

2

1958

Supreme Court of Ceylon
No. 389 (Final) of 1952.

District Court, Colombo.
No. 19175.

IN HER MAJESTY'S PRIVY COUNCIL
ON AN APPEAL FROM
THE SUPREME COURT OF CEYLON

BETWEEN

ABDUL CADER ABDEEN of Race Course Avenue,

Colombo..... *Plaintiff—Appellant.*

VERSUS

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA,
3. ABDUL CAREEM MOHAMED ISMAIL,
4. ABDUL CAREEM MOHAMED HAFEEL,
5. ABDUL CAREEM SITHI AYSHA,
6. ABDUL CAREEM SITHI SAEDA, and
7. ZAINUL ABDEEN MOHAMED AJWARD, all of "Barnes House,"
No. 43, Barnes Place, Colombo,
8. AYNUM NAWASIA,
9. SITHY AYNUR RILAH,
10. UMMU FARIDA ZULFIKAR,
11. BADDEATHUZ ZUHIRIAH,
12. SITHY ZAMEELATHUL MARLIAH, Minors (8th-12th),
all of "Barnes House," No 43, Barnes Place, Colombo,
appearing by their Guardian-*ad-litem*,
13. MOHAMED NAFIH MOHAMED of No 43, Barnes Place,

Colombo..... *Defendants—Respondents.*

RECORD
OF PROCEEDINGS

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all of "Barnes House," No 43, Barnes Place, Colombo,
appearing by their *Guardian-ad-litem*.
13. MOHAMED NAFIH MOHAMED of No 43, Barnes Place,

Colombo..... *Defendants—Respondents.*

RECORD
OF PROCEEDINGS

UNIVERSITY OF LONDON
M.C.L.
24 JAN 1959
INSTITUTE OF / L.L.D
LEGAL STUDIES

52044

No. 1.
Journal Entries.

No. 1
Journal Entries
17.3.48
to
29.9.55

IN THE DISTRICT COURT OF COLOMBO.

A. C. ABDEEN.

Plaintiff.

Vs.

A. C. M. THAHEER & 12 OTHERS

Defendants.

No. 19175/M.

Class : V.

Amount : Rs. 61,500/-.

10 Nature : Money.

Procedure : Regular.

Journal.

(1)

The 17th day of March, 1948.

Mr. John Wilson (Jr.) files appointment and Complaint together with copy of Agreement No. 4080 (1b)

Plaint accepted and Summons ordered for on K/R for Rs. 60,000/- being filed.

Intld.....

20

D.J.

(2)

23- 3-48 Proctor for Plaintiff moves for D. N. for Rs. 60,000/- referred to in para 14 of Complaint.

Issue.

(4)

Additional District Judge.

6- 4-48 SS. issued not in order.

Original SS. does not contain the caption. K. R. not filed.

Intld.

(5)

30 12- 4-48 K. R. No. 180/34641 of 2-4-48 for Rs. 60,000/- filed.

Intld.

(7)

12- 4-48 SS. issued on 1-7 defendants.

(8)

14- 5-48 Mr. John Wilson for Plaintiff.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

1. Summons served on 1, 3, 4, 5, 6, & 7 defendants on being pointed out by Plaintiff's brother.

4th defendant absent. Proxies of 1, 3, 5, 6 & 7 defendants filed their answer on 19-6.

2. Summons not served on 2nd defendant.
Affidavit and Re-issue for 4-6-48.

(9)
18- 5-48 SS. re-issued on 2nd defendant. Intld. S.S.

(10)
4- 6-48 Mr. John Wilson for plaintiff. 10

Mr. M. H. A. Raheem for 3, 5, 6, 7 defendants.

Mr. P. S. P. Kalpage for 1st defendant.

1. Answer of 3, 5, 6, 7 defendants

Mr. Raheem says they are not filing answer. They abide by plaint.

2. Answer of 1st defendant S. O. 9-7

3. Affidavit of identity re 4th defendant.

4. Summons not served on 2nd defendant.

Evading service.

Re-issue for 9-7-48 20

Intld.
D. J.

(11)
17- 6-48 Proctor for plaintiff files affidavit from plaintiff and for the reasons stated therein moves to issue SS. on 2nd defendant for substituted service by affixing the same to the gate or door of 2nd defendant's residence "Barnes House" No. 43, Barnes Place, Colombo for him to appear within 7 days of such service.

Allowed also by registered post.

Intld. 30
D. J.

(12)
29- 6-48 SS. re-issued on 2nd defendant for substituted service.

Copy sent by Registered Post.

(13)
9- 7-48 Mr. John Wilson for Plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

1. Answer of 1st defendant. Filed.
2. Affidavit re 4th defendant. S. O. for 23/
3. Summons served on 2nd defendant by way of substituted service on 2-7-48 she is absent seven days not lapsed.
4. Proof of posting tendered.

Mr. H. V. Ram Iswara files proxy for 2nd defendant. Answer
of 2nd defendant 23/7

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

10 Intld..

(14)
23- 7-48 Mr. John Wilson for plaintiff.

Mr. H. V. Ram Iswara for 2nd defendant.

1. Answer of 2nd defendant filed.
2. Affidavit re 4th defendant

4th defendant present and admits Service of S.S.
Trial 9-2-49 Intld..

(15)
30-10-48 Mr. J. Wilson files petition and affidavit from the petitioner and
20 for the reasons stated therein moves :

- (a) That the 6th respondent be appointed G. A. L. of the 1st to 5th Respondents.
- (b) That the 6th respondent be appointed G. A. L. of the 1st to 5th respondents for the purpose of the said action.

(16) Enter Order Nisi for 3-12
Order Nisi entered Intld. S.S.
D. J.

(17)
24-11-48 Order Nisi issued on 6th respondent.

30 3-12-48 Order Nisi not served on 6th respondent.

Re-issue for 11-2-49.

Intld. S.S.
D. J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

(18)
8-12-48 As trial is fixed on 9-2-49, Proctor for Plaintiff moves to advance the returnable date of Order Nisi to 22-1-49.

Allowed for 21-1-49.

Intld. S.S.
D.J.

(19)
16-12-48 Order Nisi re-issue on 6th respondent.

(20)
21- 1-49 Mr. John Wilson for plaintiff.

10

Order Nisi served on 6th Respondent on being pointed out by Plaintiff's Agent. He is present and consents to be appointed G. A. L. I appoint him G. A. L. of 1st to 5th respondents.

Issue notice on parties to show cause why they should not be added for 11-2.

Intld.

(21)
28- 1-49 As parties have to be added, Proctor for Plaintiff moves to postpone the trial fixed for 9-2-49.

Proctor for 1st defendant received notice for 11-2-49
Proctor for 2nd defendants & 3-7 defendants received notice.
Take case off trial roll and call on 11-2.

20

Intld. S.S.

(22)
2- 2-49 Notice to add parties issue on 6 respondent.

(23)
7- 2-49 Proctor for 1st defendant with notice to Proctors for plaintiff and 2nd defendant files list of witnesses and documents and moves for summons.

Re 4th obtain Certified Copies as required by Sec., 154 C. P. C. 30 subject to this allowed.

Intld.
D.J.

(24)
7- 2-49 Proctor for 2nd defendant with notice to Proctors for plaintiff and 1st defendant and 3-6 defendants files list of witnesses and documents and moves for summons.

Re 3 obtain Certified copies as required by Sec. 154 C. P. C. subject to this allowed.

Intld. 40
D.J.

(25)

11- 2-49 Mr. John Wilson for Plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

Mr. H. V. Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3-6 defendants.

1. Case called *vide* 21 to re-fix trial.
2. Notice to add parties served on 6th respondent. His proxy filed.

10

Mr. Adv. Renganathan for 1st & 2nd defendants & 6th respondent, states that they object to the application to add minors as defendants.

Call 25-2 for objections.

Inquiry on 6-4.

Intld. S.S.

(26)

25- 2-49 Mr. John Wilson for Plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

Mr. H. V. Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 6th respondent.

20

Case called *vide* (25.)

Objections to addition of minors as defendants—filed.

Inquiry on 6-4.

Intld. S.S.

(27)

6- 4-49 Inquiry *vide* (25) and (26.)

Appearances as at (26.)

Vide proceedings.

Intld.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

- (28)
7- 4-49 Proctor for Plaintiff-petitioner, files documents marked A1-A2.
Check and file.
Intld. *D. J.*
- (29)
31- 5-49 Order delivered
Vide order sheet for appearances.
Issue SS. on 1st to 5th respondents who are added by the 6th
respondent for 1-7-49. 10
Sgd *D. J.*
- (30)
16- 6-49 Proctor for defendant moves to add the parties as 8-13 defendants.
He also moves for a date to file answer of the 13th defendant
and G. A. L. of 8-12 defendants.
Proctor for 13th defendant received notice.
1. Allowed.
2. Answer on 15-7.
Sgd; H. A. de Silva 20
D. J.
- (31)
15- 7-49 Mr. John Wilson for Plaintiff.
Mr. P. S. P Kalpage for 13th defendant.
Answer of 13th defendant—not filed.
Trial for 16-3-50.
Sgd: H. A. de Silva
D. J.
- (32)
21- 7-49 Proctor for plaintiff moves to withdraw documents marked A1
and A2. 30
Allowed.
Intld. H. A. de S.
D. J.
- (33)
22- 2-50 Proctor for 1st defendant with notice to Proctor for plaintiff,
files 1st defendant's list of witnesses and moves for summons.

Allowed.
Obtain Certified Copies.

Sgd: H. A. de Silva
D.J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

(34)
25- 2-50 Proctor for plaintiff moves to amend the plaint by deleting
paras 11 and 12 thereof and also moves to file the Amended
Plaint (34a).
10 Proctor for 1st and 13th defendants as Guardian-*ad-litem* of 8-12
defendants has cause to show on 3-3-50.

Proctor for 3rd, 5th, 6th and 7th defendants received notice.
Call on 3-3.

Intld. H. A. de S.
D.J.

(35)
3- 3-50 Mr. John Wilson for Plaintiff.

Mr. P. S. P. Kalpage for defendant.

Case called wide (34) to amend plaint.

20 Proctors for defendants have no objection to the amendment to
the plaint being accepted.
Amended answers if any for 10-3-50.

Intld. H. A. de S.
D.J.

(36)
10- 3-50 Amended Answer—not filed.

Later filed.

Trial is already fixed.

Intld. H. A. de S.
D.J.

(37)
30 11- 3-50 SS. on 4 witnesses by 1st defendant.

(38)
15- 3-50 Proctor for 1st defendant moves to amend para 11 (a) of the
answer.

Plaintiff's Proctor received notice.

Noted.

Intld. H. A. de S.
D.J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

(39)
16- 3-50 Trial *vide* (31)

Mr. John Wilson for plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

Mr. H. V. Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3, 5-7 defendants.

It is now 4.00 p.m. No time.

Trial re-fixed for 23-10-50.

Intld. H. A. de S.
D. J. 10

(40)
17- 3-50 Proctor for plaintiff moves to file plaintiff's list of witnesses and documents.

Proctor for 1st and 2nd defendants received notice.

File.

Intld. H. A. de S.
D. J.

(41)
23-10-50 Trial—*Vide* (39.)

Mr. John Wilson for plaintiff. 20

Mr. P. S. P. Kalpage for 1st defendant.

Mr. H. V. Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3, 5-7 defendants.

It is now 4.10 p.m. No time.

Trial is now re-fixed for 29-1-51.

Specially fixed.

Intld. H. A. de S.
D. J.

(42)
18-11-50 Proctor for defendants, with notice to Proctor for plaintiff, moves 30 to postpone the case to some other date as convenient to Court

as Counsel appearing for the defendants is unable to attend Court on the 29th January 1951, the trial date.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

Proctor for plaintiff received notice for 21-11-50.

Call on 21-11.

Intld. H. A. de S.

D. J.

(43)

21-11-50 Case call *vide* (42).

Mr. J. Wilson for plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

10 Mr. H. V. Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3, 5-7 defendants.

Mr. Kalpage present.

Other Proctors absent.

No order for the present as Mr. Kalpage does not want one. He says that if necessary, he will ask for an order later.

Intld. H. A. de S.

D. J.

(44)

29/30-1-51 Trial *Vide* (41).

Mr. John Wilson for plaintiff.

20 Mr. P. S.P. Kalpage for 1st defendant.

Mr. H. V. Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3, 5-7 defendants.

Yesterday was decided a Public Holiday

Trial re-fixed for 21-3.

Intld.

(45)

21- 3-51 Trial *Vide* (44).

Mr. John Wilson for plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

No. 1
Journal Entries
17.3.48
to
29.9.55
--- continued

Mr. H. V Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3, 5-7 defendants.

Vide proceedings (45) filed.

Trial postponed for 24-7-51.

Specially fixed.

Intld.

D. J.

(46)
27- 4-51 Mr. M. M. A. Raheem, Proctor files appointment (46a) as Proctor for 4th defendant and consents to judgment as prayed for in the plaint.

No relief is claimed against 4th defendant.

Intld.

D. J.

(47)
2- 5-51 The 4th Defendant states that the consideration payable to him under Agreement to sell No. 4080 and Transfer No. 4,118 both attested by Mr. John Wilson of Colombo, Notary Public, is Rs. 11,500/-.

A sum of Rs. 2,500 having been paid to the defendant by the 20 plaintiff on the execution of the said agreement No. 4080 and a further sum of Rs. 1,500/- having been advanced to him by the plaintiff., subsequently, 4th defendant moves for an order of payment in his favour for the balance sum of Rs. 7,500/-

Proctor for plaintiff consents.

Move through the Proctors on record.

Intld. N. S.

D. J.

(48)
11- 5-51 Proctor for 4th Defendant states that a sum of Rs. 7,500/- (to wit :- 30 Rs. 11,500/- due on the Agreement No. 4080 dated 3rd October 1947 attested by J. Wilson, N. P., less Rs. 2,500/- paid at the execution of the said Agreement and a further sum of Rs. 1,500/- paid to this defendant by the plaintiff) is due to the 4th defendant out of the money lying to the credit of this case.

He therefore moves for payment orders.

(a) In favour of the Proctor for 4th defendant Rs. 1,718/55 and

(b) In favour of the 4th defendant for Rs. 5,781/45.

Proctor for plaintiff and the 4th defendant consent.

File consent of other defendants, or notice them for 25-5.

Intld. N.S.
D. J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

(49)

17- 5-51 Notice to draw money, issued on 1st and 2nd defendants.

10 (50)

Intld. . . .

25- 5-51 Mr. John Wilson for Plaintiff

Mr. P. S. P. Kalpage for 1st and 13th defendants.

Mr. H. V Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3-7 defendants.

Notice to draw money served on 1-2 defendants on being pointed out.

1st defendant absent.

2nd defendant absent.

Affidavit of identity for 15-6.

20

Notice not issued on 13th defendant who is the G. A. L. of 8-12 defendants.

Letter of consent from 3, 5, 6 and 7 respondents filed.

Re-issue on 13th defendant 15-6.

Intld. . . .
D. J.

(51)

29- 5-51 Notice to draw money issued on 13th defendant.

(52)

15- 6-51 Mr. John Wilson for plaintiff.

Mr. P. S. P. Kalpage for 1st and 13th defendants

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

Mr. H. V Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3–7 defendants

Notice to draw money served on the 13th defendant, who is the G. A. L. of 8–12 defendants, on being pointed out. 13th defendant is .

Affidavit of identity re 1st and 2nd defendants
Call on 22–6

Intld.

D. J.

10

(54)
22– 6–51 Mr. John Wilson for plaintiff.

Mr. P. S. P. Kalpage for 1st and 13th defendants.

Mr. H. V Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3–7 defendants.

13th defendant is G.A.L. over 8th–12th defendants.

Case called—*Vide* J.E. (52)

Affidavit of identity *re* }
13th defendant and 1st } Filed with motion by Proctor
and 2nd defendants } for 4th defendant

Proctor for 4th defendant moves, with the consent of the 4th 20
defendant, that the following Orders of payment be issued for
the sum of Rs. 7,500/- *vide* his application (48)

(a) In favour of the Proctor for the 4th defendant Rs. 1,995.75

(b) In favour of the 4th defendant ,, 5,504.25

Rs. 7,500.00

Letter of consent of 3rd, 5th, 6th and 7th defendants already filed
—*Vide* J.E. (50.)

Application allowed, verify and pay.

Intld. N. S.

D. J. 30

(55)
25- 6-51 Proctor for 4th defendant moves that the Court be pleased to issue the relevant P/Os. to wit :—

(1) in favour of the Proctor for Rs. 1,995.75 and

(2) in favour of the 4th defendant for Rs. 5,504.25—*Vide* (54) above.

Pay.

Intld. N. S.
D. J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

10 (56)
27- 6-51 P.O. No. A 70371 dated 27-6-51 for Rs. 5,504/25 and
P.O. No. A 70372 dated 27-6-51 for Rs. 1995./75 issued in favour of 4th defendant and Proctor for 4th defendants respectively.

Intld.
Secy.

Intld. J H. F.
Adm.. Secy.

(57)
24- 7-51 Trial *Vide* (45)

20 Mr. John Wilson for plaintiff.

Mr. P. S. P Kalpage for 1st defendant.

Mr. H. V Ram Iswara for 2nd defendant.

Mr. M. M. A. Raheem for 3, 5-7 defendants.

Vide proceedings filed.

Further hearing on 9-10-51.

Intld. N. S.
D. J.

(58)
9-10-51 Trial (Contd.) *Vide* (57.)

30 Mr. John Wilson for plaintiff.

Mr. P. S. P. Kalpage for 1st defendant.

Mr. H. V. Ram Iswara for 2nd defendant.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

Mr. M. M. A. Raheem for 3, 5, 7th defendants.

Vide proceedings filed.

Judgment on 1-11-51.

- Intld. N. S.
D. J.
- (59)
13-10-51 Proctor for plaintiff files documents marked P1-P14.
- Check and file.
- Intld. N. S.
D. J.
- (60)
19-10-51 Proctor for 1st defendant tenders documents marked D1 to D5
duly stamped. 10
- Check and file.
- Intld. N. S.
D. J.
- (61)
1-11-51 Judgment delivered in open Court.
- Intld. N. S.
D. J.
- (62) Decree entered. 20
- Intld.
- (63)
9-11-51 Proctor for defendants-appellants tenders petition of appeal of
the defendants together with stamps to the value of Rs. 28.50
and Rs. 57/- Stamps affixed to Secretary's Certificate and S. C.
Judgment (Blank forms) respectively, and cancelled.
- Accept.
- Intld. N. S.
D. J.
- (64)
9-11-51 The Petition of Appeal of the Defendant-Appellant having been
accepted by Court, proctor for Appellant states that he will
move on 22-11-51 to tender Rs. 250/- as Security for any costs
which may be incurred by the Plaintiff-Respondent in appeal in
the premises and deposit in Court a sufficient sum of money to
cover the expenses of serving notice of appeal on the plaintiff-
respondent. 30

Notice tendered with precept for issue through Court.

Issue notice for 22-11-51.

Intld. N. S.
D. J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

(65)
13-11-51 Notice of Security issued—W. P.

Intld. N. S.
D. J.

(66)
10 13-11-51 2nd defendant moves for leave of Court to cancel and revoke the proxy granted by him to Mr. H. V Ram Iswara Proctor.

Proctor for 2nd defendant consents.

Allowed.

Proxy is revoked.

Intld. N. S.
D. J.

(67)
13-11-51 Mr. P. S. P. Kalpage files appointment as proctor for 2nd defendant together Revocation of proxy and moves that Court be pleased to accept same.
20

File.

Intld. N. S.
D. J.

(68)
22-11-51 Case Called *Vide* (64).

Mr. John Wilson for plaintiff-respondent—Absent.

Mr. P. S. P. Kalpage for defendant-appellant—Present.

