

42,1956

No. 24 of 1955.

# In the Privy Council.

## ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

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1. MOHAMEDALY ADAMJEE
  2. LUKMANJEE GULAMHUSSEIN
  3. TAIYABHAI GULMAHUSSEIN
  4. ABBASBHOY GULMAHUSSEIN all of Colombo  
(Plaintiffs) . . . . . *Appellants*

AND

1. HADAD SADEEN
2. ABDUL CADER SADEEN
3. HALWAN SADEEN
4. UMMUL KAIR SADEEN wife of M. S.  
Aboobucker
5. AYNUL MARLIYA SADEEN wife of M. A.  
Hamid
- 20 7. MOHIDEEN SADEEN all of Castle Street,  
Borrella, Colombo
8. MOHAMED HAMZA MAHROOF of 158 Layards  
Broadway, Colombo
9. MOHAMED MAROOF SITHY NASEEWA of  
168 New Moor Street, Colombo
10. MOHAMED MAHROOF MOHAMED KHALIF  
(9th and 10th by their G-A-L.) and
11. M. L. M. M. SHARIFF both of 164 New Moor  
Street, Colombo, and
- 30 12. NOORUL HIDAYA ABDEEN of Reid Avenue,  
Colombo
13. MUZAIRA AKBAR of Reid Avenue, Colombo
14. ABDUL MAWAHIB NAKEEM of Castle Street,  
Borella, Colombo
15. SITHY SAFIA NAKEEM
16. UMMU VOJEEDA NAKEEM
17. NASEEN JIFFRY NAKEEM
18. MOHAMED ISMAIL NAKEEM
19. MOHAMED SAMSUDEEN NAKEEM
- 40 20. MOHAMED MILHAR NAKEEM (14th to 20th  
by their G-A-L)

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21. M. Y. M. HAMZA
22. Mrs. NOOR HIMIYA MOHIDEEN, and
23. M. AWN MARIKAR all of Castle Street, Borella,  
Colombo
24. M. MOHAMED THAHIR of Messenger Street,  
Colombo
25. Mrs. UMMU HAZEEMA MOHIDEEN of Castle  
Street, Borella, Colombo
26. Mrs. SITHY ZAVAHIRA ZUBAIR of Kirrillapone
27. M. M. NUHMAN 10
28. M. H. SAKAF
29. M. Z. P. CASSIM
30. Mrs. UMMU ZULAIHA AMMEN
31. Miss. H. M. MOHIDEEN
32. MOHAMED SAMEER MOHAMED ALAVI all  
of Castle Street, Borella, Colombo
33. Miss S. Z. SAMEER (32nd and 33rd by their  
G-A-L)
34. M. I. M. SAMEER
35. M. S. FAROOK 20
36. Miss M. R. S. HANOON (35 and 36 by their  
G-A-L)
37. M. Z. F. CASSIM
38. HADIJA GHOUSE CASSIM
39. AYN SAFIA GHOUSE CASSIM
40. SHUHAIB GHOUSE CASSIM
41. AMEER EAIZER GHOUSE CASSIM
42. FALIH GHOUSE CASSIM (by their G-A-L)
43. M. GHOUSE CASSIM all of Castle Street,  
Borella, Colombo (Defendants) . . . Respondents 30

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## Case for the Appellants.

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RECORD.

p. 27, ll. 11-17.

pp. 259, 260.

pp. 82-99.

1. In the present action the Plaintiffs-Appellants seek an Order against the Defendants-Respondents setting aside or vacating a decree entered in partition proceedings No. 5706/P in the District Court of Colombo (to which all the Defendants but none of the Appellants were parties) on the 30th day of March 1950 or in the alternative for damages against the Defendants jointly and severally in the sum of Rs. 100,000. The District Court of Colombo by its Judgment, and the Decree entered in pursuance thereof in this action on the 4th day of March 1952, refused to set aside or vacate the said decree, but ordered the Respondents to pay to the Appellants the sum of Rs.29,687/50 by way of damages under 40

the proviso to Section 9 of the Partition Ordinance No. 10 of 1863. This Judgment and Decree were affirmed by a Judgment and Decree of the Supreme Court of the Island of Ceylon of the 12th day of February 1954 from which Judgment and Decree this appeal is, by leave of that Court, preferred.

pp. 110-117.

pp. 124-125.

