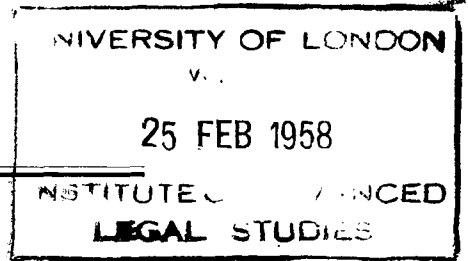


12, 1957

No. 10 of 1956.

# In the Privy Council.

## ON APPEAL FROM THE SUPREME COURT OF CEYLON



BETWEEN

K. M. PERERA (Defendant) . . . . . *Appellant*

AND

H. G. MARTIN-DIAS (Plaintiff) . . . . . *Respondent.*

### Case for the Appellant.

RECORD.

10 1. This is an appeal from a judgment and decree of the Supreme Court of Ceylon, dated the 4th August, 1954, allowing an appeal from the District Court of Kurunegala, dated the 13th March, 1950. The District Court had dismissed the Respondent's suit with costs. In allowing the appeal, the Supreme Court granted the reliefs asked for in the plaint and directed that the matter be remitted to the District Court for an accounting.

20 2. The appeal deals mainly with questions of fact. The Court of first instance, namely, the District Court of Kurunegala, after scrutiny of the documentary evidence and a careful evaluation of the oral evidence, entered relevant findings on all questions of fact, in favour of the Appellant. Such findings are set out in paragraph 10 of this Case. It is submitted that the Supreme Court was not justified in reversing these findings of fact.

30 3. (A) Prior to 1942 "passenger transport" in operation in Ceylon was unsatisfactory in many ways. Early in 1942 what was known as the Nelson Scheme had been mooted and resulted in Ordinance No. 47 of 1942 entitled "An Ordinance to provide for the introduction of a system of exclusive road service licences for omnibuses and for the regulation and control of the use of omnibuses on highways and to effect consequential amendments in the Motor Car Ordinance No. 45 of 1938." Under the said Ordinance No. 47 of 1942, which came into operation on the 1st January, 1943, passenger transport on a defined route was to be given exclusively to one "person" whether a limited liability company or an individual. The operators on existing routes had been called upon to form themselves into companies and to apply for exclusive rights in respect of routes they were interested in.

(B) In 1942 and sometime earlier the Plaintiff, Defendant and seven others were providing transport services on what was known as the Kurunegala-Alawwa route. There were also other operators on this route. The Appellant, the Respondent and the seven others referred to earlier registered themselves on 20th July, 1942, as partners under the name of K.A.B. Bus Co. with intent to apply for the exclusive road service licence on the Kurunegala-Alawwa route. Though called a partnership the arrangement between the Appellant, the Respondent and the seven others was not in fact a "partnership," as known in law.

p. 204.  
Ex. P.1.

pp. 210-225.  
Exs. P.13-19.

4. The group of people consisting of the Appellant, the Respondent and the seven others applied amongst others, including a company called Sri Lanka Omnibus Company Limited, to the proper authority for the grant of exclusive route rights on the Kurunegala-Alawwa route. The route rights were granted to the said Sri Lanka Bus Company Limited (hereinafter usually called "the Sri Lanka Bus Co."). It was then open to the members of the K.A.B. Bus Co. to either surrender their vehicles to the Sri Lanka Bus Co. and obtain shares to the value of such vehicles and loss of route rights, or, to claim compensation from the Sri Lanka Bus Co. in terms of Ordinance No. 47 of 1942. 10

5. The members of the K.A.B. Bus Co. elected to become shareholders in the Sri Lanka Bus Co. and in fact became shareholders of the Company. The members of the K.A.B. Bus Co. individually surrendered their buses to the Sri Lanka Bus Co. The K.A.B. Bus Co. ceased to carry on business in January, 1943, and Notice of Cessation of Business was given to the proper authority on the 6th February, 1943. 20

p. 233.  
Ex. P.4.

p. 235.  
Ex. P.11.

p. 232.  
Ex. D. 17.