No return to Notice of Security on Proctor for plaintiff-respondent.

He is absent.

30 Security for appeal is accepted.

Issue notice of appeal on bond being perfected for 19-1.

Intld. N. S.
D. J.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

(69)
22-11-51 Paying-in-Voucher for Rs. 250/- being Security issued *Vide* (68).

Intld,

(70)
23-11-51 Proctor for defendant-appellant files Bond to Prosecute
Appeal. K. R. for Rs. 250/- as security.

Notice of appeal together copy of petition of appeal.

File.

Issue notice of appeal for 18-1-52.

Intld. N. S. 10
D. J.

(70a)
23-11-51 K. R. 1/9 No. 1791/06147 of 22-11-51 for Rs. 250/- being
security.

(71)
3-11-51 Proctor for appellant files application for typewritten copy and
applies for paying-in-voucher for Rs. 25/-.

Issue.

Intld. N. S.
D. J. 20

(72)
27-11-51 Notice of Appeal issued—W. P.

Intld.

(73)
4-12-51 K. R. 1/9 No. 1798/06154 of 22-11-51 for Rs. 25 - filed.

(74)
18-1-52 Mr. P. S. P. Kalpage for 1st, 2nd, 8th to 13th defendants-
appellants.

Mr. John Wilson for plaintiff-respondent.

Mr. M. M. A. Raheem for 3rd-7th defendants.

30

Notice of Appeal served on Proctors for plaintiff-respondent-
and 3rd-7th defendants.

Forward record to Supreme Court.

Intld. N. S.
D. J.

(75)
26- 1-52 A sum of Rs. 14,000/- to wit Rs. 16,500/- due on the Agreement No. 4080 dated 3-10-47 and attested by John Wilson of Colombo, Notary Public less Rs. 2,500/- paid at the execution of the said agreement is due to the 5th and 7th defendants out of the moneys lying to the credit of this case. Proctor for 5th and 7th defendants moves that Court be pleased to issue an order of payment for Rs. 14,000/- in favour of the 5th and 7th defendants. Proctor for plaintiff consents. Notice 1st, 2nd, 3rd, 4th and 6th defendants for 8-2.

10

Intld. N. S.
D. J.

(76)
2- 2-52 Notice to draw money issue on 1st-4th, 6th and 13th defendants W. P.

(77)
8-2-52 No return to Notice to draw money.

20

1st defendant	} Absent.
2nd defendant	
3rd defendant	
4th defendant	
6th defendant	
13th defendant	

Await and re-issue for 7-3-52.

Intld. N. S.
D. J.

(78)
8- 2-52 As notices have been served on 1st, 2nd, 3rd, 4th, 6th, and 13th defendants (*Vide* Fiscal's report) and as no cause has been shown—Proctor for 5th and 7th defendants moves that the Court be pleased to issue an order of payment for Rs. 14,000/- in favour of the 5th and 7th defendants.

30

Notice was served on being pointed out. File affidavit of identity and move.

Intld. N. S.
D. J.

(79)
13- 2-52 Proctor for 5th and 7th defendant files affidavit (79a) from the 7th defendant and moves that his application for an order of payment for Rs. 14,000/- in favour of the 5th and 7th defendants be now allowed and that order of payment be issued accordingly.

40

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

Pay.

Intld. N. S.
D. J.

(80)
15- 2-52 P. O. No. A 72140 for Rs. 14,000/- issued in favour of 5th and 7th defendants.

Intld. . . .
Asst. Secretary.

Intld. . . .
Admn. Secretary.

(81)
7- 3-52 A sum of Rs. 6,385/80 is lying to the credit of the above case as 10 accrued interest up to 30-6-51 as set out in the schedule hereto. Of the said sum of Rs. 6,385.80 the 4th defendant is entitled to a sum of Rs. 689.40 and the 5th and 7th defendants are entitled to a sum of Rs. 1521/52 jointly.

Proctor for 4th, 5th and 7th defendants with notice to Proctor for plaintiff moves that Court be pleased to issue order of payment for Rs. 689.40 in favour of 4th defendant and for Rs. 1,521.52 in favour of the 5th and 7th defendants jointly.

Notice 1st, 2nd, 3rd, 6th and 13th defendants for 28-3.

Intld. N. S. 20
D. J.

(82)
12- 3-52 Notice to draw money issue on 1-3rd, 6th and 13th defendants W. P.

(83)
28- 3-52 Notice to draw money not served on 1-3rd, 6th and 13th defendants.

Re-issue for 30-5-52.

Intld. N. S.
D. J. 30

(84)
19- 4-52 Notice to draw money re-issued on 1-3rd, 6th and 13th defendants W. P.

(85)
30- 5-52 Mr. J. Wilson for plaintiff.
Mr. P. S. P. Kalpage for 1st defendant, 2nd defendant and 8th - 13th defendants.

Mr. M. M. A. Raheem for 3rd-7th defendants.

1. Notice to draw money served on 1st and 2nd defendants.

1st defendant } Absent.
2nd defendant }

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

2. Notice to draw money served on 3rd, 6th and 13th defendants on being pointed out.

3rd defendant } Absent.
6th defendant }
13th defendant }

10 (G. A. L. of 8th–12th defendants.)

Affidavit of identity 20/6

Intld. N. S.
D. J.

(86)
13- 6-52 With reference to the application dated 4-3-52 Proctor for 3rd to 7th defendants move for the following Orders of Payment being the proportionate share of the Loan Board Dividend due to 4th defendant.

In his favour—Rs. 100/-.

20 In favour of the 4th defendant Rs. 589.40.

4th defendant consents.

Affidavit of identity filed.

Support.

Intld.
D. J.

(87)
24- 7-52 Mr. M. M. A. Raheem in support.

Issue O/P to Mr. Raheem for Rs. 100/-and for Rs. 589.40 to 4th defendant on minute of consent from 5th defendant being filed.

30 Sgd. M. C. Sansoni
D. J.

(88)
5- 9-52 The appeal branch calls for fees as the brief in this case consists of 96 pages.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

Proctor for plaintiff Rs. 62.50
Proctor for defendant Rs. 37.50

Call for

Intld.

D. J.

- (89)
11- 9-52 Additional fees called for from Proctors.
- (90)
20- 9-52 K. R. No. D/10 No. 1550/59924 of 16-9-52 for Rs. 62.50 is filed. 10
- (91)
3-10-52 K. R. D/10 No. 202/61797 of 3-10-52 for Rs. 37.50 filed.
- (92)
6-10-52 A sum of Rs. 1521.52 is due to the 5th and 7th defendants and Rs. 689.40 is due to the 4th defendant being the Loan Board dividend as per statement dated 4th March 1952 filed of record in this case.

Proctor for 3rd, 4th, 5th, 6th and 7th defendants moves that the following orders of payment be issued for the said sum of Rs. 1521.52 and Rs. 689.40.

In favour of the 4th defendant	Rs. 589.40	20
In his favour	Rs. 1621.52	
	Rs. 2210.92	

Due notice of the application to draw these moneys have been given to the Proctor for the Plaintiff and to all other defendants. The 4th, 5th and 7th defendants consent.

Allowed.

Intld. M. C. S.

D. J.

- (93)
13-10-52 Order of payment No. A83061 for Rs. 589.40 issued to 4th 30 defendant.
- | | | |
|---|--|--|
| Intld.
<i>Asst. Secretary.</i>
D. C. Colombo. | Intld.
<i>Admn. Secretary.</i>
for District Judge. | |
|---|--|--|
- (94)
13-10-52 Order of payment No. A83062 for Rs. 1621.52 issued to Mr. M. M. A. Raheem, Proctor, Colombo.

Intld.
Asst. Secretary.
D. C. Colombo

Intld.
Admn. Secretary.
for District Judge.

40

(95)
9-12-52 Record forwarded to the Registrar, Supreme Court with 2 briefs for the Judges.

No. 1
Journal Entries
17.3.48
to
29.9.55
—continued

Intld. . .
Asst. Secretary.

(96)
3- 6-55 Mr. John Wilson moves to have out of the record Deed No. 4118 dated 2nd Jany., 1948 marked P13 for Registration and return.

Allowed by the S. C.

10

Intld. J. H. F
for D. J. Colombo.

Received P13.
Sgd. John Wilson.
3-6-55

(97)
25- 6-55 Registrar S. C. forwards case record together with S. C. judgment, allowing appellant's appeal and dismissing plaintiff's action against appellant with costs in both Courts.

Proctors to note.

20

Intld. . . .
D. J.

(98)
27- 6-55 Proctor for plaintiff returns Deed No 4118 of 2-1-1948 and attested by John Wilson of Colombo, Notary Public, marked P 13, duly registered at the Land Registry.

File Intld.

(99)
29- 9-55 Final Leave to Appeal to the Privy Council having been allowed, Registrar, S. C. calls for the case record and connected documents to enable him to take necessary action.

30

Forward.

Intld. . . .
D. J.

Plaint of the Plaintiff.

IN THE DISTRICT COURT OF COLOMBO.

ABDUL CADER ABDEEN of Colombo *Plaintiff.*

No. 19175/M.

Class : V.

Nature : Money. Vs.

Procedure : Regular.

Value : Rs. 61,500/-.

1. ABDUL CAREEM MOHAMED THAHEER, 10
2. ABDUL CAREEM MOOMIMA UMMA,
3. ABDUL CAREEM MOHAMED ISMAIL,
4. ABDUL CAREEM MOHAMED HAFEEL,
5. ABDUL CAREEM SITHI AYSHA,
6. ABDUL CAREEM SITHI SAEDA,
7. ZAINUL ABDEEN MOHAMED AJWARD,
(all of " Barnes House," No. 43 Barnes Place, Colombo.)
8. AYNUM NAWASIA,
9. SITHY AYNUR RILAH,
10. UMMU FARIDA ZULFEKAR, 20
11. BADDEATHISZ ZUHIRIAH,
12. SITHY ZAMEETHUL MARLIAH
(by their Guardian *ad-litem*)
13. MOHAMED NAFIH MOHAMED,

On this 17th day of March, 1948.

The plaintiff of the plaintiff abovenamed appearing by John Wilson (Jr.)
his Proctor, states as follows :—

(1) The parties to this action reside and the cause of action hereinafter set forth arose at Colombo within the local limits of the jurisdiction of this Court.

No. 2
Plaint of the
Plaintiff
17.3.48
—continued

(2) By an Agreement bearing No. 4,080 dated the 3rd day of October, 1947, and attested by John Wilson of Colombo, Notary Public (a certified copy whereof is filed herewith marked "A" and is pleaded as part and parcel of this plaint) made at Colombo within the jurisdiction of this Court the defendants abovenamed agreed with plaintiff to sell and cause to be sold subject to the terms and conditions contained therein the premises in the schedule to the said agreement and in the schedule hereto fully described for the sum of Rs. 92,000/- of which a sum of Rs. 12,500/- was paid to the defendants by the plaintiff at the date of the execution of the said agreement.

(3) At the date of the execution of the said agreement No. 4,080 the defendants abovenamed were entitled to an undivided 151/192 shares of the said premises and Abdul Careem Mohamed Abdul Cader Zainul Abdeen Ummu Biaza and Hussain Lafir minors were entitled to the balance undivided 41/192 shares. It was understood at the said date that sanction of Court would be obtained for the conveyance of the shares of the said minors.

(4) By order of this Court dated the 18th day of December, 1947, in Guardianship Proceedings No. 4,603 the 4th defendant abovenamed as Curator of the estate of the said minor Abdul Careem Mohamed Abdul Cader was authorised and empowered to sell the said Abdul Careem Mohamed Abdul Cader's share of the said premises to the plaintiff for the sum of Rs. 11,500/- and to execute the necessary Deed of Conveyance in favour of the plaintiff upon the said sum of Rs. 11,500/- being credited to the said Guardianship Proceedings No. 4,603.

(5) By order of this Court dated the 18th December, 1947, in Guardianship Proceedings No. 4,604 the 7th defendant abovenamed as Curator of the estate of the said Zainul Abdeen Umma Faiza and Hussain Laffir were authorised and empowered to sell to the plaintiff the share of the said Zainul Abdeen, Ummu Faiza and Hussain Laffir in the said premises for the sum of Rs. 6,500/- and to execute the necessary Deed of Conveyance in favour of the plaintiff upon the said share of Rs. 6,500/- being deposited to the credit of the said Guardianship Proceedings No. 4,604.

(6) It was a condition of the said Agreement that the sale of the said premises should be completed on or before the 31st day of December, 1947, and that upon payment to the defendants and upon deposit to the credit of the Curatorship Proceedings in the District Court of Colombo relating to the estates of the said minors the balance purchase price of Rs. 79,500/- the defendants should execute and cause to be executed the deed of transfer in favour of the plaintiff.

(7) On or about the 22nd day of December, 1947, the plaintiff deposited to the credit of the said Guardianship Proceedings Nos. 4,603 and 4,604 the said sums of Rs. 11,500/- and Rs. 6,500/-.

(8) On the 31st day of December, 1947, the plaintiff tendered the balance purchase price of Rs. 61,500/- to the defendants together with a Deed of Conveyance in favour of the plaintiff for the said premises and requested the defendants to execute the same.

(9) The 3rd, 4th, 5th, 6th, 7th defendants and the 4th defendant as Curator of the estate of the said Abdul Careem Mohamed Abdul Cader and the 7th defendant as Curator of the estate of the said Zainul Abdeen Ummu 10 Faiza and Hussain Lafir have executed the said Deed of Conveyance but the 1st and 2nd defendants wrongfully and unlawfully and in breach of the said Agreement No. 4,080 have failed, neglected and refused to execute the said Deed of Conveyance.

(10) It was also a condition of the said Agreement No. 4,080 that vacant possession of the said premises should be given to the plaintiff at least one day prior to the execution of the said Deed of Transfer.

(11) The 1st and 2nd defendants wrongfully and in breach of the said condition have failed neglected and refused to give to the plaintiff vacant possession of the said premises to the loss and damage of the plaintiff in a 20 sum of Rs. 500/- per mensem.

(12) By reason of the premises a cause of action has accrued to plaintiff to sue the 1st and 2nd defendants for specific performance of the said agreement No. 4,080 and for the recovery of damages at the rate of Rs. 500/- per mensem from 1st January, 1948, until vacant possession of the said premises is given to plaintiff.

(13) The 3rd, 4th, 5th, 6th and 7th defendants are made parties to give them notice of this action but no relief is claimed as against them.

(14) The plaintiff has paid to the 4th defendant the further sum of Rs. 1,500/- and brings into Court the said balance sum of Rs. 60,000/-. 30

Wherefore the plaintiff prays as follows :--

1. that the 1st and 2nd defendants be ordered and decreed to execute in favour of the plaintiff a conveyance of their share of the premises described in the schedule hereto,
2. that the 1st and 2nd defendants be ordered and decreed to pay to the plaintiff the sum of Rs. 500/- per mensem from 1st January, 1948, until vacant possession of the said premises is given to plaintiff.

3. for costs of this action, and
4. for such other and further relief in the premises as to this Court shall seem meet.

Sgd. JOHN WILSON,
Proctor for Plaintiff.

The Schedule referred to above :

All that allotment of land with the buildings standing thereon formerly called "Osborne Lodge" now called "Barnes House" bearing former assessment No. 1870/5, and presently bearing assessment No. 43, situated at 10 Barnes Place, Cinnamon Gardens in Ward No. 9, within the Municipality and in the District of Colombo, Western Province; and bounded on the north by the property of W. de Abrew, on the east by premises bearing assessment No. 6, on the south by road called Barnes Place, and on the west by premises bearing assessment No. 4; containing in extent three roods and thirty-four and forty-three one-hundredths perches (A0-R3-P34 43/100) according to figure of survey bearing No. 1,262 dated the 23rd day of March, 1925, made by Ben J. Thiedeman, Licensed Surveyor.

Sgd. JOHN WILSON,
Proctor for Plaintiff.

20 Documents filed with the plaint.

1. Certified Copy of Agreement No. 4,080 marked "A"
2. Appointment.

Sgd. JOHN WILSON,
Proctor for Plaintiff.

Documents relied on by the plaintiff.

1. Correspondence between plaintiff and defendants.
2. Correspondence between plaintiff's Proctor and defendants.

Sgd. JOHN WILSON,
Proctor for Plaintiff.

30 Prior Registration A 270/65

No. 4,080.

This Agreement is made Third day of October, One thousand Nine hundred and Forty-seven between Abdul Careem Mohamed Thaheer Abdul Careem Mohamed Ismail Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha Abdul Careem Sithi Saida Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward, all of No. 43, Barnes

Place, in Colombo, in the Island of Ceylon (hereinafter called and referred to as “the said vendors” which term as herein used shall where the context so requires or admits mean and include the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward, their and each of their respective heirs, executors and administrators) of the one part and Abdul Cader Abdeen of Colombo aforesaid (hereinafter called and referred to as “the said Purchaser” which term as herein used shall where the context so requires or admits mean and include the said Abdul Cader Abdeen, his heirs, executors and administrators) of the other part. 10

Whereas the vendors are seised and possessed of or otherwise well and sufficiently entitled jointly to an undivided One-hundred and Fifty-one upon One-hundred and Ninety-two (151/192) parts or shares from and out of all those premises in the Schedule hereto particularly described.

And whereas Zainul Abdeen Umma Faiza, Hussain Lafir and Abdul Careem Mohamed Abdul Cader, (minors,) all of No. 43, Barnes Place aforesaid are jointly entitled to the remaining Forty-one upon One-hundred and Ninety-two (41/192) parts or shares from and out of the said premises in the said schedule hereto particularly described. 20

And whereas the vendors have agreed to sell and to cause to be sold and the Purchaser has agreed to buy the said premises in the said Schedule hereto particularly described at the price and upon the terms and conditions hereinafter set forth.

Now this Agreement witnesseth as follows :—

1. The vendors will sell and cause to be sold and the Purchaser will subject expressly to the provisions of clauses 4 and 5 hereof buy the said premises in the said Schedule hereto particularly described together with all and singular the rights, privileges, easements, servitudes and appurtenances whatsoever thereto belonging or appurtenant thereto or used or enjoyed therewith. 30

2. The price shall be the sum of Rupees Ninety-two Thousand (Rs. 92,000/-) of which a sum of Rupees Twelve thousand Five hundred (Rs. 12,500/-) by way of deposit has been paid to the vendors by the purchaser (the receipt whereof the said vendors do hereby admit and acknowledge) and the balance shall be paid on the date the purchase is completed.

3. The sale shall be completed on or before the 31st day of December, 1947, by the Purchaser :

(a) tendering to the Vendors for execution at the office of Mr. John Wilson, Proctor and Notary, 365, Dam Street, 40

Colombo, a transfer in the customary form of the said premises hereby agreed to be sold in favour of the Purchaser or his nominee or nominees the same to be attested by the Purchaser's or his nominee or nominee's Notary. The Vendors in and by the said Deed of Transfer shall warrant and defend the title to the said One-hundred and Fifty-one upon One-hundred and Ninety-two (151/192) parts or shares of the said premises in the said Schedule hereto particularly described and enter into other usual covenants.

10

(b) paying to the Vendors and depositing to the credit of curatorship proceedings in the District Court of Colombo relating to the estates of the said minors the balance purchase price of Rupees Seventy-nine thousand Five-hundred (Rs. 79,500/-) and thereupon the vendors shall execute and cause to be executed at the cost and expense of the Purchaser the Deed of Transfer in favour of the Purchaser or his nominee or nominees as aforesaid.

4. Vacant possession of the said premises in the said schedule hereto particularly described shall be given by the Vendors to the Purchaser at least one day prior to the execution of the said Deed of Transfer.

5. The Vendors shall deduce to the satisfaction of the said Mr. John Wilson a good and indefeasible title to the said premises in the said schedule hereto particularly described.