2. One Idroos Lebbe Marikkar was the owner of, and was at the date of his death on or about the 8th day of May 1876 lawfully entitled to, an allotment of land with the buildings and plantations standing thereon situated at Kollupitiya within the Municipality and District of Colombo Western Province and then bearing the Assessment No. 19 and 19A, described in the Plaint in this action as bearing Assessment No. 26, situated at Kollupitiya and presently bearing Assessment Nos. G7 (1-5) to 37, Muhandiram's Road and 153, 155 and 157 Galle Road, Kollupitiya. This allotment, which forms the subject matter of this action, is hereinafter called "the said land and premises."

p. 24, ll. 11-13.

p. 27, l. 31-p. 28, l. 5.

3. The said Marikkar left a Last Will (No. 7130) made the 12th day of December 1872, and admitted to probate on the 29th day of May 1876. Such Will *inter alia* provided as follows :—

pp. 126-127.

p. 128.

20 " I do hereby will and desire my wife Assene Natchia, daughter of Seka Marikar, and my children Mohamado Noordeen Mohammada Mohideen, Slema Lebbe, Abdul Ryhiman, Mohanado Usboe, Amsa Natcha and Savia Umma and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate, shall be entitled to and take their respective shares according to my religion and Shaffe sect to which I belong, but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or liabilities, and out of such income produce and rents after defraying expenses for their subsistence and maintenance of their families, the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors herein named or any court of justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

p. 126, l. 24-p. 127, l. 10

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I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

4. The said Will has been the subject of previous litigation. In the case of *Abdul Hameed Sitti Kadija v. De Saram* [1946] A.C. 208 the parties thereto agreed that the case should proceed on the footing that the said Will applied to the said Abdul Hameed who was a son of the said Marikkar born after the date of the said Will as if he had been named by the said Marikkar with his other children named therein. In that case the Honourable Board held that these clauses of this Will created a *fidei commissum* and that accordingly the said Abdul Hameed could not mortgage any interest so as to operate after his death in property conveyed to him subject to the trusts and conditions of the Will as his share of the 10 immovable properties of the said Marikkar. No question of registration, prescription, or partition such as is hereinafter mentioned arose in that case.

5. Pursuant to the terms of his said Will the Executor of the said Marikkar conveyed the said land and premises to one of his daughters named Savia Umma by Deed (No. 2575) dated the 14th day of September 1888. Neither the said Will nor the Probate thereof nor the said Conveyance of the 14th day of September 1888 was ever registered in accordance with the provisions of the Land Registration Ordinance No. 8 of 1863 (later repealed and re-enacted in the Land Registration Ordinance of 1891) which provided *inter alia* as follows :— 20

“ 38. From and after the time when this Ordinance shall come into operation, every Deed or other instrument of Sale, Purchase, Transfer, Assignment or Mortgage, of any land or other immovable property, or of Promise, Bargain, Contract or Agreement, for effecting any such object, or for establishing or transferring any security, interest or encumbrance affecting such land or property (other than a Lease at will or for any period not exceeding one month) ; or of Contract or Agreement for the future sale or purchase or transfer of any such land or property ; and every Deed or Act of Release, Surrender or Annulment, of or 30 affecting any such Deed or other instrument, and the Probate of any Will and every grant of Administration affecting any such land or property ; and every Judgment or Order of Court affecting any such land or other property shall, if executed made granted or pronounced after the time when this Ordinance shall have come into operation, be registered in the Branch Office of the District or Province in which such land or property is situate . . .”

“ 39. Every Deed, Judgment, Order or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable considera- 40 tion, by virtue of any subsequent deed, judgment, order or other instrument, which shall have been duly registered as aforesaid. Provided however that fraud or collusion in obtaining such last mentioned deed, judgment, order or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder, and that nothing herein contained shall be deemed to give any greater effect or different construction to any deed, judgment, order or other instrument registered in pursuance hereof, save the priority hereby conferred on it.”

The said Ordinance was repealed and replaced by The Land Registration Ordinance No. 14 of 1891, which re-enacted the afore-recited provisions *verbatim* as Sections 16 and 17.

This new Ordinance has since 1st January 1928 been repealed and replaced by The Registration of Documents Ordinance No. 23 of 1927 (Chapter 101—Legislative Enactments of Ceylon Revised Edition 1938) which provides *inter alia* as follows :—

10 “ 7.—(1) An instrument executed or made on or after the first day of January, eighteen hundred and sixty-four, whether before or after the commencement of this Ordinance shall unless it is duly registered under this Chapter . . . be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this Chapter . . .

