. 38.
p. 100.

20. Although the Supreme Court of Ceylon found it unnecessary to decide whether the Appellant had established that Deed No. 800 (P6) was executed the Judgment dealt in some detail with the contention of the Appellant that by virtue of the rule of *jus accrescendi* the effect of Deed No. 800 (P6) was that on the death of Poopalasingham he and the first-named Respondent became entitled to the entire property. Mr. Justice Canekeratne said that consideration of that question was not necessary

p. 99, ll. 41-43.

for the decision of the case but that it was desirable to say something about it. He went on to express views on the question to an effect contrary to the Appellant's contention, and if and in so far as it may be necessary to do so these Respondents rely upon the observations of Mr. Justice Canekeratne in that connection and submit that the Appellant's contention as to the effect of Deed No. 800 (P6)—assuming it to have been executed and to be valid—was wrong. p. 99, l. 38. p. 100.

21. The case for these Respondents may be summarised as follows :
 (A) that Deed No. 5825 dated the 1st April 1896 (P4) was valid and was
 10 validly accepted by their father's maternal uncle on his behalf and/or was
 validly accepted by their father himself ; (B) that the District Judge was
 wrong in holding Deed No. 5825 (P4) to be invalid for want of proper
 acceptance and that the decision of the Supreme Court upholding the
 validity of the Deed was right ; (C) that Deed No. 799 dated the 6th July
 1908 (P5) was invalid and of no effect and did not revoke Deed No. 5825 p. 113.
 (P4), if only because it was the unilateral act of the donors and the father p. 140.
 of these Respondents was not a party thereto, and also because he did p. 113.
 not approve or consent to the same ; (D) that in so far as the District p. 140.
 Judge accepted that Deed No. 799 (P5) was valid he was wrong, and that
 20 the decision of the Supreme Court of Ceylon holding it to be invalid and
 ineffective was right ; (E) that the findings of the Supreme Court of Ceylon
 as to the validity of Deed No. 5825 (P4) and the invalidity of Deed No. 799 p. 113.
 (P5) rendered it unnecessary to consider any question as to Deed No. 800 p. 140.
 (P6) and were conclusive of the whole case ; (F) that in any event the p. 143.
 Appellant did not discharge the burden of proof upon him as to the execution
 of Deed No. 800 (P6), and that the District Judge was wrong in holding
 that he had done so and paid no or no proper regard to the unsatisfactory
 nature of the evidence adduced on behalf of the Appellant on that matter
 or to the fact that these Respondents adduced a considerable amount of
 30 evidence to contrary effect ; (G) that if and in so far as it may be necessary
 to consider the effect of Deed No. 800 (P6) the Appellant's contention
 that he and the first-named Respondent were entitled to the whole of the
 said land thereunder was wrong.

22. These Respondents humbly submit that the Judgment of the Supreme Court of Ceylon is correct, that they are absolutely entitled to the whole of the said land in equal shares and that this appeal should be dismissed with costs for the following amongst other

REASONS.

- 40 (1) BECAUSE Deed No. 5825 (P4) was valid and was
 validly accepted by the maternal uncle of these
 Respondents' father and/or by these Respondents'
 father himself and/or was recognised, acted upon and
 accepted by the donors.
- (2) BECAUSE Deed No. 799 (P5) was invalid and ineffective
 and did not revoke Deed No. 5825 (P4), in that it was
 the unilateral act of the donors, and these Respondents'
 father the donee was not a party thereto and further
 did not approve or consent to the same.

- (3) BECAUSE if Deed No. 5825 (P4) was valid and Deed No. 799 (P5) invalid it is unnecessary to consider any question concerning the alleged Deed No. 800 (P6) upon which the Appellant relies.
- (4) BECAUSE Deed No. 800 (P6) was not proved by the Appellant.
- (5) BECAUSE even if proved Deed No. 800 (P6) did not entitle the Appellant and the first-named Respondent to the whole or any part of the land in question.
- (6) BECAUSE in relation to each of the Deeds in question 10 (P4, P5 and P6) the burden of proof as to his case thereon was upon the Appellant and in each instance he failed to discharge the burden.
- (7) BECAUSE the validity or invalidity of each of the Deeds in question (P4, P5 and P6) depends upon findings of fact, and all the material facts have been found in favour of these Respondents by the Supreme Court of Ceylon.
- (8) BECAUSE the Judgment of the District Judge was wrong in fact and law. 20
- (9) BECAUSE the Judgment of the Supreme Court of Ceylon was right in fact and law for the reasons therein contained.

JAMES COMYN.

Appeal No. 24 of 1951.

In the Privy Council.

ON APPEAL

from the Supreme Court of Ceylon.

BETWEEN

ARUMUGAM NAGALINGAM of
Polikandy (Plaintiff) . *Appellant*

AND

ARUMUGAM THANABALA-
SINGHAM, KANDAVANAM
VADIVELU, KANDAVANAM
CHELLIAH and KANDAVANAM
KANDASAMY, all of Polikandy
(Defendants) . . . *Respondents.*

Case

FOR THE SECOND, THIRD AND FOURTH
NAMED RESPONDENTS.

LEE AND PEMBERTONS,
46 Lincoln's Inn Fields,
London, W.C.2,
Solicitors for the Second, Third and
Fourth Named Respondents.