6. The Purchaser shall give to the Vendors at least 7 days' notice of the date on which the Purchaser intends to complete the sale so as to enable the Vendors to give to the Purchaser vacant possession as aforesaid of the said premises in the said schedule hereto particularly described.

7. In the event of the Purchaser dying prior to the said 31st day of December, 1947, these presents shall stand cancelled and determined and the Vendors shall forthwith pay to the legal representatives of the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-).

8. In the event of the Purchaser being ready and willing to complete the said sale in terms hereof and the Vendors failing, refusing or neglecting to execute and cause to be executed the said Deed of Transfer as aforesaid then and in such case the Vendors shall repay forthwith to the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the Purchaser a sum of Rupees Fifteen-thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as penalty.

No. 2
Plaint of the
Plaintiff
17.3.48
—continued

9. In the event of the Vendors deducing a good and indefeasible title to the satisfaction of the said Mr. John Wilson and being ready and willing to execute or cause to be executed prior to the 31st day of December, 1947, the said Transfer and to give vacant possession as aforesaid and the Purchaser failing, refusing or neglecting to complete the purchase as aforesaid the Purchaser shall pay to the Vendors a sum of Rupees Fifteen-thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as penalty and the Vendors shall refund to the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-).

IN WITNESS WHEREOF the said Abdul Careem Mohamed Thaheer, 10 Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdul Mohamed Ajward and the said Abdul Cader Abdeen have set their respective hands hereunto and to two others of the same tenor and date as these presents at 43, Barnes Place, in Colombo, on this Third day of October, One thousand Nine hundred and Forty-seven.

The Schedule above referred to :

All that allotment of land with the buildings standing thereon formerly called "Osborne Lodge" now called "Barnes House," bearing former assessment No. 1870/5 and presently bearing assessment No. 43, situated at 20 Barnes Place, Cinnamon Gardens in Ward No. 9 within the Municipality and in the District of Colombo, Western Province ; and bounded on the North by the property of W. de Abrew, on the east by premises bearing assessment No. 6, on the south by the road called Barnes Place, and on the west by premises bearing assessment No. 4 ; containing in extent Three roods and Thirty-four and Forty-three One-hundredths perches (A0-R3-P34 43/100) according to the figure of survey bearing No. 1262 dated the 23rd day of March, 1925, made by Ben J. Thiedeman, Licensed Surveyor Registered under Title A 146/252 and A 175/29 in the Colombo District Land Registry Office.

30

Signed in the presence of us :

Sgd. H. A. SIMON SINGHO.
,, M. S. M. HAMZA.

Sgd. A. C. M. THAHIR,
,, A. C. M. HAFEEL,
,, A. C. S. AYSHA,
,, A. C. S. SAEDA,
,, A. C. MOOMINA UMMA,
,, A. C. M. ISMAIL.

Sgd. JOHN WILSON, 40
N.P.

Signed in the presence of us by Zainul
Abdeen Mohamed Ajward and Abdul
Cader Abdeen at 365 Dam Street,
Colombo this 3rd day of October 1947

Sgd. Z. A. M. AJWARD.
,, A. C. ABDEEN.

No. 2
Plaint of the
Plaintiff
17.3.48
—continued

Sgd. CHRISTOPHER BEN RODRIGO.
,, T. P. MALDENIYA.

Sgd. JOHN WILSON,
Notary Public.

I, John Wilson of Colombo, Notary Public, do hereby certify and
10 attest that the foregoing Instrument having been duly read over and explained
by me to the within named Abdul Careem Mohamed Thaheer Abdul
Careem Mohamed Ismail Abdul Careem Mohamed Hafeel Abdul Careem
Sithi Aysha Abdul Careem Sithi Saeda and Abdul Careem Moomina Umma
six of the executants therein named who are known to me and who have
signed as the first named as "A. C. M. Thahir" the second named as "A. C. M.
Ismail" the third named as "A. C. M. Hafeel" the fourth named as "A. C. S.
Aysha" the fifth named as "A. C. S. Saeeda" and the sixth named as "A. C.
Moomina Umma" respectively in the presence of Hettiarachige Simon
Singho of Marties Lane, San Sebastian, Colombo and Mohamed Samsudeen
20 Mohamed Hamza of 43, Barnes Place, Colombo, the subscribing witnesses
thereto both of whom are also known to me and who have signed as "H. A.
Simon Singho" and "M. S. M. Hamza" respectively the same was signed
by the said executants and by the said witnesses and by me the said Notary
in my presence and in the presence of one another all being present together
at the same time at 43, Barnes Place, in Colombo, on this Third day of
October one thousand Nine hundred and Forty-seven.

I further certify and attest that the consideration therein mentioned
Rs. 12,500/- was paid by five cheques bearing Nos. 02/25 63693, 02/25 63694,
02/25 63695, 02/25 63696, and 02/25 63697 drawn on the Imperial Bank of India,
30 Colombo, and that in the Original on page 2 in lines 3 and 4 the words
"Zainul Abdeen Zainul Abdeen" and "Zainul Abdeen" were deleted in
line 20 the word "five" was deleted in line 21 the figures "92,000" were
typed on erasure and corrected in ink and between the lines 20 and 21 the
words "five hundred" were deleted on page 3 in line 8 the words "Eighty-
two" and figures "82,500" were deleted and the words and figures "seventy-
nine" and "79,500/-" were substituted on page 5 in line 15 the word "and"
was interpolated in line 20 and figures "43" were written in the Duplicate
on page 1 in line 10 the word "their" was typed on an erasure in lines 20
and 21 the words "Zainul Abdeen Zainul Abdeen" and "Zainul Abdeen"
40 were deleted on page 2 in line 16 the word "five" was deleted in line 17 the
figures "95,000/-" were deleted and the words and figures (Rs. 92,000/-) were
substituted and between the lines 16 and 17 the words "five hundred" were
deleted on page 3 in line 1 the words "eighty-two" were deleted and "seventy-
nine" substituted in line 2 the figures "82,500/-" were deleted and "79,500/-"

No. 2
Plaint of the
Plaintiff
17.3.48
—continued

substituted in line 17 the words “ prior ” was typed on an erasure before the said Instrument was read over and explained and signed as aforesaid and that the Duplicate bears a stamp of Rs. 10/- and the Original a stamp of Re. 1/- which said stamps were supplied by me.

Date of Attestation : 3rd October 1947.

(SEAL) Which I attest.

Sgd. JOHN WILSON,
Notary Public.

I, John Wilson of Colombo, Notary Public, do hereby certify and attest that the foregoing Instrument having been duly read over and explained ¹⁰ by me to the within-named Zainul Abdeen Mohamed Ajward and read over by Abdul Cader Abdeen two of the executants therein named who are known to me and who have signed as “ Z. A. M. Ajward ” and “ A. C. Abdeen ” respectively in the presence of Christopher Benjamin Rodrigo and Tudor Perera Maldeniya both of Dam Street in Colombo the subscribing witnesses thereto both of whom are also known to me and who have signed as “Christopher Ben Rodrigo ” and “ T. P. Maldeniya ” respectively the same was signed by the said executants and by the said witnesses and by me the said Notary in my presence and in the presence of one another all being present together at the same time at 365, Dam Street in Colombo, on 20 this Third day of October One thousand Nine hundred and Forty-seven.

Date of Attestation : 3rd October 1947.

(SEAL) Which I attest,
Sgd. JOHN WILSON,
Notary Public.

True copy to which a stamp of Re. 1/- is affixed.

Colombo 17th March 1948. Sgd. JOHN WILSON JR.,
Notary Public.

No. 3
Amended Plaintiff
of the Plaintiff
17.3.48

No. 3

AMENDED PLAINT OF THE PLAINTIFF

30

IN THE DISTRICT COURT OF COLOMBO

ABDUL CADER ABDEEN of Colombo

Plaintiff.

No. 19175/M

Vs.

1. ABDUL CAREEM MOHAMED THAHEER.
2. ABDUL CAREEM MOOMINA UMMA.

3. ABDUL CAREEM MOHAMED ISMAIL.
4. ABDUL CAREEM MOHAMED HAFEEL.
5. ABDUL CAREEM SITHI AYSHA.
6. ABDUL CAREEM SITHI SAEDA and
7. ZAINUL ABDEEN MOHAMED AJWARD,
all of "Barnes House," No 43, Barnes Place, Colombo.
8. AYNUM NAWASIA.
9. SITHY AYNUR RILAH.
10. UMMU FARIDA ZULFIKAR.
- 10 11. BADDEATHUZ ZUHIRIAH.
12. SITHY ZAMEELATHUL MARLIAH, minors
all of "Barnes House," No. 43, Barnes Place,
Colombo, appearing by their guardian-*ad-litem*,
13. MOHAMED NAFIH MOHAMED,
of No. 43, Barnes Place, Colombo. *Defendants.*

On this 17th day of March 1948.

The amended plaintiff of the plaintiff abovenamed appearing by John Wilson (Jr.) his Proctor states as follows :—

1. The parties to this action reside and the cause of action herein-
20 after set forth arose at Colombo within the local limits of the jurisdiction of
this Court.

2. By an agreement bearing No. 4080 dated 3rd October 1947,
attested by John Wilson of Colombo, Notary Public, (a certified copy
whereof is filed herewith marked " A " and is pleaded as part and parcel of
this plaintiff) made at Colombo within the jurisdiction of this Court the defend-
ants abovenamed agreed with plaintiff to sell and cause to be sold subject
to the terms and conditions contained therein the premises in the schedule
to the said agreement and in the schedule hereto fully described for the sum
of Rs. 92,000/- of which a sum of Rs. 12,500/- was paid to the defendants by
30 the plaintiff at the date of the execution of the said agreement.

3. At the date of execution of the said agreement No. 4080 the defend-
ants abovenamed were entitled to an undivided 151/192 shares of the said

premises and Abdul Careem Mohamed Abdul Cader Zainul Abdeen Umma Faiza and Hussain Laffir minors were entitled to the balance undivided 41/192 shares. It was understood at the said date that sanction of Court would be obtained for the conveyance of the shares of the said minors.

4. By order of this Court dated the 18th day of December 1947 in Guardianship Proceedings No. 4603 the 4th defendant abovenamed as Curator of the estate of the said minor Abdul Careem Mohamed Abdul Cader was authorised and empowered to sell the said Abdul Careem Mohamed Abdul Cader's share of the said premises to the plaintiff for the sum of Rs. 11,500/- and to execute the necessary deed of conveyance in favour of the plaintiff upon the said sum of Rs. 11,500/- being credited to the said Guardianship Proceedings No. 4603. 10

5. By order of this Court dated the 18th day of December 1947 in Guardianship Proceedings No. 4604 the 7th defendant abovenamed as Curator of the estate of the said Zainul Abdeen Umma Faiza and Hussain Laffir was authorised and empowered to sell to the plaintiff the shares of the said Zainul Abdeen Umma Faiza and Hussain Laffir in the said premises for the sum of Rs. 6,500/- and to execute the necessary deed of conveyance in favour of the plaintiff upon the said sum of Rs. 6,500/- being deposited to the credit of the said Guardianship Proceedings No. 4604. 20

6. It was a condition of the said agreement that the sale of the said premises should be completed on or before the 31st day of December 1947 and that upon payment to the defendants and upon deposit to the credit of the Curatorship Proceedings in the District Court of Colombo relating to the estates of the said minors the balance purchase price of Rs. 79,500/- the defendants should execute and cause to be executed the deed of transfer in favour of the plaintiff.

7. On or about the 22nd day of December 1947 the plaintiff deposited to the credit of the said Guardianship Proceedings No. 4603 and 4604 the said sums of Rs. 11,500/- and Rs. 6,500/- respectively. 30

8. On the 31st day of December 1947 the plaintiff tendered the balance purchase price of Rs. 61,500/- to the defendants together with a deed of conveyance in favour of the plaintiff for the said premises and requested the defendants to execute the same.

9. The 3rd, 4th, 5th, 6th, 7th defendants and the 4th defendant as Curator of the estate of the said Abdul Careem Mohamed Abdul Cader and the 7th defendant as Curator of the estate of the said Zainul Abdeen Umma Faiza and Hussain Laffir have executed the said deed of conveyance but the 1st and 2nd defendants wrongfully and unlawfully and in breach of the said agreement No. 4080 have failed, neglected and refused to execute 40 the said deed of conveyance.

10. It was also a condition of the said agreement No. 4080 that vacant possession of the said premises should be given to the plaintiff at least one day prior to the execution of the deed of transfer.

No. 3
Amended Plaint
of the Plaintiff.
17.3.48
--continued

11. (a) The said agreement No. 4080 dated the 3rd October 1947 was duly registered. The 1st defendant by deed No. 1504 dated the 2nd January 1948 attested by P. S. P. Kalpage, Notary Public, gifted his undivided share of the said premises to the 8th, 9th, 10th, 11th and 12th defendants who are minors and who are represented in this action by their guardian-*ad-litem* the 13th defendant. The 8th, 9th, 10th, 11th and 12th defendants acquired the said share with notice of the said agreement No. 4080 and hold the said share for the benefit of the plaintiff to the extent necessary to give effect to the said agreement.

(b) The 1st, 2nd, 8th, 9th, 10th, 11th, and 12th defendants in breach of the terms and conditions contained in the said agreement No. 4080 acting in concert are in the wrongful and unlawful possession of the said premises since the month of January 1948 to the plaintiff's loss and damage of Rs. 500/- per mensem.

12. By reason of the premises a cause of action has accrued to the plaintiff to sue the 1st, 2nd, 8th, 9th, 10th, 11th and 12th defendants for specific performance of the said agreement No. 4080, for possession of the said premises and for damages at the rate of Rs. 500/- per mensem from January 1948 until possession of the said premises is delivered to the plaintiff.

13. The 3rd, 4th, 5th, 6th and 7th defendants are made parties to give them notice of this action but no relief is claimed as against them.

14. The plaintiff has paid to the 4th defendant a further sum of Rs. 1,500/- and brings into Court the said balance sum of Rs. 60,000/-.

Wherefore the plaintiff prays as follows :—

- 30
- i. that the 1st, 2nd, 8th, 9th, 10th, 11th, and 12th and the 13th defendants be ordered and decreed to execute in favour of the plaintiff a conveyance of the shares of the 1st, 2nd, 8th, 9th, 10th, 11th and 12th defendants of the said premises described in the schedule hereto and that the said defendants be ejected from the said premises and the plaintiff be placed in possession thereof.
 - ii. that the 1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th defendants be ordered and decreed to pay to the plaintiff damages at the rate of Rs.500/- per mensem from January 1948, until the plaintiff is placed in possession of the said premises.

No. 3
Amended Plaintiff
of the Plaintiff
17.3.48
—continued

- iii. for costs and
- iv. for such other and further relief in the premises as to this Court shall seem meet.

Sgd. JOHN WILSON,

Proctor for Plaintiff.

The Schedule above referred to.

All that allotment of land with the buildings standing thereon formerly called "Osborne Lodge" now called "Barnes House" bearing former assessment No. 1870/5 and presently bearing assessment No. 43, situated at Barnes Place, Cinnamon Gardens in Ward No. 9 within the Municipality and in District of Colombo Western province and bounded on the North by the property of W. D. Abrew on the East by premises bearing assessment No. 6 on the South by the road called Barnes Place and on the West by premises bearing assessment No. 4 containing in extent three roods and thirty-four and forty-three one hundredths perches (A0- R3- P34 43/100) according to figure of survey bearing No. 1262 dated the 23rd day of March 1925 made by Ben J. Thiedeman, Licensed Surveyor.

Sgd. JOHN WILSON,

Proctor for Plaintiff.

Documents filed with the plaintiff.

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1. Certified copy of Agreement No. 4080 marked "A"
2. Appointment.

Sgd. JOHN WILSON,

Proctor for Plaintiff.

Documents relied on by the plaintiff.

- Correspondence between plaintiff and defendants.
- Correspondence between plaintiff's proctor and defendants.

Sgd. JOHN WILSON,

Proctor for Plaintiff.

No. 4.No. 4
Answer of the
1st Defendant
9.7.48**Answer of the 1st Defendant.**

IN THE DISTRICT COURT OF COLOMBO

ABDUL CADER ABDEEN of Colombo
No. 19175/M.*Plaintiff.**Vs.*1. ABDUL CAREEM MOHAMED THAHEER,
of 43, Barnes Place, Colombo and 6 others*.Defendants.*

This 9th day of July 1948.

The answer of the 1st defendant appearing by P. S. P. Kalpage his
10 Proctor states as follows :—

1. Answering paragraph 1 of the plaint this defendant admits the jurisdiction of this Court.

2. Answering paragraph 2 of the plaint this defendant admits the agreement No. 4080 referred to therein and further states that this defendant received Rs. 2,500/- only as an advance for his share.

3. Answering paragraph 3 of the plaint this defendant admits that the defendants were entitled to an undivided 151/192 shares of the said premises and the minors mentioned therein were entitled to 41/192 shares save and except as hereinafter admitted the defendant denies the rest of the
20 averments therein contained.

4. This defendant is unaware of the averments in paragraphs 4, 5 and 7 of the plaint and therefore denies them and puts the plaintiff to the proof thereof.

5. Answering paragraph 6 of the plaint this defendant states that the said paragraph does not set out accurately the conditions of the said agreement and therefore denies them and states that the conditions of the said agreement were, *inter alia*, as follows :—

(a) That the sale should be completed on or before 31-12-47
by the purchaser.

30 (1) Tendering to the vendors for execution at the office of Mr. John Wilson, Proctor and Notary, 365, Dam Street, Colombo, a transfer in the customary form of the said premises hereby agreed to be sold in favour of the Purchaser or his nominee or nominees the same to be attested by the Purchaser's or his nominee or nominees' Notary. The vendors in and by the said deed of Transfer shall warrant and defend the title to the said one

No. 4
 Answer of the
 1st Defendant
 9.7.48
 --continued

hundred and fifty one upon one hundred and ninety two (151/192) parts or shares of the said premises in the said schedule hereto particularly described and enter into other usual covenants.

(2) Paying to the vendors and depositing to the credit of curatorship proceedings in the District Court of Colombo relating to the estates of the said Minors the balance purchase price of Rupees Seventy-nine thousand Five hundred (Rs. 79,500/-) and thereupon the vendors shall execute and cause to be executed at the cost and expense of the purchaser the Deed of Transfer in favour of the Purchaser or his nominee or nominees as aforesaid.

(b) That the plaintiff should give to the defendants at least 10 7 days notice of the date on which the purchaser intends to complete the sale so as to enable the vendors to give the purchaser vacant possession in terms of the agreement.

5. This defendant denies the averments in paragraph 8 of the plaint.

6. Answering paragraph 9 of this plaint this defendant admits that he did not execute this deed of conveyance but denies that by not executing the said deed he acted wrongfully or unlawfully or in breach of this agreement.

7. This defendant admits the averments in paragraph 10 of the plaint.

8. The defendant denies the averments in paragraphs 11 and 12 of 20 the plaint.

9. This defendant is unaware of the averments in paragraph 14 of the plaint and puts the plaintiff to the proof thereof.

10. Further answering the defendants states (a) that the defendant failed and neglected to fulfil the terms and conditions set out in paragraph 4 above and (b) that this defendant is in occupation of a portion of the said premises, as he lawfully might, as Co-owner and (c) that for the reasons aforesaid the plaintiff cannot have and maintain this action.

Wherefore this defendant prays—

(a) That the plaintiff's action be dismissed.

(b) For costs and

(c) For such other and further relief as to this Court shall seem meet.

Sgd. P. S. P. KALPAGE,
Proctor for 1st Defendant.

No. 5.

No. 5
 Answer of the
 2nd Defendant
 23.7.48

Answer of the 2nd Defendant.

IN THE DISTRICT COURT OF COLOMBO.