(2) But fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.

20 (3) An instrument duly registered before the commencement of this Ordinance, under the Land Registration Ordinance 1891 or any Ordinance repealed by that Ordinance, shall be deemed to have been duly registered under this Chapter.

(4) Registration of an instrument under this Chapter shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have except the priority conferred on it by this section.”

The said Ordinance No. 23 of 1927 further provides by the third proviso to Section 8 (b) thereof that the registration of any letters of administration granted after the commencement thereof shall no longer be necessary. By section 10 thereof :—

30 “ (1) A Will shall not, as against a disposition by any heir of the testator of land affected by the Will be deemed to be void or lose any priority or effect by reason only that at the date of the disposition by the heir the Will was not registered under this Chapter.

(2) This section applies whether the Testator died before or after the commencement of this Ordinance, but does not apply—

(a) where the disposition by the heir was executed before the commencement of this Ordinance.”

40 6. The Appellants deduce their title to the said land and premises from the said Savia Umma through a series of events and documents as follows :—

(i) By a Fiscal's Conveyance (No. 11174) dated the 29th day of March 1916 executed as the result of mortgage proceedings No. 40152 in the District Court of Colombo against Savia Umma and her husband the said land and premises were conveyed to one Leonora Fonseka for valuable consideration. pp. 136-137

pp. 147-149.

(ii) By a Deed (No. 6186) dated the 16th day of August 1919 the said land and premises were conveyed by the said Leonora Fonseka to one Adamjee Luckmanjee for valuable consideration.

pp. 149-150.

p. 149.

(iii) The said Adamjee Luckmanjee died on the 20th day of February 1927 and Letters of Administration to his estate in the District Court of Colombo (No. 3486/T) dated the 28th day of February 1929 were granted to one Gulamhussein Adamjee.

pp. 153-173.

(iv) By Deed (No. 452/437) dated the 21st day of September 1931 and the 15th day of January 1932 the said Gulamhussein Adamjee the Administrator of the estate of the said Adamjee Luckmanjee and his widow Havabai Valijee conveyed the entirety of the said land and premises to the deceased's two sons, the said Gulamhussein Adamjee and the first Appellant, in equal shares. 10

pp. 173-175.

pp. 175-176.

(v) The said Gulamhussein Adamjee died on the 15th day of July 1937 having by his Will dated the 16th day of June 1937 which was admitted to Probate in the District Court of Colombo (No. 8526/T) on the 26th day of October 1938 devised his undivided half share in the said land and premises to his four sons, the second third and fourth Appellants and one Taherbhai Gulamhussein.

p. 33, ll. 31-2.

p. 55, ll. 31-4.

(vi) The said Taherbhai Gulamhussein died intestate and unmarried on the 10th day of August 1941 and his heirs were his full brother the fourth Appellant and his grandmother the said Havabai Valijee. 20

pp. 183-226.

(vii) By Deed (No. 419) dated the 12th day of September 1944 the said Havabai Valijee conveyed all her interest in the said land and premises to the fourth Appellant.

pp. 226-227.

pp. 144-145.

(viii) Letters of Administration to the estate of the said Taherbhai Gulamhussein in the District Court of Colombo (No. 1087/T) dated the 1st day of December 1944 were granted to the second Appellant. 30

All the above deeds were duly registered under the said Ordinance.

The Appellants are accordingly together entitled to the entirety of the said land and premises and they claim title thereto through a series of Deeds which or some of which were made for valuable consideration.

p. 86, ll. 34-8.

7. The Appellants and their predecessors in title have been in receipt of the rents and profits of the said land and premises and in sole uninterrupted and undisturbed possession thereof for upwards of 34 years by a title adverse to and independent of that of the Respondents.

p. 60, ll. 35-8.

8. A small portion of the said land and premises was acquired in 1920 from the then owners by the Municipality of Colombo for the sum of Rs.18,000. 40

pp. 247-252.

9. On the 15th day of July 1949, the first to seventh (inclusive) Respondents instituted proceedings for partition of the said land and premises against the remaining Respondents as Defendants in the District Court of Colombo the reference number of the Plaint being No. 5706/P.