6. Sri Lanka Bus Co. had been given exclusive rights over various routes in addition to the Kurunegala-Alawwa route. The Directors of the Sri Lanka Bus Co. decided to operate the various routes by dividing them up into different branches to wit, Branches A, B, C, D, E, F. G. Branch G was to operate the Kurunegala-Alawwa Route. 30

p. 227.  
Ex. D.25.  
p. 230.  
Exs. D.1 & D. 26.

p. 234.  
Ex. D. 21.

p. 242.  
Ex. D. 23.  
p. 250, l. 7.  
p. 293, l. 7.

7. On the 16th March, 1943, the Appellant was appointed Manager of Branch G by the Sri Lanka Bus Co. on certain terms and conditions. Such appointment was renewed yearly by the Sri Lanka Bus Co. in general meeting assembled, on some occasions in spite of the opposition of the Respondent among others.

p. 13.

8. By his Complaint, dated the 30th August, 1946, the Respondent set out his cause of action against the Appellant as follows:—

"2. The plaintiff and the defendant are registered shareholders of the Sri Lanka Omnibus Company, Limited.

3. The plaintiff was, prior to the 16th day of January, 1943, the owner of the motor omnibus No. X 4361 and a partner of the K.A. Bus Company which was a registered partnership consisting of nine omnibus owners carrying on business of running omnibuses for carrying passengers between Kurunegala and Alawwa. The defendant was a partner and the manager of the said partnership business. 40

4. In accordance with a decision of the said partnership taken in December, 1942, the omnibuses belonging to the partners were transferred to the Sri Lanka Omnibus Company, Limited, the plaintiff receiving 25 ordinary shares in the Sri Lanka Omnibus Company, Limited, in exchange for his omnibus No. X 4361 which was valued by the Sri Lanka Omnibus Company, Limited, at Rs. 2,250.

10 5. The Sri Lanka Omnibus Company, Limited, started a separate organisation called the 'G' branch to run the omnibuses taken over from the K.A. Bus Company on the Kurunegala-Alawwa routes.

6. The plaintiff and the other persons who were partners of the said K.A. Bus Company were invited to meet the Directors of the Sri Lanka Omnibus Company, Limited, on 12th March, 1943.

7. At the said meeting the Chairman of the Board of Directors of the Sri Lanka Omnibus Company, Limited, speaking on behalf of the said Board, informed the plaintiff and the said other persons that :—

20 (A) the Board of Directors had decided to offer to contract with the said persons, from whom the buses in the 'G' branch had been taken over viz., the former partners of the K.A. Bus Company, for the running of the said omnibuses by them for the Sri Lanka Omnibus Company, Limited, on a payment to the said persons of 90 per cent. of the gross takings of the said omnibuses less the sum of Re. 1 per omnibus per diem.

30 (B) that, as it was not possible for the Sri Lanka Omnibus Company, Limited, to enter into separate contracts for the said purpose with each of the said persons the said persons should nominate one from among them to represent them and to act for them in the matter of the said contract and its execution.

8. The plaintiff and the said other persons accepted the said offer of the Board of Directors and nominated the defendant, who undertook to represent them and act on their behalf, to contract with Sri Lanka Omnibus Company, Limited, for the said purpose.

40 9. Thereupon the said Sri Lanka Omnibus Company, Limited, appointed the defendant who was the agent and representative of the plaintiff and the other said persons, to be the manager of the said 'G' branch of the Sri Lanka Omnibus Company, Limited, for the running of the said omnibuses and for the payment to the Sri Lanka Omnibus Company, Limited, 10 per cent. of the gross takings of the said omnibuses plus a further sum of Re. 1 per omnibus.

10. The defendant has since March, 1943, collected the gross takings of all the said omnibuses and paid to the Sri Lanka Omnibus Company, Limited, the amounts due to it.

11. At a meeting of the plaintiff, the defendant and the other said persons held at Kurunegala on the 8th of April, 1943, it was decided that  $\frac{2}{3}$ rd of the net profits from the working of the omnibuses of the said ' G ' branch were to be distributed monthly among the said persons in proportion to the valuation of their omnibuses by the Sri Lanka Omnibus Company, Limited, and that the remaining  $\frac{1}{3}$ rd of the net profits was to be reserved for distribution in a similar manner at the end of each financial year after deducting therefrom any capital or exceptional expenditure that the said persons might specially authorise. The defendant, at the same meeting, promised 10 and undertook to distribute the said profits among the said persons at meetings to be convened by him for the purpose.