ABDUL CADER ABDEEN of Colombo
 No. 19,175/M.

Plaintiff.

Vs.

2. ABDUL CAREEM MOOMINA UMMA of
 43, Barnes Place, Colombo and 6 others

.Defendants.

On this 23rd day of July 1948.

The answer of the 2nd defendant abovenamed appearing H. V
 10 Ram Iswara, her Proctor, states as follows :—

1. Answering paragraph 1 of the plaint this defendant admits the jurisdiction of this Court.

2. This defendant admits the averments in paragraph 2 of the plaint.

3. Answering paragraph 3 of the plaint this defendant admits the correctness of the shares set out therein. This defendant denies the rest of the averments therein contained.

4. This defendant is unaware of the averments in paragraphs 4 and 5 of the plaint and therefore denies them and puts the plaintiff to the proof thereof.

20 5. This defendant denies the averments in paragraph 6 of the plaint as it does not correctly and precisely set out the terms therein and further states :—

(a) that it was a term of the said Agreement that the sale of the premises referred to in the agreement should be completed on or before the 31st December 1947 by the purchaser (i) tendering to the vendors for execution at the office of Mr. John Wilson, Proctor and Notary, 365, Dam Street, Colombo, a Transfer in the customary form of the said premises hereby agreed to be sold in favour of the Purchaser or his nominee or nominees the same to be attested by the Purchaser's or his nominee or nominee's Notary. The vendor in and by the said Deed of Transfer shall warrant and defend the title to the said one hundred and fifty upon one hundred and ninety two (151/192) parts or shares of the said premises in the said schedule hereto

particularly described and enter into other usual covenants and (ii) paying to the vendors and depositing to the credit of Curatorship Proceedings in the District Court of Colombo relating to the estates of the said minors the balance purchase price of Rs. 79,500/-; (b) and that thereupon the vendors shall execute and cause to be executed at the cost and expense of the purchaser the Deed of Transfer in favour of the Purchaser or his nominee or nominees as aforesaid.

It was further term of the said agreement that the purchaser the 10 plaintiff should give to the vendors, 7 days notice of the date on which the plaintiff intended to complete the sale so as to enable the vendors to give the purchaser vacant possession.

6. This defendant denies the averments in paragraph 7, 8, 11 and 12 of the plaint.

7 Answering paragraph 9 of the plaint the defendant admits that she has not executed the deed of conveyance but denies that on doing so she acted wrongfully or unlawfully or on breach of the agreement.

8. This defendant denies the averments in paragraph 10 of the 20 plaint as it does not fully and precisely set the terms of the agreement regarding the delivery of possession to plaintiff.

9. Further answering this defendant states :—

(a) that the plaintiff failed and neglected to fulfil the terms and conditions of the said agreement set out in paragraph 5 above ; (b) that the deed tendered for the defendant's signature did not conform to clause 3 (a) of the said agreement ; (c) this defendant, therefore, as she lawfully might refuse to sign the deed of conveyance (d,) that she is in possession, as co-owner of her share of the said pre- 30 mises (e) that for all or for any of the reasons aforesaid the plaintiff is not entitled to sue for specific performance of the agreement or to have and maintain this action for damages.

Wherefore this defendant prays—

(a) that the plaintiff's action be dismissed.
 (b) for costs and (c) for such other and further relief as to this Court shall seem meet.

Sgd. H. V. RAM ISWARA,
Proctor for 2nd Defendant. 40

No. 6.**Statement of Objections of 1st Defendant and 6th Respondent.**

No. 6
Statement of
Objections of 1st
Defendant and
6th Respondent
25.2.49

IN THE DISTRICT COURT OF COLOMBO

ABDUL CADER ABDEEN of Colombo

Plaintiff.

No. 19,175/M

Vs.

1. ABDUL CAREEM MOHAMED THAHEER
and Another .

Defendants.

Between

10 ABDUL CADER ABDEEN of Colombo *Petitioner.**Vs.*

1. AYNUM NAWASIA

2. SITHY AYNUR RILAH.

3. UMMA FARIDA ZULFIKAR.

4. BADDEATHUZ ZULFIKAR.

5. SITHY ZAMEELATHUL MARLIAH, Minors,
all of No 43, Barnes Place, Colombo, appearing
by their guardian-*ad-litem*

20 6. MOHAMED NAFIH MOHAMED of No. 43,
Barnes Place, Colombo

Respondents.

On this 25th day of February, 1949.

The statement of objections of the 1st defendant and the 6th respondents appearing by P. S. P. Kalpage their Proctor states as follows :—

1. The 6th respondent has been appointed guardian-*ad-litem* of the 1st to 5th respondents for the purpose of the plaintiffs application to add the 1st to the 5th respondents as parties to this action.

2. The 6th respondent denies that the 1st to the 5th respondents acquired the premises referred to therein with notice of the agreement No. 4080.

No. 6
Statement of
Objections of
1st Defendant
and
6th Respondent
25.2.49
—continued

3. The 1st defendant and 6th respondent state that the 1st to 6th respondents cannot be joined as parties to this action *inter alia* for the following reasons :—

- (a) this is an action on a contract between the plaintiff and the defendants and the 1st to the 5th respondents were not parties to the said contract.
- (b) that the addition of the 1st to 5th respondents would be a misjoinder of parties and causes of action, the plaintiffs' cause of action, if any, against the 1st to 5th respondents is distinct from the cause of action set out in the plaint 10 against the defendants.
- (c) the petition and affidavit of the plaintiff do not disclose adequate or proper grounds for the addition of the 1st to the 5th respondents as parties to this action or for the appointment of the 6th respondents as guardian-*ad-litem*.

Wherefore the 1st defendant and the 6th respondent pray :—

- (a) that the plaintiff's application to add the 1st to the 5th respondents as parties to this action and to appoint the 6th respondent as their guardian-*ad-litem* for the said action be dismissed. 20
- (b) for costs and
- (c) for such other and further relief as to this court shall seem meet.

Sgd. P. S. P. KALPAGE,
*Proctor for 1st Defendant and
6th Respondent.*

No. 7
Inquiry and
Order

No. 7.

Inquiry and Order.

6-4-49.

Plaintiff petitioner absent. Advocate Eddusuriya with Advocate 30 Kadirgamar instructed by Mr. John Wilson for plaintiff petitioner.

1st defendant is present. The other defendants are absent.

Husband of the 2nd defendant is present.

Advocate Ranganathan instructed by Mr. Kalpage for the 1st defendant and 6th respondent and for the 2nd defendant instructed by Mr. Ram Iswara

No. 7
Inquiry and
Order
—continued

6th respondent present. Other respondents namely,—

1st to 5th are absent. 1st to 5th respondents are minors. 6th respondent is the G. A. L of the 1st to 5th respondents.

Mr. Eddusuriya addresses Court.

This is an application to add the 1st to 5th respondents by their G. A. L. the 6th respondent. Objections have been filed by the 6th respondent to his being added. 1st defendant who is a party to the agreement has gifted his share to his children, 1st to 5th respondents, who are minors, subsequent to the deed of agreement which deed is duly registered.

Mr. Eddusuriya argues that these are necessary parties in order that the plaintiff may get judgment binding the transferees subsequent to the agreement.

He cites 32 N. L. R. 81, 46 N. L. R. 97.

The date of the agreement is 3-10-47. The deed by the 1st defendant in favour of the 1st to 5th minor respondents is dated 2-1-48, that is to say subsequent to the deed of agreement. Mr. Eddusuriya argues that they are necessary parties in order that specific performance of this agreement may be obtained. All subsequent transferees should be made parties. If they are not made parties in this case probably a subsequent action will have to be filed against them. The deed by the 1st defendant in favour of the 1st to 5th minors is subsequent to the transfer. If they are not made parties plaintiff fears that he may have to sue them all over again to get possession.

He refers to section 18 of the C. P. C. He cites 1 N. L. R. at 51.

This authority deals with the scope of Section 18 C. P. C.

Mr. Eddusuriya states that in this particular case he does not want to claim any damages against the minors. He only wants a decree binding them as well as to prevent multiplicity of actions and especially because their title accrued to them after the deed of agreement.

He also refers to section 33 C. P. C.

No prejudice will be caused either to the 1st defendant or the minors by their being made parties to the action.

Mr. Ranganathan addresses court.

No doubt Section 18 of the C. P. C. has been introduced in order to prevent multiplicity of actions. The Court is given power to add parties in the two instances given in the C. P. C. If certain parties are necessary for the complete and necessary adjudication of a case then those parties will be added by the Court. The 2nd list of parties contemplated by section 18 are proper or useful parties for the adjudication of the matter. This action is not for possession because according to the deed of agreement before plaintiff can get possession he has to give 7 days notice to the 1st defendant of his intention of taking possession or calling upon the 1st defendant to give possession. This is a case of pure breach of contract between the parties. According to the deed of agreement the date of performance is the 31st December 47. 1st and 2nd defendants have failed to carry out the agreement. How do the minors become parties to that dispute. The minors are not necessary parties to the dispute at all.

The other question is whether they are useful or proper parties in the contemplation of the section. Did 1st and 2nd defendants commit a breach of the agreement. He submits that the addition of the minors will not in any way help the court to adjudicate on that issue effectively and completely.

The next question is what are the reliefs they are entitled to because of the breach. One relief asked is that 1st and 2nd defendants effect a transfer. The addition of these parties is not necessary for the purpose of granting that relief. The 2nd relief asked for is Rs. 500/- as damages against 1st and 2nd defendants for failure to perform the agreement. To this also the addition of the minors is not at all necessary. If it is an action for declaration of title or possession, if the minors and the father are jointly in possession, perhaps they may be necessary parties because they are acting jointly.

In this particular case the 1st defendant disputes the right of the plaintiff to get a transfer. Once the transfer is obtained it is then time for the plaintiff to sue the subsequent purchasers for title under section 93 of the Trusts Ordinance.

He cites 43 N. L. R. p. 493.

He submits that the cause of action against the minors, if any, is a distinct one. Section 93 of the Trusts Ordinance would apply. He cites 43 N. L. R. p. 91 and 39 N. L. R. p. 143.

Mr. Eddusuriya replies.

He says he wants to make his position clear. His argument is that these minors whom he is seeking to add are liable in damages to the plaintiff along with the 1st defendant but he is prepared to waive damages against the minors. He says that this admission by him must not be taken to mean that the minors are not liable in damages.

Mr. Eddusuriya also states that partition action 5217 of this Court has been filed in respect of these premises by the 5 minors with the 6th respondent as their next friend. 1st defendant in this suit is not a party in the partition suit. The 1st five minor respondents have brought the action having acquired the title of the 1st defendant in this case. The defendants to the partition suit are the 2nd defendant in the present suit and the plaintiff petitioner. The plaint in the partition case is dated 9-1-48.

No. 7
Inquiry and
Order
---continued

Mr. Eddusuriya also states that the plaintiff in this suit has filed a statement of claim in the partition suit asking that the rights of the minor plaintiffs in that case be subject to the deed 4080 of 3-10-47. That case is pending. He further says that apart from that plea the plaintiff in this case who is the 2nd defendant in the partition case has taken up other pleas, namely that the action be stayed pending the decision of case No. 19,175/M of this Court.

Mr. Eddusuriya marks certified copy of the plaint in the partition action No. 5217/P. D. C. Colombo A1 and the certified copy of the statement of claim filed by the 2nd defendant in that case A2.

Mr. Ranganathan admits that the partition suit has not been decided. He admits that the statements made by Mr. Eddusuriya with regard to the said partition action are correct.

Order reserved.

Sgd. H. A. DE SILVA,
D. J.
6-4-49.

Order

In this action plaintiff asks for specific performance of an agreement bearing No. 4080 of 3-10-47 to convey certain premises to him. It was a condition of the said agreement that the sale of the premises should be completed on or before 31-12-47. Plaintiff alleges that the 1st and 2nd defendants have failed to convey their share of the premises in question within the time stipulated though demand was made therefor.

3rd to 7th defendants have been brought into the case in order to give them notice of this action. They themselves own certain shares of these premises and they have performed their part of the contract. The two parties who have failed and neglected in breach of the said contract to perform their part of the contract for specific performance are the 1st and 2nd defendants. It has now been discovered by the plaintiff that the 1st defendant who was entitled to a 1/8th share of the premises that he agreed to convey upon the said deed of agreement has by deed of transfer No. 1504 of 2-1-48 gifted the said 1/8th share to the 1st to 5th respondents, his children, who are minors. The present application is for the addition of the 1st to 5th respondents by their guardian-*ad-litem* the 6th respondent to this suit. 6th respondent has been appointed guardian-*ad-litem* over the 1st to 5th respondents. Objections

have been filed to their being added. This action was filed on 17-3-48. The deed upon which the 1st defendant has gifted his rights which were subject to the deed of agreement No. 4080-of 3-10-47 is dated 2-1-48, *vide* affidavit and petition of the plaintiff petitioner dated 27-10-48. Objections to their being added in this suit are set out in the objections filed by the 1st defendant and the 6th respondent who is the guardian-*ad-litem* over the 1st to 5th respondents.

Counsel argued the matter before me. Counsel for the plaintiff argues that the deed of agreement No. 4080 has been duly registered. The 1st to 5th respondents who are the children of the 1st defendant have been 10 gifted this property by the 1st defendant subsequent to the deed of agreement and that these respondents are necessary parties in order that a judgment may be obtained binding the donees whose deed is subsequent to the deed of agreement. He also argues that if these parties are not brought in probably a subsequent action would have to be filed against them. He cites Section 18 C. P. C. He argues that the addition of these parties is necessary to enable the court to effectually and completely to adjudicate upon and settle all the questions involved in the action. He has cited to me 32 N. L. R. 81, 46 N. L. R. 97, 1 N. L. R. 51, Section 33 C. P. C. and Section 93 of the Trusts Ordinance *Silva vs. Selonona* (32 N. L. R. 81) is a judgment of the Divisional 20 Bench of the Supreme Court where it was held that the registration of an agreement to sell land is of itself notice within the meaning of Section 93 of the Trusts Ordinance to a person who acquires the land subsequent to such agreement. So that in the present case the minor respondents who have obtained the deed of gift from their father, 1st defendant, subsequent to the deed of agreement in question have on the authority of this case acquired the land with notice in as much as the deed of agreement has been registered. In that case plaintiff sued 3 defendants for specific performance of the agreement entered into between 1st and 2nd defendants to convey certain premises to plaintiff 30 within a certain date. The 3rd defendant who was the appellant in the suit purchased these premises from the 1st and 2nd defendants subsequent to the deed of agreement and 3rd defendant was added as a party to give him notice of the action. There does not seem to have been any objections taken in that suit to the addition of the 3rd defendant who was only a transferee with notice subsequent to the deed of agreement. The point raised by 3rd defendant in that case was that he was not bound by the deed of agreement in as much as the mere registration of the deed of agreement was not sufficient notice to him. There the question of misjoinder of parties and causes of action was not raised although the case was fully discussed. Garvin A. C. J. who delivered the judgment has fully discussed all cases that were cited 40 before him.

Roche et al Vs. Keerthiratne et al 46 N. L. R. 97 has been cited to me. There too the question of addition of parties was considered. Keuneman J. who delivered the judgment in that case with which Rose J. agreed has made the following observation which, I think, is of assistance in arriving at a decision

of the matter under consideration before me: “ Counsel for the respondent has cited at least one instance where, on an application under Section 93 of the Trusts Ordinance both the contracting party and the subsequent transferee have been joined as parties. It is true that no objection was taken in this instance that there have been a misjoinder of causes of action. On the other hand, Counsel for the appellant has not cited any authority to show that in such a case there would be a misjoinder of causes of action, and on principle I am unable to agree that there would have been a misjoinder in such a case.” I think that *dictum* of Keuneman J. is helpful in the determination
10 of the question before me.

I have also been cited Section 93 of the Trust Ordinance Cap. 72. It runs thus: “ Where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract provided, that in the case of a contract affecting immovable property such contract shall have been duly registered before such acquisition.” Counsel for the plaintiff argues that the five minors who are sought to be brought into this case hold this property for the benefit of the plaintiff to the extent
20 necessary to give effect to the contract. Counsel for the 1st defendant and the 6th respondent argues that the cause of action alleged in this case against the 1st and 2nd defendants is their failure and neglect to specifically perform the contract entered into between the parties. The respondents who are sought to be added were no parties to the contract of relationship that was created by the deed of agreement, and therefore the respondents who became owners of the 1st defendant’s rights subsequent to the deed of agreement being not parties to the contract are not necessary parties to this action. His argument amounts to that if the plaintiff succeeds in his prayer for specific performance, then he should proceed against the respondents in a separate
30 action to have his title vindicated. It is interesting to find that as soon as the 1st to 5th respondents became owners of the 1/8th share of the 1st defendant in this suit they filed partition action No. 5217 of this Court for a partition of this land. They were the plaintiffs by their next friend. They have claimed 1/8th share (*vide* certified copy of the plaint in D. C. 5217 A1. *Vide* certified copy of the answer filed in that case A2 by the plaintiff who was the 2nd defendant in that suit.) That case has not yet been decided. 2nd defendant in his answer has asked that the partition action be stayed pending the final determination of Action No. 19,175 of this Court and also for
40 declaration that the shares allotted to the plaintiffs in that suit, if any, be held by them for the benefit of the defendant namely 2nd defendant in that suit to the extent necessary to give effect to the agreement No. 4080 of 3-10-47. Thus it would appear that the parties have come to grips now in the partition action pending. There is nothing before this Court to show that that case was being stayed pending the decision of the present suit. It is also argued by plaintiff’s Counsel that no prejudice will be caused to the respondents if they are added as parties to this suit and the rights of all parties fully gone into and an adjudication made with regard to the rights of all parties concerned.

No. 7
Inquiry and
Order
—continued

In view of the authorities submitted to me by Counsel for the plaintiff and the reasons urged by him I am of opinion that the 1st to 5th respondents by their guardian-*ad-litem* 6th respondent should be joined in this suit and there is no misjoinder of parties and causes of action especially in view of Section 93 of the Trust Ordinance Cap. 72. 1st to 5th respondents are added by their guardian-*ad-litem* 6th respondent. The 6th respondent will pay the plaintiff petitioner Rs. 52.50 as costs of this inquiry.

Sgd. H. A. DE SILVA,
D. J.

31-5-49 10

31-5-49.

Order delivered in open court in the presence of Mr. Sittampalam who takes notice on behalf of Mr. John Wilson and Mr. Shanmuganathan on behalf of Mr. Kalpage.

Sgd. H. A. DE SILVA,
D. J.

31-5-49.

No. 8.

ANSWER OF THE 8th TO 12th DEFENDANTS.

IN THE DISTRICT COURT OF COLOMBO.

20

ABDUL CADER ABDEEN of Colombo.... ... *Plaintiff.*

No. 19,175/M. *Vs.*

8. AYNUM NAWASIA.

9. SITHY AYNUR RILAH.

10. UMMU FARIDA ZULFIKAR.

11. BADDEATHUZ ZUHRIAH.

12. SITHY ZAMEELATHUL MARLIAH Minors all of
“Barnes House” No. 43, Barnes Place, Colombo,
appearing by their *Guardian-ad-litem*

13. MOHAMED NAFIH MAHMOOD of No. 43,
Barnes Place, Colombo.... ... *Defendants.* 30

No. 8
Answer of the
8th to 12th
Defendants
10.3.50

On this 10th day of March 1950

No. 8
Answer of the
8th to 12th
Defendants
10.3.50
—continued

The Answer of the 8th to 12th defendants by their Guardian-*ad-litem* the 13th defendant appearing by P. S. P. Kalpage their Proctor states as follows :—

1. Answering Paragraph 1 of the Amended Plaintiff these defendants admit the jurisdiction of this Court.

2. These defendants deny the averments in paragraph 2 of the Amended Plaintiff, but admit that the agreement referred to therein was between the plaintiff and the 1st to 7th defendants but state that these 10 defendants were unaware of the said Agreement.