These proceedings are hereinafter called "the Partition Action." None of the Appellants was made a party to the Partition Action, nor was any notice whatsoever of the existence of the Partition Action ever given to the Appellants or to any of them, in spite of the fact that not only were the Respondents well aware that the Appellants were in possession of the said land and premises but that the Partition Action was registered as a *Lis Pendens* in the same Folio of Encumbrances as the Deeds through which the Appellants derive their title to the said land and premises.

p. 94, ll. 17-20.

p. 146.

10 10. The Plaintiff in the Partition Action alleged that the said land and premises were upon the death of the said Marikkar allotted to the said Savia Umma by a Deed (No. 246) dated the 19th day of February 1878 (this was an admitted error for the Deed of the 14th day of September 1888 to which reference is made in paragraph 5 hereof); that on her death the said land and premises devolved upon her nine surviving children; and that the Plaintiffs therein were the seven children of one such child of Savia Umma and that the Defendants thereto were children or grandchildren of the other eight children of Savia Umma; that the Will of the said Marikkar created a valid *fidei commissum* in favour of the grandchildren of the said Savia Umma; and that the parties thereto and their  
20 predecessors in title had been in undisturbed and uninterrupted possession of the said land and premises.

p. 249, ll. 17-22.

p. 60, ll. 20-21.

p. 84, ll. 14-16.

p. 255, ll. 18-22.

11. On the 30th day of April 1950 the District Court of Colombo (M. C. Sansoni, A.D.J.) entered its Decree in the Partition Action whereby it declared the Respondents to be entitled to various undivided shares (together making up the totality) of the said land and premises, and ordered and declared that the said land should be sold and the proceeds brought into Court.

pp. 259-260.

12. From this said Decree certain of the Respondents appealed to the Supreme Court of the Island of Ceylon, contending for a different distribution of the proceeds of sale of the said land and premises between the Respondents but such appeal was dismissed with costs on the 6th day of September 1951.

pp. 275-281.

13. It is submitted that no proper investigation was ever made by the Court into the title of the parties to the Partition Action. Neither the date of the death of Savia Umma nor of any of her children was even stated, nor was it indeed strictly proved that any of them was dead. Nor did any of the Respondents therein strictly prove his or her descent from Savia Umma. The only evidence of pedigree was the verbal evidence of one witness. There was no evidence that any of the parties to the action  
40 was in possession of the said land or premises or any part thereof.

pp. 255-256.

14. The Partition Ordinance, No. 10 of 1863, provides *inter alia* as follows :—

" 4. If the defendant served as aforesaid shall make default in appearance as directed by the summons, the Court shall fix a day to hear evidence in support of the application of the plaintiffs and on that day or any other day to which the Court may adjourn the

hearing shall hear evidence in support of the title of the plaintiffs and the extent of their shares or interests, as also the title of the defendants and the extent of their respective shares or interests in so far as may be practicable by any *ex parte* proceeding, and shall, if the plaintiffs' title be proved, give judgment by default, decreeing partition or sale as to the Court shall seem fit. If the defendants shall appear and dispute the title of the plaintiffs, or shall claim larger shares or interests than the plaintiffs have stated to belong to them or shall dispute any other material allegation in the libel, the Court shall in the same cause proceed to examine the titles of all the parties interested therein and the extent of their several shares or interests and to try and determine any other material question in dispute between the parties and to decree a partition or sale according to the application of the parties or as to the Court shall seem fit : Provided however that it shall be competent to the Court to decree the sale of the common property though such sale be not prayed for by the parties in the original libel, if in any suit for a partition it shall appear to such Court that on account of the number or poverty of the owners, the nature, extent, or value of the land or other causes a partition would be impossible or inexpedient. 10

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“ 9. The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty ; Provided that nothing herein contained shall affect the right of any party prejudiced by such partition or sale to recover damages from the parties by whose act, whether of commission or omission, such damages had accrued.” 30

p. 34, ll. 12-21.

15. The Appellants became aware of the existence of the Partition Action for the first time in April 1950, and shortly thereafter on the 20th day of May 1950 they commenced the present action in the District Court of Colombo claiming the following relief :—

pp. 18-23.

(A) That the Court should set aside or vacate the said Decree entered in the Partition Action and should declare the same to be null and void and of no effect in law ;

p. 91, ll. 25-36.