12. The defendant duly accounted for and distributed the profits among the said persons at monthly meetings convened by him until November, 1943.

13. Since November, 1943, the defendant has wrongfully and unlawfully failed to account to the plaintiff and withheld from the plaintiff the plaintiff's share of the said profits and has wrongfully and unlawfully appropriated the moneys to himself. The plaintiff assesses the amount so due and payable to the plaintiff by the 20 defendant at Rs. 22,088.56 up to date hereof.

14. A cause of action has accrued to the plaintiff to sue the defendant for an accounting and for the recovery of the amount found due to the plaintiff and in default of a proper accounting for the recovery of Rs. 22,088.56 due up to date hereof.

Wherefore the plaintiff prays :—

(A) that the defendant be directed to account to the plaintiff for the moneys collected by him as manager of the ' G ' branch of the Sri Lanka Omnibus Company, Limited, and to pay to the plaintiff the sum found to be due on such accounting. 30

(B) in default of proper accounting, for judgment against the defendant in the sum of Rs. 22,088.56 with legal interest thereon from date hereof till the date of decree and thereafter on the aggregate amount of the decree until payment in full.

(C) For costs and for such other and further relief as to this Court shall seem meet."

9. The answer of the Appellant in praying for dismissal of the action, denied the allegations in the plaint and stated, *inter alia* :—

p. 17, l. 4.

" 5. Further answering the defendant stated that he collected monies and made disbursements as branch manager in accordance 40 with the terms of his employment by the Sri Lanka Omnibus Co. and specially denies that he was liable to account for monies collected by him in such capacity to the plaintiff or to any other person mentioned in the plaint.

7. The defendant denies that he is liable in law to make any accounting to the plaintiff or to pay any money to the plaintiff.

8. The defendant pleads that plaintiff's cause of action if any is prescribed in law."

10. (i) The issues framed at the trial were all answered in favour of the Appellant. p. 176, l. 15 to  
p. 178, l. 6.  
p. 184, l. 21.

(ii) Issues (4) and (6) and the answers thereto were as hereunder :—

	ISSUE	ANSWER	
10	" 4. Were the buses belonging to the said partnership business transferred to the Sri Lanka Omnibus Co., Ltd. ? "	" In the negative. Individuals who were partners transferred their buses in their individual capacities to the S.L.B. Co."	p. 176, l. 22. p. 184, l. 25.
	" 6. Was plaintiff allotted shares to the value of Rs. 2,250 in the Sri Lanka Bus Co. Ltd. in exchange for his bus X 4261 ? "	" In the affirmative."	p. 176, l. 26. p. 184, l. 29.

(iii) Issues (7) (8) (A) and (B) (11) (12) (A) and (B) (19) (20) (21) (22) relating to the meeting of the 12th March, 1943 . . . were answered as hereunder :—

	ISSUE	ANSWER	
	" 7. Were the plaintiff and others who were partners of the K.A.B. Bus Co. invited to meet the directors of the Sri Lanka Omnibus Co., Ltd. on 12.3.43 ? "	" In the affirmative but not as partners of the K.A.B. Co."	p. 176, l. 28. p. 184, l. 30.
30	" 8. At the said meeting— (A) did the directors offer to contract with the said persons for running the said buses by them for the Sri Lanka Bus Co., Ltd. on a payment to the said persons of 90% of gross takings less a sum of Re. 1 per bus per day ? "	" In the negative."	p. 176, l. 31. p. 184, l. 33.
40	(B) suggest to the said persons that they should nominate one from among them to represent them and act for them in the matter of the said contract and its execution ? "	" In the negative."	p. 176, l. 35. p. 184, l. 33.
	" 11. Did Sri Lanka Bus Co. Ltd. appoint the defendant to be the manager of the ' G ' Branch of the said company ? "	" In the affirmative."	p. 177, l. 1. p. 184, l. 36.