3. Answering paragraph 3 of the amended plaintiff these defendants admit that the minors referred to therein were entitled to 41/192 shares, but deny the rest of the averments therein contained, and state that the 1st to the 7th defendants were entitled to 151/192 shares.

4. These defendants are unaware of the averments in paragraphs 4, 5 and 7 and therefore deny them, and put the Plaintiff to proof thereof.

5. Answering paragraph 6 of the amended plaintiff these defendants state that the said para does not set out accurately the conditions of the said agreement and therefore denies them, and states that the conditions of 20 the said agreement were, *inter alia* as follows :—

1. (a) That the sale should be completed on or before 31st day of December 1947 by the purchaser. Tendering to the vendors for execution at the Office of Mr. John Wilson, Proctor and Notary Public, No. 365, Dam Street, Colombo, a transfer in the customary form of the said premises hereby agreed to be sold in favour of the Purchaser or his nominee or nominees the same to be attested by the Purchaser's or his nominee or nominees' Notary. The Vendors in and by the said Deed of Transfer shall warrant and defend the title to the said 151/192 parts or shares of the said premises in the said Schedule hereto particularly described and enter into other usual covenants.

(b) Paying to the said Vendors and depositing to the credit of Curatorship Proceedings in D. C. Colombo relating to the Estate of the said Minors the balance purchase price of Rs. 79,500/- and thereupon the Vendors shall execute and cause to be executed at the cost and expense of the Purchaser the Deed of Transfer in favour of the purchaser or his nominee or nominees as aforesaid.

No. 8
 Answer of the
 8th to 12th
 Defendants
 10,3,50
 —continued

- (c) That the plaintiff should give to the defendants at least 7 days notice of the date on which the purchaser intends to complete the sale so as to enable the Vendors to give the Purchaser vacant possession in terms of the agreement.

6. These defendants deny the averments in Paragraph 8 of the amended plaint.

7. Answering Paragraph 9 of the amended plaint these defendants state :—

- (a) That they are unaware of the execution of a Deed of Conveyance by the 3rd to the 7th defendants. 10
- (b) That if such conveyance has been executed by them as alleged, the 3rd to 7th defendants have been wrongly made parties to this action.
- (c) These defendants deny the rest of the averments in the said paragraph.

8. These defendants admit the averments in paragraph 10 of the amended plaint, but state that they were unaware of the said averments.

9. Answering Paragraph 11 (a) of the amended plaint these defendants state :—

- (a) That they are unaware of the averments that the said agree-20 ment was duly registered and therefore deny the said averments and
- (b) That they admit that the 1st defendant by Deed No. 1504 dated 2nd January 1948 attested by P. S. P. Kalpage, Notary Public gifted his un-divided share of the said premises to these defendants who are represented by their Guardian-*ad-litem* the 13th defendant and
- (c) That they deny all and singular the rest of the averments contained in the said Para 11 (a).

10. These defendants deny the averments in Para 11 (b) and 12 of 30 the amended plaint.

11. Further answering these defendants state :—

- (a) That the plaintiff failed and neglected to fulfil the terms and conditions set out in Para 5 above and is therefore not entitled to SPECIFIC Performance of the Agreement No. 4080.

(b) These defendants had no notice of the said agreement No. 4080 when they acquired shares on the said property by Deed No. 1504 of the 2nd January 1948, the said agreement cannot therefore be enforced against these defendants.

No. 8.
Answer of the
8th to 12th
Defendants.
10.3.50.
—continued

WHEREFORE these defendants pray :—

- (a) That the plaintiff's action against them be dismissed,
(b) for costs and
(c) for such other and further relief as to this Court shall seem meet.

10

Sgd. P. S. P. KALPAGE,
*Proctor for 8th to 12th Defendants
by their Guardian-ad litem the 13th
Defendant.*

No. 9.

No. 9.
Issues Framed.

Issues Framed.

21-3-51.

Mr. Advocate Nadesan for plaintiff.

Mr. Advocate Kandiah for 1st defendant.

20 Mr. Advocate Suppramaniam for 2nd defendant.

Other defendants are absent and are unrepresented.

13th defendant present in person and guardian-*ad-litem* of 8 to 12 defendants.

Mr. Nadesan opens his case: Agreement between 1st to 7th defendants by which they agreed to sell the property which is the subject matter of this action and an advance of Rs. 12,500/- was paid. 1st to 7th defendants were entitled to 151/192 shares and the three minors to 41/192 shares. They did not default and do not come into the picture. The money in respect of their shares is deposited in Court. The transfer had to be effected on 31-12-47.
30 The deeds were ready and 1st to 7th defendants were expected to sign the deed. All have signed except 1st and 2nd defendants. On 31-12 the balance Rs. 61,500/- was tendered. On 2-1-48 1st defendant gifted by deed 1504 his undivided share to 8th, 9th, 10th, 11th and 12th defendants who are minors. Plaintiff is now suing 1st and 2nd defendants and 8th to 13th defendants for a conveyance in respect of the property and for damages.

Mr. Kandiah says his main defence is based on para 8 of the deed. The deed provides for damages in the event of the seller being unwilling or unable to complete the sale. He says in view of this provision specific performance cannot be asked for.

Mr. Nadesan says that has not been pleaded.

It is agreed that the issues be framed at this stage.

Mr. Nadesan suggests :—

1. Did the plaintiff on or about 31st December, 1947 tender to the parties to deed 4080 including 1st and 2nd defendants the purchase price of Rs. 61,500/- together with deed of conveyance in favour of the plaintiff for the said premises and request the parties to execute the same.

2. Did the 1st and 2nd defendants wrongfully and unlawfully refuse to execute the said deed of conveyance. (It is admitted that 1st defendant has by deed 1504 transferred his undivided share to 8th, 9th, 10th, 11th and 12th defendants.)

3. Did 1st to 7th defendants agree to place the plaintiff in vacant possession of the premises on 30-12-47 ?

4. Are 1st and 2nd and 8th to 12th defendants in wrongful possession of the premises since 1-1-48. ?

5. Is plaintiff entitled to specific performance of the said agreement by 1st and 2nd defendants and in view of the transfer to 8th to 12th defendants by 8th to 12th defendants also. ?

6. To what damages if any is plaintiff entitled.

(At this stage Mr. Rustomjee appears for 8th to 12th defendants instructed by Mr. Kalpage).

Mr. Kandiah objects to issue 1. He says there was no tender of the money and no tender of the deed and no request to execute the deed. He wants the issue split up. Issue 1 is altered to read as follows :—

1. Did the plaintiff on 31-12-47 (a) tender to the parties to the deed 8040 including 1st and 2nd defendants the purchase price of Rs. 61,500/-.

(b) tender the deed of conveyance and request parties to execute the same.

Mr. Nadesan has no objection to this.

In answer to Mr. Kandiah Mr. Nadesan says that 1st and 2nd defendants are in possession of the premises.

No. 9.
Issues Framed.
—continued.

Mr. Kandiah says his clients are in possession of a specific portion.

Mr. Nadesan says they are in possession of the entire premises.

Mr. Kandiah suggests—

7. Is plaintiff entitled to specific performance in view of the provision in clause 8 of the agreement 4080 ?

8. Can plaintiff in any event maintain this action for specific performance as against the added defendants that is the 8th to 12th defendants.

10 9. Is there a misjoinder of parties and of causes of action.

10. Did the plaintiff fail (a) to tender to 1st and 2nd defendants the purchase price before calling upon the defendants to execute the deed of transfer. (b) tender the proposed deed of transfer for execution by defendants at the office of Mr. John Wilson, Proctor and Notary, 365, Dam street, Colombo ; (c) Give at least 7 days notice in terms of clause 6 of the said agreement.

11. If issue 10a or 10b or 10c or all or any of them is answered in the affirmative can plaintiff maintain this action for specific performance.

20 Mr. Nadesan objects to No. 8 as not pleaded. He objects to issue 10 as not pleaded. He also objects to 10 (a) on the same ground. He objects to 7 and 9 also on the same ground.

Mr. Kandiah submits that these issues have not been pleaded specifically.

Counsel say that issues 7, 8, 9, 10 and 12 concern all defendants and they rely upon these issues.

I accept the issues. Some of them at least have not been pleaded by the defendants. They involve questions of fact and law and Mr. Nadesan is not ready to meet them.

30 The trial will have to be adjourned. Defendants will pay plaintiffs the costs of today. Trial postponed for 24th July—specially fixed.

Sgd. N. SINNETHAMBY,
D. J.

No. 9. 24-7-51
Issues Framed.
—continued.

Mr. Advocate Nadesan with Mr. Advocate Manohara for the plaintiff.

Mr. Advocate Kandiah for the 1st defendant.

Mr. Advocate Subramaniam for the 2nd defendant.

Mr. Advocate Rustomjee for the 8th to 13th defendants.

Errors in previous day's proceedings corrected.

Mr. Nadesan suggests the following further issues.

12. Did the 8th to 12th defendants have notice of the agreement No. 4080, P1 ?

13a. Did the 1st and 2nd defendants refuse to carry out the terms 10 of the agreement P1 on or about 29-12-47 ?

b. If so, was tender of the purchase price and of the deed of transfer for execution necessary.

I accept the issues.

No. 10.
Plaintiff's
Evidence.

No. 10.

Plaintiff's Evidence.

Mr. Nadesan calls :

A. C. ABDEEN.
Examination.

A. C. ABDEEN, affirmed : 43, Landed Proprietor, Racecourse Avenue.

I know the defendants in this case. They are related to me. In 1947 all the defendants lived at Barnes House. That is the house in respect 20 of which I have entered into this agreement.

On 3-10-47 I entered into an agreement with the 1st to 7th defendants attested by Mr. John Wilson by which the defendants agreed to transfer an undivided 151/192 share of the said premises to which they were entitled, and also to cause the transfer of the balance 41/192 share to be made by the minors at that time. I produce marked P1 certified copy of the agreement.

Under the terms of the agreement I was to pay the 1st to 7th defendants the sum of Rs. 12,500/- as advance. The total consideration in respect of the property was Rs. 92,000/- for the entire property. After deducting Rs. 12,500/- I had to pay the balance amount. That included the minor's 30 shares also. It was agreed that in respect of the minors' shares application

was to be made in appropriate guardianship proceedings and that the moneys due to the minors' shares should be deposited to the credits of those cases. Accordingly in Guardianship proceedings No. 4603 application was made by the 4th defendant as curator of the estate of the minor Abdul Carim Abdul Cader to sell the minor's share of the premises to me for Rs. 11,500/-. That application was allowed on 18-12-47.

Mr. Nadesan marks a copy as P2.

That application was allowed and the 4th defendant as curator of the estate of Abdul Carim Abdul Cader was allowed to transfer Abdul Cader's interests in the premises for Rs. 11,500/- Rs. 11,500/- is the proportionate amount due to the minor on the basis of Rs. 92,000/- being the value of the entire property.

Application was similarly made in Guardianship proceedings No. 4604 for permission to sell Zainul Abdul Cader's share to me and the court made order on 18-12-47 before it permitted the sale of the share for Rs. 6,500/- for the conveyance to be executed on the sum of Rs. 6,500/- being deposited in the Guardianship case.

Mr. Nadesan marks a copy as P3.

Rs. 6,500/- was the proportionate amount due to that minor in respect of his share.

On or about 22-12-47 I deposited to the credit of both guardianship cases the sum of Rs. 11,500/- and Rs. 6,500/- respectively. After depositing those moneys I made arrangements with regard to the execution of the deed of transfer itself. I made arrangements for the execution of the transfer on 1st December. Once I made arrangements to take possession on 1st December. They said they were unable to get a house. Then I said I have made arrangements for the transfer on 31st December. The execution of the transfer was to be on the 30th. First of all in December they agreed to give vacant possession and then the transfer. That was on September 24th. At that time I obtained an ordinary writing. Subsequent to that in October 1947 this agreement was entered into. This agreement had to be executed before 31st December. After this agreement was signed I took the necessary steps and deposited certain moneys to the credit of the curatorship proceedings. In respect of the execution of the deed of transfer on 31st December I went to the defendant's house on 22nd December—that is the date on which the money was deposited—I went and told them that the Court sanction was obtained, all those things are finished, and they have to give vacant possession on 30th December. Thahir was not there. Umina Umma was there. I did not meet Thahir on the 22nd. I met him about 2 days thereafter and told him. I also informed the 3rd to 7th defendants. I met 3rd to 7th defendants on 22nd December when they were staying there.

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Examination.
—continued

On 29th December 1947 I received a letter from the 2nd defendant which I produce marked P4. She says that she will not be able to execute it now but that I will have to wait until such time as she obtains a house.

On the same day I received another letter from the 1st defendant dated 29th December 1947, which I produce marked P5. I did not receive the letter of 23rd December. The cheque for Rs. 2,500/- returned by him represented his share of the advance paid. He referred to a letter of the 23rd December which I did not receive.

These two defendants declined to execute the transfer. 3rd to 7th defendants were willing to execute the transfer. They told me so and they 10 subsequently executed the deeds.

In reply to P4 my Proctor wrote to the 2nd defendant on 30th December 1947, copy of which I produce marked P6.

I produce marked P7 letter dated 30th December 1947 which was written in reply to P5 to the 1st defendant. Along with that letter was returned the cheque for Rs. 2,500/-. Mr. Kandiah hands over the original of P7.

I produce marked P8 copy of a circular letter dated 30th December 1947 which I had sent to the 1st to 7th defendants. In reply to my letter P6 I received from the Proctor for the 2nd defendant a letter dated 31st December 20 1947 which I produce marked P9.

On 30th December 1947 I went to the premises to take possession. 1st and 2nd defendants declined to give possession and they also said they will not execute the transfer. The other defendants were willing to give possession and execute the transfer.

On 30th December 1947 the Deed of Transfer was taken to the house at about 4 o'clock. My Proctor Mr. Wilson accompanied me. I tendered the money. After depositing Rs. 11,500/- and Rs. 6,500/- and paying an advance of Rs. 12,500/- the difference was Rs. 61,500/-. I took a cheque for 30 Rs. 61,500/-

On 31st December 1st and 2nd defendants declined to execute the deed but the others were willing to sign. I wanted that all of them should sign the deed of agreement. I asked them to consider the matter a little longer.

Thereafter I went again on 2nd January 1948. On that day the 3rd to 7th defendants signed the deed but the 1st and 2nd defendants still declined to sign.

Thereafter on 6th February 1948 through my Proctor I wrote a letter to the 2nd defendant by registered post, copy of which I produce marked P10.

In reply to P10 I received from the 2nd defendant letter dated 16th February 1948 which I produce marked P11.

1st defendant did not send any letters thereafter.

Out of the sum of Rs. 61,500/- which was due I have brought into Court Rs. 60,000/-. I paid the 4th defendant a further sum of Rs. 1,500 - out of the consideration due. He took an advance of Rs. 1,500/- from me.

On the same day that I wrote to 2nd defendant letter P10 I also sent a letter by registered post to the 1st defendant, copy of which I produce marked P12, to which I received no reply.

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Examination.
—continued

10 I produce Deed No. 4118 which has been executed by the 3rd to 7th defendants on their own behalf and on behalf of the three minors marked P13.

On 31st December a draft of P13 was taken for defendants' signatures to Barnes House. It was taken to the house because of the Muslim Lady who did not want to come here.

The Agreement 4080 of 3rd October has been duly registered by me.

I produce marked P14 certified extract of encumbrances.

On 2nd January 1948, the date on which the 3rd to 7th defendants executed the deed of transfer in my favour, 1st defendant gifted his undivided share of the premises to the 8th to 12th defendants. 8th to 12th defendants
20 are Thahir's children.

Since 1947 1st and 2nd defendants and 8th to 12th defendants have been living in the same house. They have not given possession of the house to me. As a matter of fact 8th to 12th defendants have since filed a partition action against me which is pending till a decision in this case.

By reason of the 1st and 2nd defendants and 8th to 12th defendants being in possession of these premises I have suffered damages at the rate of Rs. 500/- a month. I want to break down that house and put up another house. The extent of this land is one acre. They pay taxes of Rs. 160/- a quarter. I do not know what the standard rent of the house is. Taxes
30 amount to Rs. 160/- a quarter. I did not try to find out what the rent is.

Cross-Examined by Mr. Kandiah :

I am a fairly wealthy man. I am worth over 10 lakhs. I carry on various businesses. I was a bookmaker for about 27 years. I do about 8 to 10 different businesses. I made some money on bookmaking which I put on the businesses. I started the business of bookmaking when I was about 18 or 19 years old. I studied at Zahira College. I left school at the age of about

A. C. Abdeen.
Cross-
Examination.

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen.
Cross-
Examination.
—continued

16 or 17. Immediately thereafter I began bookmaking. I wasn't a bookmaker last year or the year before last. I was a bookmaker last about 10 years ago. I was a public bookmaker about 1938 to 1940 in Bombay. I was a bookmaker in Colombo. Today I am not a bookmaker in Colombo. I was a bookmaker in Colombo last year or the year before last. I was not fined recently in a case. I did not try to take a cheque out of Ceylon. When I came from Cairo I had a draft for £ 1,000 written in India. I came to Colombo and when I was going away I had not declared it; it was declared in my passport. I was fined Rs. 25,000/- by the Customs. I did not pay the fine. I refused to pay the fine. I have not yet paid the fine. That is about 10 3 years ago. The Customs department did not take any steps against me thereafter. I have given evidence in this Court. I remember the case before Mr. H. A. De Silva in which judgment was given against me. I wanted that judgment set aside. I gave evidence. The judge did not believe me. The judgment was not vacated.

I went to Mecca in 1947, about August or September when we usually go. At the time of this agreement of 3rd October 1947 I was in Ceylon. I cannot remember when I left Ceylon for Mecca. I went twice to Mecca. I signed the agreement on 3rd October. I was here on 3rd October. I cannot remember whether I went to Mecca before or after I signed this agreement. 20 I was out of the Island for about a month. I went by plane. I was seriously ill when I was in Mecca. Doctors had to attend on me. I was ill on my return. I wasn't ill for a long time. I was ill for about 15 to 20 days. I cannot remember dates, but I know I was sick and unable to go about. 1st defendant's mother did not come and see me when I was sick.

I went to the house. In the latter part of December 1947 I was well enough to go about. The Mecca season is in the middle of September. In 1947 the Mecca season was before October. In some years the months are different. It varies with each year. According to this year's festival 2 or 3 months thereafter the season starts. 30

Q.—I have instructions that you left for Mecca after the deed was signed.

A.—I cannot say definitely. If you give me time I will tell you. The passport will show that.

When the application was made to sell the minor's share I entrusted matters to my lawyers. I did not come to Court. Sometimes I went to the Proctor's office. At the time the application was made I went to the Proctor's office. Sometimes I went and sometimes I telephoned him. I was in a position to go to my Proctor's office about the time the application was made—between 15th and 30th December 1947. If I had heavy work I 40 telephoned the Proctor. Sometimes I went there. Dr. Sivapragasam attended on me when I was sick. By reference to my passport I can say when I was

confined to my room. I can bring my passport. I returned a sick man when I returned from the first trip to Mecca. The second trip was in 1949. The first trip was in 1947. I was confined to my room for about 20 days. I instructed my Proctor in all these matters. I used to go to the Proctor's office and sit down and give instructions myself. I used to go and tell my lawyer I got a letter like this and ask him to reply.

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Cross-
Examination.
--continued

Agreement P1 was entered into on 3rd October 1947. At that time all the defendants were in occupation of the house. All the people stayed in that house except Ismail and Hafir on 3rd October 1947. They were not
10 living in the house on 3rd October 1947 but they came there every day because their mother was there. One man was staying in Colpetty and the other man was living at Bambalapitiya, on the date of the agreement; the rest were in the house. I am sure of this position.