(B) Alternatively Rs.100,000 damages (representing the full value of the said land and premises) against the Respondents jointly and severally ; 40

(C) An injunction against the Respondents restraining them from selling the said land and premises or alternatively from making any application for the withdrawal of or drawing or receiving payment of the proceeds of any sale thereof which might be deposited in Court or any share or part thereof ;



(D) An order on the Commissioner appointed by the Court for the sale of the said land and premises to stay the sale of the same ;

(E) Costs and further and other relief.

16. At the same time the Appellants applied in the Partition Action for *inter alia* an injunction restraining the sale of the said land and premises. No Order was made upon such application, but upon an application being made in this action it was ordered that the said sale, which had been fixed for the 20th day of November 1950 should not take place until after judgment in this action.

pp. 260-263.

p. 50, ll. 17-18.

10 17. The Appellants claimed and claim to be entitled to such relief for the following reasons :—

(A) That first under and by virtue of the said documents and secondly by prescription they had become entitled to the entirety of the said land and premises ;

p. 25, ll. 24-31.  
p. 79, ll. 33-40.  
p. 80, ll. 6-22.

20 (B) That by virtue of the registration of the Deeds upon which their title rested and the non-registration of any document under which the Respondents' claim to the said lands and premises rested, the Appellants were entitled not only to that share in the said land and premises to which Savia Umma would have succeeded upon the intestacy of her father, but also to the entirety of the said land and premises allotted to Savia Umma upon the division of the said Marikkar's estate ;

p. 89, ll. 39-42.

30 (C) That as by themselves or their predecessors in title they had been in sole undisturbed and uninterrupted possession of the said land and premises from at least the 29th day of March 1916 by a title adverse to and independent of that of the Respondents, they had therefore prescribed thereto, in accordance with Section 3 of the Prescription Ordinance No. 22 of 1871 (Chapter 55 Ceylon Legislative Enactments—Revised Edition 1938) which provides as follows :—

p. 25, ll. 32-36.  
p. 80, ll. 30-31.

40 “ Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or Plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the Defendant to a decree in his favour with costs. And in like manner, when any Plaintiff shall bring his action . . . proof of such undisturbed and uninterrupted possession as hereinbefore explained by such Plaintiff . . . or by those under whom he claims, shall entitle such Plaintiff . . . to a decree in his favour with costs.

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.”

p. 26, ll. 1-3.  
p. 80, ll. 42-43.  
p. 81, ll. 8-12.

(D) That the Respondents having at all material times notice of the Appellants' ownership and possession obtained the decree in the said Partition Action without notice to the Appellants by fraud and collusion with each other without disclosing the Appellants' title and without disclosing the fact that the Appellants were in possession and falsely stated that they had been in undisturbed and uninterrupted possession thereof by themselves and by their predecessors ; 10

p. 26, ll. 4-19.  
p. 81, ll. 8-12.

(E) That the omission of the Respondents either to give the Appellants notice of the Partition Action or to make them parties thereto was wrongful, unlawful, negligent, or fraudulent, and was for the purpose of obtaining a decree from the Court without the Appellants having knowledge thereof ;

p. 6, ll. 20-25.  
p. 81, ll. 16-24.

(F) That there had been no proper investigation into title by the Court in the Partition Action in accordance with the terms of Section 4 of the Partition Ordinance ; 20

p. 26, ll. 25-27, 31, 32.

(G) That the Appellants had effected improvements on the said land and premises worth at least Rs.30,000 while the land and premises were worth at least Rs.100,000. By the date of the hearing their value had risen to Rs.150,000.

p. 91, ll. 34-36.

p. 27, ll. 1-9.  
p. 82, ll. 1, 2.

(H) That the Appellants would suffer grave and irreparable injury loss and damage if the said land and premises were to be sold, and that for this reason they were entitled to an injunction as aforesaid.

18. The Respondents relied on the following contentions :—

p. 44, l. 6.

(A) That they were unaware that the Appellants had any rights or interest in the said land and premises ; 30

p. 77, ll. 43-45.

(B) That they were now the owners thereof being the *fidei commissarii* of the last Will of the said Marikkar and that any interest of the Appellants in the said land and premises came to an end with the death of the said Savia Umma ;

p. 76, ll. 7-24.