	ISSUE	ANSWER	
p. 177, l. 6. p. 184, l. 38.	“ 12. As such manager was defendant (A) responsible to the Sri Lanka Bus Co. for the running of the said buses and for the payment of the said dues, and (B) the agent and representative of the other said persons for the distribution to them of the balance income ? ”	“ (A) In the affirmative.”  “ (B) In the negative.”	
p. 177, l. 33. p. 185, l. 4.	“ 19. Was the defendant appointed local manager of branch ‘ G ’ by the said Sri Lanka Bus Co. ? ”	“ In the affirmative.”	10
p. 177, l. 35. p. 185, l. 5.	“ 20. If so, was the said appointment independent of any nomination by the plaintiff and other persons mentioned in the plaint.”	“ In the affirmative.”	
p. 177, l. 37. p. 185, l. 6.	“ 21. Did defendant collect moneys and make disbursements as branch manager in accordance with the terms of his employment by the Sri Lanka Bus Co. ? ”	“ In the affirmative.”	20
p. 177, l. 40. p. 185, l. 7.	“ 22. If so, is he liable in law to account for such moneys collected by him to the plaintiff and other said persons referred to ? ”	“ In the negative.”	

(iv) Issues 13, 14, 15, 15 (A) and 16 relate to matters alleged in paragraph 11 of the plaint as having taken place on the 8th April, 1943. Such issues were answered as hereunder :— 30

	ISSUE	ANSWER	
p. 177, l. 10. p. 184, l. 39.	“ 13. Was it decided at a meeting of the plaintiff and defendant and other said persons held on 8.4.43 that $\frac{2}{3}$ of the net profits of the 90% gross takings of the ‘ G ’ branch were to be distributed monthly by the defendant and the said persons in proportion to their shares and that the remaining $\frac{1}{3}$ was to be distributed at the end of the financial year ? ”	“ In the negative.”	40
p. 177, l. 18. p. 184, l. 41.	“ 14. Did defendant at the said meeting promise and undertake to distribute the gross profits in the said manner at meetings to be convened by him for the said purpose ? ”	“ In the negative.”	

## ISSUE

## ANSWER

“ 15. Did defendant duly account for and distribute profits in the said manner at monthly meetings convened by him until November 1943 ? ”

“ Does not arise in view of the answer to issue No. 14.” p. 177, l. 21.  
p. 184, l. 42.

“ 15. (A) Were monthly meetings held and convened by the defendant as suggested in issue No. 15 ? ”

“ In the negative.” p. 177, l. 24.  
p. 184, l. 43.

10

[sic]

“ 16. Has defendant since November, 1943, wrongfully, unlawfully, *fail* to account to the plaintiff and withheld from plaintiff plaintiff's share of the said profits ? ”

“ In the negative.” p. 177, l. 26.  
p. 185, l. 1.

(v) On the issue of prescription too, the answer was in favour of the Appellant. p. 178, l. 6.  
p. 185, l. 10.

11. The Plaintiff gave evidence, and called a witness one L. A. Pabilis Appuhamy, in support of his plaint. p. 20.  
p. 67.

20

The Defendant himself gave evidence and called Mudaliyar J. Madanayake, a Director of the Sri Lanka Bus Co. and S. A. Samarasinghe, Manager of the “ F ” Branch to support his position. p. 132.  
p. 109.  
p. 127.

12. In accepting the evidence of the Appellant and his witness Mudaliyar Madanayake as to what transpired at the meeting of the 12th March, 1943, the learned District Judge, stated :—

“ In regard to the meeting of 12.3.43, I have no hesitation in accepting the version given by the defendant and Mudaliyar Madanayake that the individuals who at one time were members of the K.A.B. Co. partnership did not nominate the defendant as their representative but induced the defendant to accept the position as manager of the ‘ G ’ branch purely for this fact that if an outsider were appointed the plaintiff who was the driver of his own bus and Pabilis Appuhamy who was holding office as inspector might have to lose their jobs and so with the others. The defendant may have at that private discussion that they had outside the buildings of the S.L.B. Co. on 12.3.43 told his one time partners that he would also see to their pains if they did work hard and bring in more income and promise to remunerate them for their pains.” p. 181, l. 40 to  
p. 182, l. 5.