In October 1947 there was difficulty in obtaining accommodation.

Q.—The parties there stated that they might find difficulty in finding a house.?

A.—At the time the agreement was written the difficulty of getting a house was not considered.

I gave the advance of Rs. 12,500/- to find a house.

20 They said they wanted an advance to find a house. I was prepared to take a transfer of this house only when there was vacant possession. According to the agreement they have to give vacant possession. On 3rd October and thereafter there was a house problem. I do not know that for 6 or 7 families to get houses at that time was extremely difficult. If they had money they can get a house. 1st defendant wrote a letter to me stating that he was finding it difficult to get a house. That was after he took the advance. I replied to that letter. I gave his letter to my lawyers and asked them to reply to it. 1st defendant stated he was not able to get a house. I gave that letter to my
30 lawyer. About that time 1st defendant and his mother did not come to see me in my house. 1st defendant did not write a letter dated 23rd December; I got a letter on the 29th. 1st defendant addressed me as his " dear brother in law."

My brother Mazahir is married to 1st defendant's sister. (Shown P5) In P5 1st defendant refers to a letter of 23rd December 1947. I did not get a letter dated 23rd December. I told my Proctor I did not receive a letter dated 23rd December. About 29th December relations between the 1st defendant and me were quite all right. He was appealing to me. In this letter he does not say anything about difficulty in getting a house. I stated that he wrote to me a letter in which he stated that he found difficulty in
40 getting a house; this is the only letter. This is the letter I referred to. Both parties wrote two letters. I got only one letter. What I said earlier, that I got

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Cross-
Examination.
—continued

a letter saying it is difficult to get a house, is wrong. I did not get such a letter. It was put to me whether I got a letter in which he said it was difficult to get a house and I said yes. That is a mistake. I got only this letter. In this letter he says he wrote me a letter of the 23rd. About 23rd December 1st defendant did not see me. I used to go there. He did not come to me. I used to go to their house. My brother was staying there. In the month of December I have seen him in the house. I must have seen the 1st defendant earlier in December, about the 8th or the 10th; I cannot be definite. I did not see him in the latter part of December.

Money was deposited in Court to the credit of the minors. That 10 money I sent by cheque. I went myself. I cannot give the date definitely, it was between the 20th and 25th after the sanction of Court was obtained. I went to see the Proctor when I took the cheques to be deposited. Mr. Wilson does his duty well. I gave the cheque to him. He must have deposited it. I do not know when the cheque was deposited. I do not know how many days after I saw him the money was deposited. I was not in Court on the day sanction was obtained. Sanction was obtained about the 22nd or 23rd December.

I have been buying a number of properties. I have not bought any minor's share. In this particular case I knew minors' shares were involved 20 and that sanction of Court was necessary. I do not know that Courts give a lot of thought to applications for sale of property of minors. If the Court feels that the price offered is less than what it ought to be the Court should not sanction the sale. In point of fact, when application is made a lot of material is placed before Court to satisfy it that the price is fair. I have no experience of these applications. Sometimes the Court might not sanction the price and want a higher price if the land is worth more. If the Court is satisfied that the price should be higher the Court will not sanction the sale.

Four of the defendants are my brothers-in-law. They are four 30 brothers who had a sister who married my brother. I call them brothers-in-law. I know Hafeel. Everybody is friendly with me. Hafeel was not instrumental in negotiating this sale. 1st defendant negotiated this sale. Hafeel is in Court today. He did not come with me. Just now when I was standing there he was with me and talking to me. He did not come with me. 1st defendant brought about this transaction. I did not give Hafeel Rs. 5,000/- in excess of the share I gave to the others. I did not give Hafeel anything in excess of what I gave the others.

When permission to sell the minors' shares was given my lawyer told me. It was somewhere in December. I do not know when the minors' shares were transferred to me. I do not know whether the minors' shares 40 were not transferred to me on 2nd January. Up to date I do not know whether the property has been transferred to me or not. I left that with Mr. John Wilson.

Q.—Did you suggest to the mother of the 1st defendant that the defendant could return the advance ?

A.—I did not discuss with his mother.

They did not come and see me. It is false that 1st defendant's mother came alone to see me.

(Shown P7). My Proctor wrote this letter to the 1st defendant. It has no signature. All I told my Proctor was that "I want to buy this property. Do everything". I left to my Proctor to do everything for the purchase of this property. I was only concerned with the price. I fixed the price and thereafter I handed matters to him. After the letter of 29th December I entrusted matters entirely to the Proctor. Before that only the price was fixed. After the price was fixed up with the defendants I told the lawyer to make the agreement. After I got the letter from him on the 29th I entrusted matters to the hands of the lawyer. Prior to that I went to their house and spoke to them. There was a date fixed up for the transfer. Thereafter there was no talk. (Shown P8.) This is written to a number of people. All the people are addressed as of No. 43, Barnes Place, Colombo. Ismail and Hafeel used to come there. Except these two all the others were living there.

20 On the 30th some of the people were out of the house. My brother was staying there. He left the house. After the 31st December 1947, Thahir and the gentleman in Court who is married to one of the sisters was in the house. All the people staying there now were there in December except my brother and his wife and Ismail and Hafeel and their families. After 31st December my brother and family left. There was another brother staying there. I do not know whether the mother and that brother are staying there. I do not know exactly who stays there because I do not go there. I last went there in 1947. After I received the letter of 29th December I did not go there. After January 1948, I have not been there. As to who is staying 30 there after January 1948 I do not know personally. I did not go there thereafter.

On 30th December all the people were still there. Except Thahir the others did not tell me that they had difficulty in finding houses.

I was not in Court when the application was made on 18th December. P8 says that on 18th December the parties present in the District Court of Colombo were informed that the transfer will be executed tomorrow. I went with Mr. Wilson on the 31st December. The lady refused to sign. Between the 18th December and the 31st December I went to that house. I went on the 30th also. I went again on 2nd January.

40

Interval.

Sgd. N. SINNETHAMBY,
D. J.

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Cross-
Examination.
—continued

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Cross-
Examination.
---continued

24-7-51.

After Lunch.

A. C. ABDEEN,affirmed :

(Shown P8.) In this letter of the 30th December my Proctor says purchaser will agree to possession being given at the time of purchase. I made arrangements to buy the land and soon after I got a letter from Thahir I entrusted the matter entirely to the Proctor. I received the reply P9 from the 2nd defendant. I gave this letter to my lawyer. I do not know whether he did not reply to it. The lady takes up the position here that 7 days notice was not given to her. Before the agreement of 3-10-47 was signed by all the parties I discussed the terms with the parties. I myself discussed it with the 1st defendant only. Defendants had to give vacant possession on the 30th and they had to get premises for themselves before that date. I do not know whether it was difficult for them to get a house. They wanted the money in advance to take a house for themselves. They were trying to sell this house for about two years and wanted something like Rs. 70,000/- or 80,000/-. Mr. Thahir came and appealed to me to buy this property without letting it go out to an outsider. I gave them Rs. 92,000/-. I signed the agreement myself. The agreement was signed in the Barnes Place house. I signed it there and all the parties signed it there. I read the agreement before it was signed. 10 20

(Clause 7 put to witness.) All these clauses were read to me. Clause 7 also must have been read to me. I did not know that Clause was inserted there. There is also a clause that if the vendor fails to execute the deed of transfer the vendor shall repay the deposit of Rs. 12,500/- with interest and pay to the purchaser Rs. 15,000/- as liquidated damages and not as a penalty. I remember that clause. I understood it. (Counsel reads clause 9) I knew that clause also. According to clause 9 in the event of my failing to buy the property I had to pay them Rs. 15,000/- as damages. Whatever is there is there. The arrangements earlier made was that vacant possession will be given on 1-12-47, that is correct. All the defendants agreed to give possession on that day. I cannot say when that first arrangement took place whether it was after or before the agreement of 3rd October. Then they said they would give possession on the 31st December. I could not get vacant possession on that day. I would not have minded giving them an extension of time. Except 1st and 2nd defendants the others were willing to give it in time. Those other people had not rented out a house to give it by the 31st December. I cannot say whether P5 came under registered post. 1st defendant did not come to see me in my house after the agreement. My passport will show when I returned from Mecca. I do not know what the annual value is of these premises. The tax is Rs. 160/- a quarter. That was at the time I purchased it. I do not know the annual value in 1941 and 1942. I do not know whether this house comes under the Rent Control Ordinance. I do not know whether the various occupants there pay rates. I do not know 30 40

whether in 1946 1st defendant was paying Rs. 10/- as taxes. My idea in buying this land was to break it down and put up a building. I did not buy a share, I bought the whole land.

No. 10.
Plaintiff's
Evidence.
A. C. Abdeen
Cross-
Examination.
—continued

Re-examined :

Even after I failed to get vacant possession I still wanted to buy the property and as for possession I was willing to give time. I remember permission to deposit the minor's money was obtained and that money was deposited. I did not thereafter see 1st and 2nd defendant about the 30th or 31st December. Soon after permission was obtained Mr. Wilson telephoned
10 to me and that same evening I saw them that was on the 22nd or the 23rd. I went and told them that permission had already been obtained and asked them to sign the deed. The deed was to be signed on the 31st December and they had to leave on the 30th. 1st defendant was not there and 2nd defendant refused to sign on that day. He refused to join in the deed. After the 22nd or 23rd I did not see the 1st defendant. I used to see him but not in this connection.

A. C. Abdeen
Re-Examination.

Sgd. N. SINNETHAMBY,
D. J.

Mr. Nadesan closes his case reading P1 to P14.

No. 11.

Defendant's Evidence.

No. 11.
Defendant's
Evidence.

20

Mr. Kandiah calls :

A. C. M. THAHIR, affirmed :

31. Landed Proprietor, Barnes Place. 1/8th share of these premises Barnes House belonged to me in October 1947. There were 8 children in our family and each got 1/8th. I was occupying a part of the premises with my family. In 1946 I was occupying the same part I occupy today. Prior to that the same and I paid the rates and taxes for that portion. I produce D1 receipt dated 31-10-46 for Rs. 10/- being taxes paid by me. Prior
30 to that also I paid Rs. 10/- as the tax. The house was not divided by the Municipality we paid 1/8 share of the rates. That came to Rs. 10. The rates in 1946 was Rs. 80/- and thereafter the rate was increased. The annual value was Rs. 1,600/-. I was paying after that Rs. 18.75 as taxes. I produce P2 receipt dated 8-5-51 for Rs. 18.75 and 1.85 warrant costs. I remember entering into this agreement. After that I was not able to get a house to go into. I was not given notice by the plaintiff or his Proctor before 31st December requiring me to give vacant possession on the 30th December. No draft deeds were shown to me or any money tendered to me at any time. I wrote letter dated 29th December 1947 P5. In that letter I referred to a letter
40 of 23rd December I wrote that letter and posted it. I have a certificate of

A. C. M. Thahir
Examination

No. 11.
Defendant's
Evidence.
A. C. M. Thahir
Examination.
—continued

posting for it. I produce it P3 addressed to Mr. A. C. Abdeen No. 34, 5th Lane, Colpetty. I have a copy of that letter which I produce P4 dated 23-12-47. This letter would have normally reached him on the 24th. In this letter I say I went to see him several times. I went to his office. I went to his house also after he returned from Mecca which was about the end of November. When people returned from Mecca it is customary to go and see them. I did not receive a reply to that letter. I then wrote P5 and sent it by registered post and I got reply from his Proctor. With P5 I sent a cheque for Rs. 2,500/-. I had that money with me. That cheque was returned to me. Certain parties were in occupation of parts in this house and 10 in 1947 December they were the same people there who were there in October 1947. After December 1947 my last sister who has married a brother of the plaintiff left the place. All the others who were there in December 1947 are still there and in addition there are others also. Habib and Ismail collected the rents from them and they forwarded the rent to the plaintiff. I have not collected the rent from anybody. Even my father occupied the same portion I occupy now. By the agreement I agreed to sell the house only when vacant possession was available but we have not been able to vacate the house before December 1947. After October 1947 it was not easy to get houses in Colombo. I tried every- 20 where to get a house but failed. The other tenants also tried but they were not able to get houses.

Cross-Examined by Mr. Suppramaniam :

Nil.

Cross-Examined by Mr. Nadesan :

A. C. M. Thahir
- Cross-
Examination.

P5 was sent under registered post with the cheque. After I entered into the agreement I attempted to get a house. I entered into the agreement in October 1947. I knew of the difficulties in getting houses. I got an advance from the plaintiff to make payment and get a house. I agreed to sell not because I was getting a reasonable price, we had an offer 30 of over a lakh and a quarter from another man but owing to this vacant possession question we preferred to sell to the plaintiff because we could have got more time from him. At the end of November I knew I will not be able to find another house and I made up my mind to continue to stay there. Till December 31st I was trying to get a house. If I had got a house at the early part of December I would have transferred it. By the 23rd of December I knew that getting a house was impossible and after that I intended getting time. If he had given me time I would have transferred the land. He did not give time. On the 29th December I made up my mind not to transfer it because I had no house. I did not tell the plaintiff that. I did not write 40 to him. On the 29th I wrote a letter and enclosed a cheque for Rs. 2,500/- P5 to the plaintiff. I wrote to him that I was returning the money to get out of it. I was still willing to execute the transfer. I did not execute it because I could not go out of the place. The agreement says we had to give possession

one day before the transfer. I was unable to give possession. I could not execute the transfer. Plaintiff asked me to execute it. I declined to do so. That is because I had no other house. After I wrote this letter on the 29th I declined to give the transfer. On the 30th I did not meet plaintiff. I did not decline to anyone to execute the transfer on the 30th. On the 31st plaintiff was not in his bungalow. Plaintiff did not meet me on the 31st. I never saw him.

No. 11.
Defendant's
Evidence.
A. C. M. Thahir
Cross-
Examination
—continued

Sgd. N. SINNETHAMBY,
D. J.

10 Mr. Kandiah closes his case.

Mr. Suppramaniam calls no evidence.

Mr. Rustomjee calls no evidence.

No. 12

Addresses to Court.

No. 12.
Addresses to
Court.

Mr. Kandiah address.

The word " assignees " is omitted in the agreement therefore assignees not bound. In any event they cannot be made parties to this action. If there is an agreement between two parties to transfer a land before a certain date it can be transferred to a 3rd party after that date. Whoever buys it will get absolute title even if there is notice of registration. That is on the basis that the agreement is invalid—was not acted upon. The purchaser will find there is an agreement to transfer by a certain date, no transfer has taken place and he buys it. That would give him good title. In such cases remedy of specific performance is not available.

Counsel says he will address the Court first on issue 7.

Reads clause 7 of the agreement. The executor or administrator of the purchaser cannot ask for specific performance in the event of the purchaser dying, according to this clause. Therefore it was in contemplation of the parties that there were certain contingencies when specific performance will not be asked. Administrator and assigns have been used in connection with the purchaser in the agreement. If not for clause 7 whatever was available to the purchaser would be available to the administrators and executors but by issue 7 that is not available to the executor and administrator because the moment the man died the agreement would have been cancelled. Reads clauses 8 and 9. Intention is looked into only if the document is not clear. If the defendants failed to execute the transfer the purchaser could ask for the return of the money and for damages and nothing else. Then the agreement is determined so far as the agreement to transfer

is concerned. If the vendors refused to execute by the 31st the purchaser cannot ask for specific performance but only for the return of the money and for damages. Cites 2 N. L. R. 270. 17 N. L. R. 238, 39 N. L. R. 255.

Sgd. N. SINNETHAMBY
D. J.

Further hearing on the 9th October.

9-10-51.

Counsel as before, except that Mr. Kandiah does not appear.

Mr. Rustomjee continues Mr. Kandiah's address :

Refers to Clauses 7, 8 and 9 of the agreement. Refers to the 39 N.L.R. 10 case. That case gives three classes (1) where damages are agreed upon as security for the performance of a principal obligation, in such a case plaintiff would be entitled to ask for specific performance (2) where parties had intended to pay an amount in excess of the breach of contract then plaintiff would be entitled to ask for specific performance, (3) where payment of damages was intended to be a substitute for the purpose of the act. To find out the intention evidence will have to be led and looked into. Intention is gathered from the documents and attendant circumstances at the time of the execution of the deed. Para 9 of the agreement says even if purchaser refused to complete the transaction there was to be no question of 20 specific performance but only a question of damages. Reads the 39 N. L. R. case pages 255, 256 last para. The facts of this case come under the 3rd class in the 39 N. L. R. case. In this case parties have made it clear that the only remedy to the injured party is to claim damages. The 39 N. L. R. case followed the case in 2 N. L. R. 270. Reads page 271. Court will hold that a clause of that nature was alternative obligation and not accessory to the principal obligation. By paras 7, 8 and 9 parties intended if there was a failure by either party to complete the transactions then the only remedy available was an action for damages. Refers to para 7 in support of his contention that it was intended as a substitute and not as accessory. Cites 30 *Fry on Specific Performance*, 5th Ed. 58. Had plaintiff complied with the conditions of the agreement Refers to para 3 clause 8. No evidence to show that this transfer was tendered for execution at the office of plaintiff's Proctor on the contrary there is a circular letter P8 of 30-12-47 where defendants were informed that the transfer will be tendered to them at their house for signature. Therefore plaintiff has not complied with that clause of the agreement. Secondly there is the question of tender. Plaintiff says tender was by cheque. That is not a valid tender. Counsel now says he does not press that last point. Thirdly according to para 6 purchaser had to give 7 days notice. That was to enable the defendants to give vacant possession. Nothing 40 to show that by the 25th or 27th defendants were unwilling to execute the transfer. 7 days notice had to be given to complete the sale and not only to give vacant possession.

So far as defendants 8th to 12th are concerned no allegation made of fraud. They are the children of the 1st defendant. Subsequent to the 31st December on 2nd January, 1st defendant gifted the property to 8th to 12th defendants. Date for performance of the agreement had passed—no notice necessary of an existing contract. If it was a deed of gift plaintiff should have made allegations of fraud or collusion. Transfer was after the 21st December. They are not bound by section 93 of the Trust Ordinance. The word acquiring in the section would include a gift. On this point counsel admits authorities deal with only sales. Cites 19 N. L. R. at 286. 10 Opinion expressed in 2 N. L. R. case obiter. The transfer was two days after the 31st December. Submits 8th to 12th defendants cannot have an order for specific performance against them.

Next question is misjoinder of parties and causes of action. There is a misjoinder as a result of the plaintiff joining the 8th to 12th defendants. So far as 8th to 12th defendants are concerned cause of action does not arise on the agreement between plaintiff and 1st to 7th defendants. 8th to 12th defendants should be dismissed on the question of misjoinder.

Mr. Suppramaniam addresses :

Has the vendor the right to claim specific performance. Cites *Fry on Specific Performance*, 6th Ed. at page 33 section 72. These parties have not thought of only the rights of the purchaser in this case but that of the vendor also. If parties put their rights and obligations in the form of a contract those which have to be implied by law in the absence of a contract ceases. In addition to the right for specific performance they could have claimed damages. The cases cited by Mr. Rustomjee are cases where only the remedy for one side is provided for. Parties having thought of both sides here the presumption is stronger than if they thought of only one side. They have agreed on certain damages and that will apply in substitution to what would be available to them in law in the absence of such agreement.

30 Mr. Nadesan replies :

The only matter which arises for consideration is the question whether the stipulation with regard to liquidated damages is accessory to the contract of sale. On the minor point raised on the question of tender counsel reads P4 and P5.

Did 1st and 2nd defendants expressly repudiate the contract. There is also P6. This shows a repudiation of the contract by these parties. It is not their case they are willing to carry it out. Therefore no question of tender arises. But there was tender in their own home some of them being ladies.