(C) That the Partition Decree was a decree *in rem* binding persons other than parties to the Partition Action ; that it was not open to a person not a party to the Partition Action to get the said Decree set aside ; that it could not be declared null and void for an insufficient investigation as to title or any other reason though the omission to make a proper investigation of title would deprive it of its conclusive character whilst continuing to be binding on the parties to the Partition Action ; 40

p. 76, l. 34-p. 77, l. 7.

(D) That there was no evidence that the same had been obtained by fraud or collusion and that even if it had been so obtained the only remedy would be damages ;

(E) That any title which the Plaintiffs had, had been wiped off by the Partition Decree ; p. 78, ll. 22-23.

(F) That the Appellants could not set up a superior title to that of the Respondents by virtue of registration, because both derived their title from the same source, i.e., the said Will of the said Marikkar ; p. 78, ll. 18-20.

10 (G) That there was no evidence that the provisions of the Partition Ordinance had not been complied with in the Partition Action, and that even if they had not been the Appellants' only remedy lay in damages ; p. 77, ll. 8-27.

(H) That the Appellants could not set up a superior title by prescription because time did not commence to run against the *fidei commissarii* until they acquired a right of possession and the onus of proving the commencement of the period of acquisition was on the Appellants and this they had not discharged ; p. 78, ll. 28-40.

(I) That the Appellants were not entitled to damages because they had no title ; p. 78, ll. 42-44.

(J) That the Appellants were not entitled to compensation for improvements because they were *mala fide* possessors ; p. 79, ll. 1-4.

20 (K) That even if the Appellants were *bona fide* possessors the rents and profits of the said land and premises, together with the sum of Rs.18,000 paid in 1920 for the acquisition of part thereof, ought to be set off against such damage ; p. 79, ll. 4-14.

(L) That the Court had no jurisdiction to stay by injunction the decree in another case except in the case of a superior Court. p. 79, ll. 15-18.

19. The District Court of Colombo (L. B. de Silva, A.D.J.) by its judgment of the 4th day of March 1952, found as follows :—

30 (A) That the Appellants and their predecessors in title had been in exclusive and uninterrupted possession of the said land and premises since 1919 ; p. 85, ll. 16-22.  
p. 86, ll. 34-38.

(B) That Savia Umma and her children were dead but that the dates of their respective deaths had not been established ; p. 86, ll. 21-23.

(C) That the deeds in the Appellants' favour had been duly registered ; p. 89, ll. 15-19.

(D) That neither the Probate of the Will of the said Marikkar nor the said Conveyance to the said Savia Umma had been duly registered ; p. 89, ll. 20-21.

40 (E) That the value of the said land and premises in May 1950 was Rs.100,000/- and that the value thereof at the date of the said judgment was Rs.150,000/-; p. 91, ll. 34-36.

(F) That the Appellants were *bona fide* possessors, and had effected improvements to the value of Rs.25,000/- whilst the Respondents had stood by and made no protest ; p. 91, ll. 23-24.  
p. 92, ll. 8-9.  
p. 92, ll. 20-24.

p. 93, ll. 1-3.

(G) That the income from the said land and premises was attributable solely to the said improvements ;

p. 94, ll. 17-25.

(H) That the Respondents had deliberately suppressed from the Court in the Partition Action the claims of the Appellants, with a view to obtaining a conclusive decree under the Partition Ordinance behind the backs of the Appellants ; that they had acted fraudulently and collusively in the Partition Action to deprive the Appellants of their rights to the said land and premises by obtaining a decree from the Court without their knowledge.

20. On the basis of these findings of fact, the Court held :—

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p. 94, ll. 6-14.

(A) That there had been a breach of duty on the part of the Respondents in not having made the Appellants parties to the Partition Action and in not having disclosed to the Court that the Appellants were and had for some considerable time been in possession of the said land and premises and claiming to be the owners thereof ;

p. 82, ll. 28-39.

(B) That notwithstanding the breach of duty and fraud of the Respondents it was bound by authority (of which *Jayawardene v. Weerasekera* (1917) 20 N.L.R. 97 is the leading exposition) to hold that a Partition Decree was conclusive against all persons whatsoever, even where obtained by fraud ;

p. 84, ll. 17-21.

(C) That the decree had not been made without a proper investigation of title ;

p. 84, ll. 17-21.

(D) That in so far as the Appellants claimed under a prescriptive title, the burden of proving the date upon which the rights or the Respondents as *fidei commissarii* accrued was upon the Appellants, and that they had not discharged such burden ;

p. 88, l. 40-p. 89, l. 6.