30

13. In rejecting the evidence of the Respondent and his witness in regard to the meeting of the 8th April, 1943, the learned District Judge stated :—

“ I completely reject the story of the plaintiff and his witness Pabilis Appuhamy that at a meeting held in April, 1943, *that* a resolution was passed that  $\frac{2}{3}$  of the 90% of the gross takings should be divided monthly among the owners of the buses and that the other  $\frac{1}{3}$  should be divided among them at the end of [sic] p. 182, ll. 5-22.

the year. One has only to look into the agreement which the defendant has entered with the S.L.B. Co. (D.19) and into the minutes book (D.16), (D.16A) and to the various pages referred to in (D.18), the certified copies of which have been produced, to make up his mind as to whether the defendant was appointed by the S.L.B.C. as manager of the ' G ' branch or as stated by the plaintiff was a nominee who was to operate as agent of the owners of the buses that were entrusted to the ' G ' branch of the S.L.B. Co. The fact that the plaintiff accepted shares in the S.L.B. Co. to the extent of Rs. 2,250 and became a shareholder of the S.L.B. Co. 10 shuts him out completely from any individual position that he may take independently of the S.L.B. Co."

p. 182, l. 4 .

p. 236.  
p. 237.

p. 183, l. 4.

p. 183, ll. 17-30.

14. The learned District Judge next considered the circumstances in which the Appellant (A) had written certain letters, P.25 dated the 5th April, 1943, and P.26 dated the 21st June, 1943, to the Plaintiff ; (B) had, between April and November, 1943, made certain payments up to November, 1943. He accepted the Appellant's case, namely, that these payments were in the nature of a bonus given as an incentive to work ; that the words " profits " and " losses " appearing in the translations of P.25 and P.26 were not to be taken in their technical or strictly commercial 20 sense ; and that these payments were stopped in October, 1943, after a discussion the Appellant had with Mudaliyar Madanayake. On this last point the learned District Judge found in favour of the Appellant in the following terms :—

" I accept the evidence of the defendant and that of Mudaliyar Madanayake when they stated that somewhere in the month of October, 1943, the defendant met Mudaliyar Madanayake in Colombo at his garage and that Mudaliyar Madanayake told the defendant that there were a certain number of chassis which had been allotted to the S.L.B. Co. and that the defendant should buy 30 a few of them and that the defendant told Madanayake that he had no money to purchase the same at that time, and that Mudaliyar Madanayake told the defendant that if the bus service was not run efficiently by him, by the replacement of new buses for old, then the S.L.B. Co. will be forced to terminate his agency. It was perhaps then that the defendant realised his position that he could not be generous towards his drivers and other workers in the buses and ever after did not pay anything out of the profits to his workers."

15. On the question of the credibility as witnesses of the Respondent 40 and his witness L. A. Pabilis Appuhamy the learned District Judge stated :—

p. 181, ll. 37-40.

" Both of them are witnesses who have denied certain facts which were well within their knowledge and accepted the same only after they were confronted with the documents in proof of same in Court "

and

p. 183, ll. 31-32.

" Pabilis Appuhamy's evidence on pages 7, 8, and 9 of 14. 7. 48 would be sufficient for one to make up his mind to discredit this witness."



16. Finally, the learned District Judge concluded his judgment in the following terms :—

10 “ I do not for a moment hesitate to disbelieve the evidence of the plaintiff and of his witness Pabilis Appuhamy on this fact that the defendant entered into certain terms and agreements with them and it was on that understanding that they nominated him as manager of the ‘ G ’ branch. In fact the evidence of the plaintiff and of Pabilis Appuhamy from the beginning to the end are full of contradictions. The latter part of their evidence contradicts the facts testified in the earlier part and I am forced to reject their evidence. I accept the evidence of the defendant and of his witnesses which are supported by documents which have been produced by the defendant. Several documents have been put in both by the plaintiff and the defendant. The Court has gone through all these documents and referred to only those documents, in its judgment, which affect the issues that have to be answered.” p. 184, ll. 7-20.

The learned District Judge dismissed the Respondent’s action with costs.

17. It is submitted that the trial judge’s judgment was essentially based on the credibility of witnesses. The learned judge had seen and 20 heard the witnesses. His findings, it is submitted, are supported by all the documents in the case.

18. The Respondent thereupon appealed to the Supreme Court of Ceylon on the grounds stated in his petition of appeal dated the 29th March, 1950. The appeal in the Supreme Court was heard by the learned Chief Justice (Rose, C.J.) and Sansoni, J. p. 186.

19. On the question of the credibility of the Respondent the learned Chief Justice stated :—

30 “ I would observe that it may well be that the learned District Judge was entitled to draw the inference that the plaintiff was not a person whose truthfulness could be relied upon in all matters.” p. 192, ll. 22-30.