40 With regard to the 7 days notice. There is plaintiff's evidence that notice was given on the 22nd that is 7 days before. It was not notice in writing.

No. 12
Addresses to
Court.
—continued

Being relations plaintiff went and informed them. That is why on the 29th they started writing to plaintiff. Apart from that that is something to enable parties to give vacant possession and had nothing to do with the execution of the deed—because it says to enable them to give vacant possession.

On the question whether 8th to 12th defendants are liable. The 19 N. L. R. case came up before the Trust Ordinance but subsequent to that there is the case in 32 N. L. R. 81 which considered the 19 N. L. R. case. It was held there that registration of an agreement to sell land is notice under section 93. Plaintiff could not plead fraud on the part of the children because they are minors and one could not say the children colluded with the father. 10 The fact that the contract has been repudiated does not mean it ceased to exist. The only way it can cease to be in existence is by cancellation of the bond. There should be a cancellation of the contract or it must be prescribed. If it ceased to exist so far as third parties are concerned then specific performance becomes impossible withstanding section 93 if the transfer is executed a day after even. That is what it comes to. If a contract has been repudiated by non performance it cannot be said that then the contract has ceased to exist. Otherwise parties cannot sue on a contract. A term of a contract may have been broken and then you come into court and sue on it because the contract still exists. One cannot sue on something which is non- 20 existent. Can one refer to a contract which has been broken by a party as a contract which has ceased to exist. For a contract to cease to exist it must be stated in it that after a certain length of time it is to become null and void and then it ceases to exist after that date. Non existence can be brought about by cancellation of the contract or something else in the terms of the contract from which one can say it has now ceased to exist. That is totally different from saying that because a party has not fulfilled the terms of the contract before a specific date it has ceased to exist. Justice Fernando's observation in the case cited is obiter. Section 93 refers to an existing contract. It is not the same thing as a contract in respect of which a breach has 30 taken place. That section contemplates the fact that a breach has taken place. Is this a contract in which specific performance can be enforced. It is. If it is not an existing contract it cannot be enforced. It is because it is existing that one can sue upon it. An existing contract is one which has not been cancelled or revoked and is effective in law from which rights flow. Where there is a repudiation of the contract it does not cease to exist.

Luncheon Interval.

Sgd. N. SINNETHAMBY,
D. J.

9-10-51

40

After Lunch.

Mr. Nadesan continues his address—

The question of specific performance can only arise after the date has expired or subsequent to a breach. One has to wait till such date and if the man does not transfer the property you can come in and say so. Section 93 is applicable to a case where time has been fixed. A contract will cease to exist only if there is something in the nature of a cancellation of the contract or both parties enter into a subsequent agreement by which the contract is discharged. We come into Court and ask for specific performance of the contract at the expiry of the period of time. Supposing there is an agreement between A and B for the transfer of a particular property on a particular date.

10 A does not transfer the property. Thereafter B files an action for specific performance of the contract. In that context can one say the contract does not exist.?

In the 32 N. L. R. case the facts are similar to the facts of this case. In that case at p. 84 it was considered that one of the classes of cases contemplated by Section 93 of the Trust Ordinance is the class where there is an agreement to sell land. He submits that in this very case the question of the transfer to a third party—the transferee does not get any larger rights than the transferor himself would have had if, in point of fact the transferee had notice of a prior registration in respect of a contract. It is one of two

20 things: if the Court is constrained to hold that Section 93 does not contemplate the instance of a person agreeing to sell property before a particular date; if A agrees to sell property on a particular date and if he makes default in that; if that is not a class of contract contemplated by Section 93, the position is clear. If it is, specific performance of a contract like that can arise only subsequent to that date. If it arises subsequent to that date the question whether it is open to a party to say that a contract is not in existence because one party to the contract is not in it is not warranted. There must be actual cancellation or something tantamount to abandonment of the contract. In other words the contract must cease to exist. If it is open to one

30 to bring an action against his vendor for specific performance of a particular contract, that presupposes the existence of a contract. It is on that basis that he asks for specific performance.

The reasoning in the 39 N. L. R. case seems to be purely on a question of fact.

Submits, if in point of fact one can bring an action for specific performance against A and under the authority of 32 N. L. R. case the other party shall hold the property for the benefit of the first party, he is obliged to make the other party a party to the action for the purpose of getting an effectual decree under that Section. That was not considered in the 32 N. L. R.

40 Case. This question came up when it was sought to add these parties. Objection of misjoinder was taken and order was made on 31-5-49 when the whole question was considered.

On the question of specific performance he cites 1934 S.A. *Law Journal* Vol. 51 at pp 347 to 374. The whole question is dealt with exhaustively

(page 354). “The right of a plaintiff to ask for specific performance of a contract where defendant is in a position to do so is beyond all doubt.

We have a right to come and ask for specific performance in respect of a contract. Unless there is the question of impossibility of performing it or unless the court holds that the justice of the case demands there should be damages only and not a transfer, ordinarily the basis on which the plaintiff comes into Court will be recognised by Courts. At p. 368 of 51 S. A. L. J. it says “Under our law the option to demand either specific performance or damages is left to the plaintiff.” The position is that under our law the option to demand either specific performance or damages is with the plaintiff. 10 It is for plaintiff in an action of this nature to elect whether he would have damages or ask for specific performance. It would be manifestly unfair for the defendant to elect whether he would transfer or pay damages because he is the person who will be seeking to derive an advantage from his breach of the contract. If there is a document under which there is a provision that a person shall sell property on a particular date failing which he shall pay a said sum by way of damages, the election as to whether he will ask for specific performance or claim damages is with the plaintiff under our law. If it is sought to be argued that the defendant himself can elect then, of course, they must refer to the terms of the agreement which gives that 20 right not to the plaintiff but to the defendant. There is nothing to prevent his putting down in the document so much by way of liquidated damages. If the option is given to the defendant on a plain construction of the words of the document it must appear unambiguously that the primary intention of the parties was that the defendant has the right to elect whether he is going to transfer the property or not.

Mr. Nadesan comments on the 2 N. L. R. case at p 274. They have not considered the general law, that is, that the option could be on the part of the person not guilty of the breach of the contract. Submits that the facts of this case do not correspond to the facts of the 2 N. L. R. case. 30

The fact in the 39 N. L. R. case are stressed at p. 256 and referred to again at p. 258.

The case that really comes close to this so far as the facts are concerned is the case reported in 17 N. L. R. at p. 238. That was a case where there was a stipulation with regard to the payment of Rs. 450/- as damages. At p. 241 the position was considered.

So far as the present agreement is concerned it is like any other agreement to sell. It provides in the event of a breach a certain sum to be payable by way of liquidated damages by the seller as well as the purchaser. Even if no sum were mentioned, ordinarily, under the law, the party has 40 the right to claim specific performance or damages.

Submits. if there is a breach of contract there are two remedies, both alternative, specific performance or damages.

No. 12.
Addresses to
Court.
—continued

Cites *Wessels on Contract Vol. 2. p. 1336 -Specific Performance and Damages.*

Wessels On Contract Vol. 2 p. 899 onwards particularly pp. 902/3.

In this case this is an agreement entered into by a number of persons who are co-owners in respect of this property. Apparently Mr. Abdeen was not willing to purchase undivided shares. He wanted all the shares to be transferred to him. That is why he entered into the agreement with these persons in respect of the entirety of the property. The agreement goes on to provide that if default is made damages shall be paid. In this case the facts are that except for 1st and 2nd defendants all the others have, in point of fact, transferred their shares to the defendant. The only persons who are standing out are the 1st and 2nd defendants. Notwithstanding the fact that Mr. Abdeen contracted with these parties for the entirety of the property he is reduced to the position of being the owner of certain undivided shares of this property, two of the shares being with the 1st and 2nd defendants. He submits that so far as Clause 8 is concerned it does not cover this case at all. It contemplates a default by the vendor refusing to execute the transfer. He submits that it does not catch up the case of one or two making default. This contemplates a case where all the vendors make default. There is no clause which covers default by two of the vendors not signing the deed when all the others have signed the deed and executed the transfer. Clause 8 on which they rely with regard to something being provided by way of liquidated damages is a clause inapplicable to the facts of this case. If ever there was a case of specific performance, judging from the intention of the parties, this is it. He says that Clause 8 contemplates failure by all the vendors and not failure by one or two of the vendors. He submits that the general law will apply and plaintiff will be entitled to ask for specific performance.

30

Sgd. N. SINNETHAMBY,
D. J.

Judgment on 1-11-51.

No. 13.

Judgment of the District Court.

JUDGMENT.

No. 13.
Judgment of the
District Court.
1.11.51

Plaintiff instituted this action for specific performance of the agreement P1 bearing No. 4080 of 3rd October 1947. By that agreement the 1st to 7th defendants agreed to sell to plaintiff the premises bearing No. 43 Barnes Place for a sum of Rs. 92,000-. An advance of Rs. 12,500 was paid and the balance was to be paid on the execution of the deed.

No. 13.
 Judgment of the
 District Court.
 1.11.51
 --continued

Two of the owners of the property are minors. Application was made in Guardianship case 4603 for the sale of the minor, Abdul Carim Abdul Cader's share to plaintiff for Rs. 11,500/- and was allowed. *Vide* P2. Similarly an application was made for the transfer of the minor, Zainul Abdeen's share to plaintiff for Rs. 6,000/- in Curatorship case No. 4604, and that application too was allowed. (P3). On 2nd December 1947 these two sums of Rs. 11,500/- and Rs. 6,000/- respectively were deposited in Court and the plaintiff was entitled to a transfer from the minors.

The agreement No. 4080 required 1st to 7th defendants to transfer their 151/192 shares of the property, the balance shares being in the two minors 10 already referred to. There was no difficulty with regard to the transfer of the minors' shares or with regard to the transfer of the shares of the 3rd, 4th, 5th, 6th and 7th defendants. They have, in point of fact, executed a deed of transfer of their shares. It is only 1st and 2nd defendants who have failed to do so and it is against them that relief is sought in this action.

In December 1947 after depositing the money to the credit of the curatorship cases plaintiff made arrangements for the execution of the transfer in his favour. 1st and 2nd defendants, however, were unable to get alternative accommodation and sought to evade their liabilities under the agreement. In terms of the agreement they had to give vacant possession and execute the 20 transfer. When plaintiff went to the defendants' house on the 22nd December Thahr, the 1st defendant, was not there; Moomina Umma was there. On that day, plaintiff says, he told them about the transfer. In the meantime, however, on the 23rd December 1st defendant sent letter D4 to the plaintiff. Plaintiff denies the receipt of this letter but I am satisfied that the letter was, in point of fact, posted. D3 is the certificate of posting in respect of it. That letter merely seeks the advise of the plaintiff, who is related to the defendants, with regard to the "delicate position" in which the defendants were by reason of the fact that they were unable to get another house. They ask for advise in that letter. This the 1st defendant followed up with another letter 30 (D5) dated 29th December which plaintiff admits. This letter refers to the early letter of the 23rd and with it the 1st defendant sends a cheque for Rs. 2,500/- being his share of the advance paid and asks that he be relieved of the obligations created by P1. D5 is a copy of P5. On receipt of this letter plaintiff saw his Proctor who sent letters P6 and P7 to 1st and 2nd defendants telling them that the plaintiff insisted on his rights. There was further correspondence between them and eventually 1st and 2nd defendants failed to execute the deed of transfer.

The other defendants were willing to execute the deed of transfer on the 30th December which was the day fixed by the plaintiff's proctor. But, 40 inasmuch as 1st and 2nd defendants have declined to give possession or to execute the deed of transfer, the matter was put off for 2nd January. On that day 3rd to 7th defendants signed the deed but 1st and 2nd defendants still refused. Further correspondence ensued and as the 1st and 2nd defendants maintained the same attitude plaintiff came into Court.

The deed executed by 3rd to 7th defendants was produced (P13) bearing No. 4118.

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On the 2nd January, the date on which P13 was executed, 1st defendant gifted by deed 1504 his undivided share to his children 8th, 9th, 10th, 11th and 12th defendants who are represented by their guardian the 13th defendant. With regard to these facts there is hardly any dispute.

The document P1 required 7 days notice to be given before the execution in order that vacant possession may be given. That notice, it is alleged, had not been given. 1st and 2nd defendants maintained that they
10 were entitled to refuse to give vacant possession because they could not get another house.

The defence offered turned mainly on the question as to whether plaintiff could insist upon specific performance, or whether he should be satisfied with the alternative stipulation with regard to damages contained in the agreement P1. It was also suggested that the transferees upon Deed 1504 were not bound by the agreement to sell entered into between their father, the 1st defendant, and the plaintiff.

On the question as to whether P1 could be specifically enforced or whether the sum mentioned by way of damages can be substituted for the
20 performance of the act, one has to consider the terms of the document itself. The answer to the question depends on the circumstances of this particular case. In two cases reported in 2 N. L. R. at p. 270 and 39 N. L. R. at p. 255 the Supreme Court, on a consideration of the circumstances of those cases, came to the conclusion that specific performance could not be enforced as the amount stipulated by way of damages was intended to be a substitute for the performance of the act of transfer. In another case reported in 17 N. L. R. at p. 238, on a consideration of the facts, the Supreme Court held that it was a case in which plaintiffs were entitled to enforce specific performance. There
30 were special facts established in the 2 N. L. R. case and the 39 N. L. R. case which compelled the Court to come to the conclusion that the agreement provided for substitute payment in place of performance. Now, in the present case provision is made for the sale to be completed before a certain date, namely, 31st December 1947. It also provides for vacant possession to be given to the plaintiff (para 6). The requirement with regard to notice, it is specifically stated in the said paragraph, is to enable the vendors to give the purchaser vacant possession. Failure to give that notice will not entitle the defendants to refuse to execute the deed, though, perhaps, they would be justified in refusing to deliver possession for a period of 7 days. Clause 7 then provides for what is to happen in the event of the purchaser dying prior to the
40 31st December; namely, the agreement, in that event, will stand cancelled and the vendors will pay the deposit of Rs. 12,500/- to the purchaser's legal representatives. In the event of the purchaser's being ready and willing to complete the sale and the vendors failing and refusing to do so, it is provided that they shall pay a sum of Rs. 15,000/- by way of liquidated damages and

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--continued

that they shall also return the advance of Rs. 12,500/- with interest. This Rs. 15,000/- is to be regarded as liquidated damages and not as a penalty.

It was contended that the existence of the provision to pay interest and the provision with regard to what was to happen in the event of purchaser's death indicated that the damages was a substitute for the performance of the act. I am unable to agree with that contention. The purchaser merely safeguarded his heirs from being called upon to make so large a payment after his death, and with regard to interest that is a provision which was introduced in order to give him, by way of damages, the interest he would otherwise have obtained upon the advance of Rs. 12,500/-. The 10 fact that plaintiff sought to secure vacant possession and the fact that under the terms of the agreement there was provision for the minors' shares to be sold or caused to be sold by the vendors show that the intention of the parties was to perform the act of transfer and to provide for damages in the event of its becoming impossible to do so. The payment of damages cannot in this case be regarded as a substitute for the performance of the act. In the 39 N. L. R. case at p. 257 the learned Judge referred to *Fry on Specific Performance* and stated that contracts of this kind are divided into three classes: first where the sum mentioned is strictly a penalty and intended to secure performance, 2nd, where a sum named is to be paid as liquidated damages and, 3rd, where 20 the sum named is to be substituted for the performance. Under the first two heads the Court will enforce specific performance.

It seems to me that in the present case the sum mentioned is specifically stated to be liquidated damages and was intended to be the damages which would become payable upon breach of the contract. There is nothing in the agreement which would indicate any other intention. It was also contended that the minor transferees from the 1st defendant, namely 8th to 12th defendants, were not bound by this agreement. They obtained their transfer on the 2nd January, 2 days after the last date on which the agreement P1 had to be performed. It was not even a transfer for valuable consideration. It 30 is difficult to accede to the proposition that by mere voluntary transfer a person who has entered into an agreement to transfer can validly evade his obligations. Even if the transfer were for valuable consideration the transferees would, by reason of the provisions of section 93 of the Trust Ordinance, be bound by the agreement to transfer. This agreement P1 has been duly registered and in terms of Section 93 the person who accepts a transfer property with notice of an existing contract affecting the sale must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Two questions arise as to whether the contract was existing at the 40 time of the transfer and as to whether there has been notice. On the question of notice I think the decision in 32 N. L. R. at p. 81 is conclusive. Registration amounts to notice within the meaning of section 93. On the question as to whether there is an existing contract it was argued that inasmuch as the last

date of performance of the contract was the 31st December there was no existing contract on the 2nd January. At first sight this appears to be quite a plausible argument. The date of performance has passed and it was contended that, therefore, the contract ceased to exist. But I should imagine that this is an incorrect reading of the term "Existing Contract." A contract, it seem to me, would cease only by cancellation, recession or by performance. One can conceive of a case where even before the last date stipulated for performance a contract is mutually rescinded or where it has been discharged by performances. In that event, of course, there would be no question of
10 specific performance being claimed. Even in the 32 N. L. R. case where the question of specific performance was considered along with the question of notice the agreement provided for performance on or before the 30th September 1928 and the transfer by a party to that agreement to the third party was on the 3rd October, 3 days later. Nonetheless, the Court came to the conclusion that there was an existing contract and that registration amounted to notice. In the 39 N. L. R. case reference was made to the words "Existing Contract" in section 93 but, in the circumstances of that case, as a long period of time, namely over 2 years, had elapsed the Court was inclined to the view that the contract had ceased to exist. The point, however, was not in the
20 9 N. L. R. case expressly decided. If, however, it was intended by the legislature that only transfers prior to the last date on which the agreement had to be performed were to be by notice and were existing contracts, then all rights under the contract would cease after that date. If the contract ceased to exist then the rights under it would also cease to exist. It seems to me, however, that a contract in respect of which there has been a breach by one of the parties still continues to exist and gives rights to parties enabling them to obtain redress either by way of damages or specific performance.

An issue was framed with regard to tender but subsequently in the course of argument this was withdrawn in view of the fact that the defendants
30 had refused to perform their part of the bargain.

On the question of damages there has been hardly any evidence. The plaintiff claims at the rate of Rs. 500/- a month which is obviously very excessive. The rates paid for his share by the 1st defendant amounts to only Rs. 10/- a quarter. So that his share would command a reasonable rental of Rs. 20/- a month. The widow would likewise be entitled to a similar share. In all the circumstances I think Rs. 40/- a month would be reasonable damages till possession is given to the plaintiff.

I answer the issues framed as follows :—

1. Question of tender has not been pressed.
2. Yes.
3. Yes.

4. Yes.
5. Yes.
6. Rs. 40/- a month from 1-1-18 till plaintiff is placed in possession of the shares of the 1st and 2nd defendants.
7. Yes.
8. Yes.
9. Although this matter has not been specifically dealt with in my judgment there is a previous order on the point which is binding upon the parties.
10. Is withdrawn. The failure to give the 7 days' notice only 10 effects the question of vacant possession.
11. Yes.
12. Yes.
- 13a. Yes
- 13b. Tender was unnecessary.

I accordingly enter judgment for the plaintiff as prayed for but with damages at Rs. 40/- a month commencing from 1st January 1948. Plaintiff will be entitled to the costs of suit.

Sgd. N. SINNETHAMBY,
D. J. 20

Judgment delivered in open Court in the presence of Mr. Wilson for plaintiff. Defendants and Proctors absent.

Sgd. N. SINNETHAMBY,
D. J.

No. 14.

Decree of the District Court.

IN THE DISTRICT COURT OF COLOMBO.

ABDUL CADER ABDEEN of Colombo *Plaintiff.*

Class : V.
No. 19175/M.