(E) That, if the burden was on the Respondents to prove when their rights as *fidei commissarii* accrued, he would hold on the evidence led in this case that they had failed to discharge that burden ;

p. 89, ll. 35-38.

(F) That in so far as the Appellants relied upon registration of the documents under which they claimed as against the unregistered Probate of the said Will of the said Marikkar, the Appellants were only entitled to claim to have succeeded to the rights to which the said Savia Umma would have been entitled upon the intestacy of her father, namely a 1/16th share of the said land and premises and not to the entirety thereof ;

p. 93, ll. 1-4.

p. 92, ll. 25-31.

(G) That the Respondents were not entitled to any of the rents and profits received by the Appellants because there would have been no income without the improvements and because they had not established when their rights as *fidei commissarii* had accrued ;

p. 92, ll. 5-22.

(H) That as the Appellants were *bona fide* possessors and as the Respondents stood by and made no protest the Appellants were entitled to compensation in respect of all improvements effected by them ;

(I) That as no one other than the Appellants' predecessors in title who received it made any claim to the Rs.18,000/- paid by the Municipality in respect of the compensation for the acquisition of a portion of the said land and premises, the Respondents could only now claim the same as a separate and specific claim which had not been made ;

p. 93, ll. 5-13.

(J) That on the basis indicated in (F) and (H) above the Appellants were entitled to Rs.29,687/50 by way of damages against the Respondents under the proviso to Section 9 of the Partition Ordinance ;

p. 95, ll. 1-2.

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(K) That no injunction to restrain the sale in the Partition Action could be granted.

p. 95, ll. 3-10.

21. On the 5th day of May 1952 the Appellants again applied to the District Court for an injunction to restrain the sale in the Partition Action. Such application was refused.

pp. 107-110.

22. From the said Judgment, the Decree entered in pursuance thereof on the 4th day of March 1952, and the refusal of the said application for an injunction, the Appellants appealed to the Supreme Court of the Island of Ceylon. The Appellants and the Respondents repeated their respective contentions before the Supreme Court (Gunasekera and K. D. de Silva J.J.) which by its Judgment and the Decree entered in pursuance thereof on the 10th day of February 1954 affirmed the conclusions of the District Court stated in paragraph 20 (B) (C) (D) and (F) and accordingly dismissed the said Appeal, and the said application for an injunction.

pp. 97-99.

pp. 110-117.

23. Against the said Judgment and Decree of the Supreme Court this appeal is now preferred, final leave to appeal having been obtained on the 9th day of April 1954. The Appellants humbly submit that the decision of the Supreme Court is wrong and that this appeal should be allowed for the following among other

p. 124.

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## REASONS

(1) BECAUSE as the Decree in the Partition Action was obtained by fraud it cannot be allowed to stand and any authority to the contrary is wrong and ought not to be followed.

(2) BECAUSE a Decree obtained by fraud or in breach of duty to the Court is not a decree which is conclusive against all persons whomsoever within the meaning of Section 9 of the Partition Ordinance.

(3) BECAUSE the Decree in the Partition Action was made without a proper investigation of the title of the Respondents to the said land and premises and a Decree so obtained is not conclusive against all persons whomsoever within the meaning of the said Section.

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- (4) BECAUSE by reason of the registration in accordance with the provisions of the Land Registration Ordinance 1891 and the Registration of Documents Ordinance 1927 of the Deeds made for valuable consideration through which the Appellants claim title to the said land and premises and the lack of registration of any document through which the Respondents claim title thereto the title of the Appellants to the said land and premises prevails over the title of the Respondents thereto.
- (5) BECAUSE in the circumstances the onus lies upon the Respondents to show that the prescription period has not run against them and that the Appellants have not acquired a title to the said land and premises by prescription and they have not discharged such onus.

LYNN UNGOED-THOMAS.

RAYMOND WALTON.

**In the Privy Council.**

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**ON APPEAL**

*from the Supreme Court of the Island of  
Ceylon.*

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BETWEEN

**MOHAMEDALY ADAMJEE**

**AND OTHERS . . . Appellants**

AND

**HADAD SADEEN AND**

**OTHERS . . . Respondents.**

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**Case for the Appellants.**

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**FARRER & CO.,**

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*Solicitors for the Appellants.*