The findings on the credibility of the Respondent, it is respectfully submitted, may therefore be regarded as concurrent.

20. The learned Chief Justice, however, stated :—

“ The question, however, which this Court has to consider is not whether the appellant in general is a truthful person but whether on the relatively narrow ground of the existence of the alleged agreement with the respondent, his story, in the light of the documents and of the probabilities of the case, should or should not be accepted.” p. 192, ll. 30-35.

40 The learned Chief Justice went on to say :—

“ It seems to me that, however unprepossessing or unconvincing the demeanour of the appellant and Pabilis may have been, having regard to the documents which are entirely unfavourable to the respondent’s case, and to the basic probabilities of the matter, p. 196, ll. 29-38.

their version, on the only part of the case that matters, should be accepted. It follows from this that the respondent's denial of the alleged agreement, which denial, in my opinion, flies in the face of the documents in the case, should be rejected, however satisfactory a witness he may have appeared to the District Judge to be on subsidiary matters."

21. It is respectfully submitted that, in reaching this conclusion, the learned Chief Justice was wrong in the view that the Appellant's denial of the alleged agreement "flew in the face of the documents in the case." It is submitted that such documents are completely in accord with and 10 support the Appellant's case and explain his (the Appellant's) conduct.

22. The Respondent had parted with the ownership of his bus to the Sri Lanka Bus Co., on the 15th January, 1943. As from this date he became a shareholder of that Company and received only his wages. The Respondent himself, in cross-examination said as follows :—

p. 47, l. 22.

"Q. You asked or applied for and became a shareholder of the Sri Lanka Bus Co., on or after 15.1.43 ?

A. Yes. I became a shareholder of the Sri Lanka Bus Co. with effect from 15.1.43."

and

p. 44, l. 7.

"After January, 1943, I did not get anything more than my daily wage for driving the bus from the Sri Lanka Bus Co. So I was paid in February, 1943. I was paid only my daily wage for driving my bus."

and

p. 46, l. 15.  
p. 47.

"Between 15.1.43 and 12.3.43 I did not receive any moneys other than my wages for driving the bus. I received moneys other than my salary after 12.3.43. I have not claimed any moneys as due to me between the period 15.1.43 and 12.3.43."

The Respondent's witness, L. A. Pabilis Appuhamy stated as follows 30. in his examination-in-chief :—

p. 70, l. 10.

"I transferred my bus to the Sri Lanka Bus Co. I am not sure. It may be that this transfer was effected on 15th January, 1943. After I transferred my bus to the Sri Lanka Bus Co., there was no division of profits for a few months."

The position at the time of the meeting of the 12th March, 1943, was that the Respondent on his part, as a shareholder, was entitled to look to the Sri Lanka Bus Co., only for the payment to him of any dividend that may have been declared by the Company. The Sri Lanka Bus Co. on its part, as employers of the Respondent, was entitled to dispense with the 40 services of the Respondent who was their employee. In this view of the matter, one of the "basic probabilities" is, it is submitted with respect, that the Company would not have become party to an agreement which would have made their position, vis-à-vis the Respondent, less favourable to themselves.

23. The learned District Judge in dismissing the Respondent's action had in fact held (and it is submitted rightly) that the Respondent had not discharged the onus that lay on him. It is respectfully submitted that the learned Chief Justice should have specifically considered, as a prior question, whether this view of the learned District Judge was a permissible one. It would appear from the reasoning of the learned Chief Justice that he had given greater consideration to the alleged infirmities of the case for Appellant and less to the findings of the learned District Judge that the Respondent had in fact failed to prove his case affirmatively as he ought to have done.

24. It is also respectfully submitted that the learned Chief Justice had not given consideration to the legal position resulting from the transfer of the buses of the K.A.B. Co. on the 15th January, 1943. The buses of the partnership were taken over individually and the individual owners allotted shares in the Sri Lanka Bus Co. The meeting of the 12th March, 1943, was no more than a meeting of certain persons in their individual capacity. At that date the partnership known as the K.A.B. Co. had long ceased to exist. The position of the Appellant himself was one of shareholder and employee (Manager "G" Branch). The learned Chief Justice goes on to say in this connection :—

"The Respondent (i.e. the Appellant in the present Appeal) places reliance upon the evidence of Mr. Madanayake, particularly passages at pages 208 and 209 of the brief which relate to the selection and appointment of the Respondent as manager of the 'G' branch. It seems to me, however, that there is nothing in Mr. Madanayake's statement of the position which necessarily negatives the existence of an agreement *inter se* between the Respondent and the remaining former partners of the K.A.B. Bus Co."

It is submitted that this is a wrong view. The basis of the case for the Respondent was that the alleged agreement whereby the Respondent and the other persons should get 90 per cent. of the profits—the several persons nominating one of their number to act for them—originated from Mudaliyar Madanayake and Dr. A. P. De Zoysa on behalf of the Sri Lanka Bus Co. These two gentlemen, although summoned by the Respondent, were not called by him. But Mudaliyar Madanayake, who was eventually called by the Appellant, denied this allegation of the Respondent.

25. The learned Chief Justice next considered the terms of appointment of the Appellant as Manager of the "G" Branch (D.21) :—

"In considering the probabilities of the matter it seems to me that the learned District Judge paid too little attention to the consideration that the Respondent was unable to give any satisfactory explanation as to why the Appellant and the other partners of the K.A.B. Bus. Co. should have been agreeable to the remarkable improvement in the Respondent's position which was effected after his acceptance of the managership of the 'G' branch if his (the Respondent's) version was true. According to him, although

p. 196, l. 39 to  
p. 197, l. 15.

prior to the formation of the ' G ' branch he was only entitled to the proportion of the profits of the partnership as represented by his two buses in relation to the whole fleet, upon formation of the ' G ' branch the other eight partners were agreeable to his having the whole of the profits of the branch which was to be operated with the buses of all nine former partners."

It is respectfully submitted, that the learned Chief Justice seems to have overlooked the change of set-up after the transfer of buses to the Sri Lanka Bus Co. While the K.A.B. Co. was in existence, the Respondent and others may have been entitled to determine how profits should be allocated. However, after the transfer in January, 1943, proprietary control in the buses passed to the Sri Lanka Bus Co. Thus in March, 1943, the Sri Lanka Bus Co. entrusted the managerial control to the Appellant. At this stage nobody could have foreseen how things would turn out—whether or not the change was going to result in the financial improvement of anybody. 10

26. For the reasons given in their Judgment their Lordships (Rose, C.J., and Sansoni, J.) allowed the Appeal. On questions of fact it is submitted the reasons given by their Lordships are inadequate and insufficient to reverse the findings of the learned District Judge. 20

27. The Appellant respectfully submits that this Appeal should be allowed with costs for the following, among other,

## REASONS

- (1) BECAUSE the District Judge had, in dealing with the issues of fact in the case, scrutinised the relevant evidence before him (including the documentary evidence) and dismissed the Respondent's action after a careful assessment of such evidence.
- (2) BECAUSE the Supreme Court was in error in not accepting the facts as found by the Trial Judge who had seen and heard the evidence. 30
- (3) BECAUSE the Supreme Court drew incorrect inferences from the documents produced in evidence in the case.
- (4) BECAUSE generally the Supreme Court was in error in not paying due regard to the established principles of law which circumscribe the rights of an appellate tribunal.
- (5) BECAUSE the Supreme Court failed to appreciate the true position resulting from the change of set-up after the sale of the buses to the Sri Lanka Bus Co. 40
- (6) BECAUSE the Supreme Court failed to appreciate the legal position resulting from the sale of the buses to the Sri Lanka Bus Co.

- (7) BECAUSE the Supreme Court failed to appreciate the true meaning and effect of the documents on which its decision was mainly based.
- (8) BECAUSE the action of the Respondent was prescribed in law.
- (9) BECAUSE the Judgment of the Supreme Court was wrong and the Judgment of the District Court was right.

C. THIAGALINGAM.

SIRIMEVAN AMERASINGHE.

**In the Privy Council.**

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**ON APPEAL**  
*from the Supreme Court of Ceylon*

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BETWEEN

**K. M. PERERA** (Defendant) . *Appellant*

AND

**H. G. MARTIN-DIAS** (Plaintiff) *Respondent*

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**Case for the Appellant.**

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