Against

50

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA,
3. ABDUL CAREEM MOHAMED ISMAIL,
4. ABDUL CAREEM MOHAMED HAFEEL,
5. ABDUL CAREEM SITHI AYSHA,

6. ABDUL CAREEM SITHI SAEDA, and
 7. ZAINUL ABDEEN MOHAMED AJWARD, all of
“ Barnes House,” No 43, Barnes Place, Colombo,
 8. AYNUM NAWASIA,
 9. SITHY AYNUR RILAH,
 10. UMMA FARIDA ZUFIKAR,
 11. BADDEATHUZ ZUHIRIAH,
 12. SITHY ZAMEELATHUL MARLIAH, minors,
all of “ Barnes House ” No 43, Barnes Place,
Colombo, appearing by their Guardian-*ad-litem*
 13. MOHAMED NAFIH MOHAMED of No. 43, Barnes
Place, Colombo
- Defendants.*

This action coming on for final disposal before N. Sinnethamby, Esq., District Judge, Colombo, on the 1st day of November, 1951, in the presence of Proctor on the part of the Plaintiff, and of Proctor on the part of the defendants, it is ordered and decreed that the 1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th defendants do execute in favour of the Plaintiff a Conveyance of the shares of the 1st, 2nd, 8th, 9th, 10th, 11th and 12th defendants of all that allotment of land with the buildings standing thereon formerly called
20 “ Osborne Lodge ” now called “ Barnes House ” bearing former assessment No. 1870/5 and presently bearing assessment No. 43, situated at Barnes Place, Cinnamon Gardens in Ward No. 9, within the Municipality and in the District of Colombo, Western Province and bounded on the north by the property of W de Abrew, on the east by premises bearing assessment No. 6, on the south by the road called Barnes Place, and on the west by premises bearing assessment No. 4, containing in extent three roods and thirty-four and forty three one hundredths perches (A0 R 3 P34, 43/100) according to figure of survey bearing No. 1262 dated the 23rd day of March, 1925, made by Ben J. Thiedeman, Licensed Surveyor. It is further ordered and decreed
30 that the defendants be ejected from the said premises, and the plaintiff be placed in possession thereof.

It is further ordered and decreed that the 1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th defendants do pay to the plaintiff the sum of Rs. 40/- per mensem commencing from 1st day of January, 1948 until the plaintiff is placed in possession of the said premises.

It is further ordered and decreed that the said defendants do pay to the plaintiff the cost of this action.

The 1st day of November, 1951.

Sgd. N. SINNETHAMBY,
District Judge.

No. 15.
Petition of
Appeal to the
Supreme Court.
9.11.51

No. 15.

Petition of Appeal to the Supreme Court.

ABDUL CADER ABDEEN of Race Course Avenue,
Colombo *Plaintiff.*

D.C., Colombo
Case N. 19,175/M *Vs.*

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA,
3. ABDUL CAREEM MOHAMED ISMAIL,
4. ABDUL CAREEM MOHAMED HAFEEL, 10
5. ABDUL CAREEM SITHI AYSHA,
6. ABDUL CAREEM SITHI SAEDA and
7. ZEINUL ABDEEN AJWARD all of No 43, "Barnes House",
Barnes Place, Colombo.
8. AYNUM NAWASIA,
9. SITHY AYNUR RILAH,
10. UMMU FARIDA ZULFIKAR,
11. B. ZUHIRIAH.
12. SITHY ZAMEETHUL MARLIAH minors all of
No. 43, Barnes House Barnes Place, Colombo, appearing by their 20
Guardian-ad-litem
13. MOHAMED NAFIH MOHAMED of No 43, Barnes Place,
Colombo *Defendants.*

And

1. ABDUL CAREEM MOHAMED THAHEER
2. ABDUL CAREEM MOOMINA UMMA,
3. AYNUL NAWASIA,

4. SITHY AYNUR RILAH,
5. UMMU FARIDA ZULFIKAR,
6. BADDEATHUSZ ZUHIRIYA,
7. SITHY ZAMEELATHUL MARLIAH, minors of No. 43, "Barnes House" Barnes Place, Colombo, appearing by their Guardian-*ad-litem*
8. MOHAMED NAFIH MOHAMED of No 43, Barnes Place, Colombo.

1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th defendants. *Appellants.*

10 *Vs.*

1. ABDUL CADER ABDEEN of Race Course Avenue, Colombo. *Plaintiff Respondent.*
2. ABDUL CAREEM MOHAMED ISMAIL,
3. ABDUL CAREEM MOHAMED HAFEEL,
4. ABDUL CAREEM SITHI AYESHA
5. ABDUL CAREEM SITHI SAEDA,
6. ZAINUL ABDEEN MOHAMED AJWARD, all of Colombo

3rd, 4th, 5th, 6th, and 7th *Defendants Respondents.*
On this 9th day of November 1951.

20 The Petition of appeal of the appellants states as follows :—

1. The 1st respondent abovenamed who is the plaintiff in this action brought an action against the appellants abovenamed *inter alia* for specific performance of the execution of a conveyance of their share of premises No 43, Barnes Place, Colombo in favour of the 1st respondent as agreed to by them in deed No. 4080 of 3rd October 1947 and attested by John Wilson, Notary Public of Colombo for ejection of the said appellants from the said premises No 43, Barnes Place, Colombo and for placing the 1st Respondent in possession thereof, for damages in Rs. 500/- per month from 1st January 1948 until the 1st respondent is put in possession thereof.

30 2. The 3rd to the 7th appellants abovenamed being minors were represented by their Guardian-*ad-litem* the 8th appellant abovenamed.

3. On the 9th day of July 1948 the 1st defendant-appellant abovenamed in his answer *inter alia* denied that the 1st respondent abovenamed had any right whatsoever under the said agreement No. 4080 that he was in wrongful possession of the said premises and further stated that the 1st respondent abovenamed had failed to perform his part of the obligations as set out in the said deed No. 4080.

4. On the 23rd day of July 1948 the 2nd defendant-appellant abovenamed in his answer *inter alia* took up the same position as that of the 1st defendant-appellant.

5. On the 10th day of March 1950 the 3rd to the 7th defendants-¹⁰ appellants who are the 8th to 12th respondents by their Guardian-*ad-litem* the 8th defendant-appellant in their answer *inter alia* denied that the 1st respondent had any cause of action whatsoever against them.

6. On the 21st day of March 1951 at the trial the following issues were framed :—

1. Did the plaintiff on 31 12 47 - (a) tender to the parties to deed No. 4080 including 1st and 2nd defendants the purchase price of Rs. 61,500/- ; (b) tender the deed of conveyance and request parties to execute same.
2. Did the 1st and 2nd defendants wrongfully and unlawfully ²⁰ refuse to execute the said deed of conveyance?
3. Did the 1st to the 7th defendants agree to place plaintiff in vacant possession of the premises on 31-12-47 ?
4. Are the 1st and 2nd defendants in wrongful possession of the premises since 1-1-48 ?
5. Is plaintiff entitled to specific performance of the said agreement by 1st and 2nd defendants and in view of the transfer to 8th to 12th defendants by the 1st defendant to 8th to 12th defendants also ?
6. To what damages if any is plaintiff entitled ? 30
7. Is plaintiff entitled to specific performance in view of the provisions in clause 8 of the agreement No. 4080 ?
8. Can plaintiff in any event maintain this action for specific performance as against the other defendants that is the 8th to the 12th defendants ?
9. Is there a misjoinder of parties and causes of action ?

10. Did the plaintiff fail—(a) to tender to the 1st and 2nd defendants the purchase price before calling upon the defendants to execute the deed of transfer ; (b) to tender the proposed deed of transfer for execution by 1st and 2nd defendants at the office of Mr. John Wilson, Proctor and Notary, 365, Dam Street, Colombo ; (c) give at least 7 days notice in terms of clause 6 of the said agreement ?
11. If issue 1 or more parts of issue 10 (a) (b) and (c) are answered in the affirmative can plaintiffs maintain this action for specific performance ?
12. Did the 8th to 12th defendants have notice of the agreement No. 4080 P 7.

7. On the 1st day of November 1951 the learned District Judge entered judgment for the 1st respondent abovenamed who is the plaintiff as prayed for but with damages at Rs. 40/- per month commencing from 1st January 1948.

8. Being aggrieved by the decision of the learned District Judge the appellants appeal to Your Lordships Court to set aside the judgment of the learned District Judge on the following among other grounds which may be urged by counsel on our behalf at the hearing of the appeal :—

- (a) That the said judgment was contrary to law and against the weight of all the evidence in the case.
- (b) That the 1st respondent (the plaintiff) had failed to carry out his part of the said agreement No. 4080 and thus had no cause of action whatsoever against the defendants-appellants.
- (c) That in any event by reason of the terms of the said deed No. 4080 the 1st respondent (the plaintiff) was not entitled to specific performance of the said agreement by the appellants abovenamed.
- (d) That the said agreement No. 4080 was not an existing contract within the meaning of section 93 of the Trust Ordinance No. 9 of 1917 at the time of the transfer to the 3rd to the 7th defendants appellants.
- (e) That in any event no order could have been against the 3rd to the 7th defendants appellants in these proceedings.
- (f) That there was a misjoinder of parties and causes of action.

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Petition of
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Supreme Court.
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--continued

Wherefore Your Lordships' humble petitioners pray that Your Lordships' Court be pleased to order the judgment of the learned District Judge to be set aside for costs of this appeal and in the Court below and for such other and further relief as to Your Lordships' Court shall seem meet.

Sgd. P. S. P. KALPAGE,
Proctor for Defendants-Appellants.

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Judgment of the
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No. 16.

Judgment of the Supreme Court.

D. C. (F) 389-M of 1952.

D. C. Colombo, No. 19175/M.

A. C. M. THAHER and Others

Defendants-Appellants. 10

Vs.

A. C. ABDEEN

Plaintiff-Respondent.

Present : GRATIAEN J., PULLE J., SANSONI J.

Counsel :

H. V. PERERA, q.c., with E. J. COORAY and N. C. J. RUSTOMJEE
for Defendants-Appellants.

S. NADESAN q.c., with G. T. SAMARAWICKREME and J. SENATHI
RAJAH for Plaintiff-Respondent.

Argued on : 20th, 23rd, 25th May, 1955.
Delivered on : 10th June, 1955.

20

GRATIAEN J.—

This appeal came before the present Bench in view of a difference of opinion between the Judges before whom it was originally argued.

The plaintiff claimed a decree against the 1st and 2nd appellants and against the other appellants (as subsequent transferees of the 1st appellant's interests) for specific performance of a contract No. 4080 dated 3rd October 1947 for the sale of residential premises called " Barnes House " in Barnes Place, Colombo.

The contract sought to be enforced had been entered into between the plaintiff (as " purchaser ") and seven out of eleven co-owners of the 30 premises including the 1st and 2nd appellants (described as the " vendors ") whereby the purchaser agreed to buy, and the " vendors " undertook to sell

“ *and cause to be sold* ” the entire premises on or before 31st December 1947 for an aggregate sum of Rs. 92,000/- out of which Rs. 12,500/- had already been paid to the “ vendors ” by way of deposit. Vacant possession of the entire premises by an agreed date was also stipulated. In my opinion, the “ vendors ” obligation was single and indivisible and no individual vendor could be said to have fulfilled his part of the contract if he merely conveyed his share of the property together with the limited rights of occupation which a co-owner enjoys. I would therefore reject the argument that the contract was severable in any respect.

10 The remaining four co-owners were not parties to the contract, and, as they were minors at the time, their interests could not be sold without the authority of the District Court of Colombo. In the result, the “ vendors ” in binding themselves to secure for the purchaser a single conveyance passing title to the entire premises in exchange for a composite consideration, had undertaken to produce a result which it was not wholly within their power to achieve.

Clause 8 of the contract provides as follows :—

20 “ 8. In the event of the purchaser being ready and willing to complete the said sale in terms hereof and the vendors failing, refusing or neglecting to execute and cause to be executed the said deed of transfer as aforesaid then and in such case the vendors shall repay forthwith the said deposit of rupees Twelve thousand Five hundred (Rs. 12,500/-) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the purchaser a sum of Rupees Fifteen thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as a penalty and the vendors shall refund to the purchaser the said deposit of Rupees Twelve thousand Five hundred (Rs. 12,500/-) ”

30 The learned District Judge held in favour of the purchaser that clause 8 merely fixed the amount of compensation which would be payable by the “ vendors ” in the event of the purchaser electing to enforce one of the alternative remedies available to him upon a breach of their contractual obligation ; and that the purchaser was not precluded from enforcing instead the other remedy of specific performance.

40 The only question which was argued before us was whether, upon a proper interpretation of the document read as a whole, the plaintiff could claim specific performance of the contract (or, if he so chose, of a part of the contract) in the event of all or any of the “ vendors ” failing, refusing or neglecting to execute and cause to be executed a conveyance of the entire premises within the stipulated period. Mr. H. V Perera very properly conceded that, if clause 8 must not be construed as providing the only legal remedy available to the purchaser upon a breach by the “ vendors ” for

whatsoever reason, this was an appropriate case for ordering specific performance having regard to the events which had occurred between 3rd October 1947 and 31st December 1947. During this interval the District Court had in fact sanctioned a sale of the minors' shares at a proportionate price, and their curators as well as the other vendors (except the 1st and 2nd appellants) were willing to execute, and ultimately signed, the conveyance tendered by the purchaser. The refusal of the 1st and 2nd appellants to join in the conveyance alone prevented the completion of the transaction. No valid grounds therefore exist for denying specific performance unless of course it was not available to the purchaser upon a proper interpretation of the contract. Accordingly, the appellants can only succeed if we adopt their submission as to the legal effect of clause 8. 10

In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain *prima facie* enjoys a legal right to demand performance by the other party ; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases. *Farmers' Co-operative Society v. Barry* (1912) S. A. A. D. 343; *Woods v. Walters* (1921) A. D. 303; Lee's Roman-Dutch Law (5th ed.) 265. 20

So much for the distinction between English law and Roman-Dutch law on this topic. But in either system, the terms of a particular contract may expressly or by necessary implication exclude the remedy. For instance, the equitable remedy would not be available in England if the seller had bound himself either to convey the property or, at his election, to pay a sum of money by way of substituted performance. *Fry on Specific Performance* (6th ed.) chapter 3. Similarly, *Wessels on Contract para* 1460 explains that under the Roman-Dutch law, "if one of (two) alternative promises is the performance of an act and the other the payment of money, we must gather from the contract and the circumstances whether the payment of money is intended merely as a penal clause or whether it is to operate as a liquidated debt. If the payment of the money is not to be construed to be a penal clause, but as an alternative prestation, then directedly the performance of the act becomes impossible or the promisor refuses to carry it out or cannot do so, the money is due." 40 A distinction is drawn in paragraphs 1453 and 1454 of the text-book between conjunctive, alternative and facultative obligations. "In the facultative obligation, there is a promise to deliver some definite thing or to perform some definite act, but at the same time the debtor reserves to himself the right of performing his contract by some other prestation e. g. I promise to deliver

A, but I reserve to myself the right of delivering B instead. The primary object of the obligation is A, but I have the power (*facultas*) of substituting B." The author also observes (para 1478) that "if the contract is silent as to whether the choice belongs to the debtor or the creditor, the law presumes that it lies with the debtor. It is the person that has to make the payment who is entitled to the choice."

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—continued

So much for the general principles ; but it is their application to particular cases which often presents enormous difficulties. The question always is, of course, *What is the contract ?* "The Courts must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation," *Ranger vs. G. W. R.* (1854) 5H. L. C. 73. I would also repeat what I had occasion to observe recently in a similar context, namely, that the interpretation of any particular words appearing in one written instrument is seldom of much assistance as a precedent for deciding the true meaning of some other written instrument. *Sivasambu vs. Kathiresar Ambagar* (1952) 55 N. L. R. 176 at 178.

I now proceed to consider whether clause 8 (as Mr. Nadesan contends) entitles the purchaser to elect at his option to enforce his legal remedy of damages against the defaulting "vendors" but leaves it open to him to enforce the alternative remedy of specific performance if he so prefers ; or whether (as Mr. H. V. Perera argued) clause 8 imposes a substituted obligation in the event of failure or refusal by the "vendors" to perform the primary obligation, namely, the conveyance by the "vendors" and certain others of the entire property for Rs. 92,000./-

The conclusion which I have reached is that the language of clause 8 is not open to the construction contended for on behalf of the purchaser. The parties must clearly have appreciated on 3rd October 1947 that failure on the part of the "vendors" to secure a conveyance of the entire property to the purchaser on or before 31st December 1947 in terms of the contract could result from a variety of causes. For example :

- (1) the sanction of the District Court to the proposed sale might not be obtained or not be obtained in time ;
- (2) the title of the premises might not be "deduced to the satisfaction of Mr. John Wilson"——Clause 5;
- (3) one or more of the "vendors" might back out of the transaction during the interval between the date of the contract and the date fixed for completion.

In the first of these contingencies, specific performance of the indivisible obligation to secure the sale of the entire property would in the very

nature of things have been impossible, because the “ vendors ” could not be compelled to achieve a result which it was beyond their power to bring about. Clause 8 certainly provides the purchaser’s only remedy in that particular contingency namely, that the vendors “ *shall forthwith* ” (the words are imperative, and exclude the notion of an option being granted to either of the parties) refund the part consideration previously deposited with them, and also pay an agreed sum by way of liquidated damages.

What then if the vendors should, for some other reason equally within the contemplation of the parties, default in the performance of their primary obligation ? Clause 8 equally provides that in any such contingency the 10 deposit must “ forthwith ” be refunded and a like sum paid to the purchaser by way of compensation.

It follows from this analysis that what was clearly intended to constitute a substituted obligation upon the first contingency referred to, must equally have been intended to constitute the sole obligation arising upon a default in any other contemplated contingency. Had it been the intention of the parties that the substituted obligation provided by clause 8 should represent the purchaser’s sole remedy in one situation, but that the alternative legal remedy of specific performance (*i. e.* under the general law) should nevertheless be reserved to him at his option in another, it would have been a 20 simple matter to insert in the contract express terms making separate provision for each separate contingency.

It is only in the absence of agreement to the contrary that the Roman-Dutch law confers on a purchaser under an executory contract the right to select one of two alternative legal remedies under the Roman-Dutch law, namely, specific performance *or* damages. But we have here a categorical stipulation that if the primary obligation is not fulfilled for any reason whatsoever, two specified sums shall immediately become due. To my mind, the stipulated return of the deposit, being part of the purchase price, necessarily implies that the primary obligation to sell is then to be regarded as having 30 come to an end. This negatives an intention that the purchaser could still demand, if he so chose, specific performance. It is also significant that, when one considers the relevant issue of mutuality, clause 9 provides that, should the purchaser default for any reason, he would, though liable to pay an agreed sum to the vendors as liquidated damages, be entitled to a refund of his earlier deposit. Clause 9 equally denies to the “ vendors ” by necessary implication the alternative legal remedy of specific performance.

Mr. Nadesan strongly relied on *Long vs. Bowring* (1863) 33 Beavan 585 and other English decisions to the effect that in England, notwithstanding an express covenant to pay liquidated damages, the jurisdiction of a Court of 40 equity to order specific performance had not been ousted. I certainly agree that a provision for the payment of liquidated damages may, in particular contracts, legitimately be construed as having been inserted to secure the performance by the defaulter of his primary obligation. But in my opinion

this is not such a case. Moreover, the historical development of the remedy of specific performance in England explains why the courts of Chancery in the country have always assumed that their equitable jurisdiction to act upon the conscience of a defaulting party could not be ousted unless the contract clearly said so. Accordingly, it may well be that the insertion of a clause providing for liquidated damages in an English contract would *prima facie* be regarded as applying only to a situation where the innocent party is content to enforce his common law remedy against the defaulter. Be that as it may, I think that in a system of law which recognises that two alternative legal
10 remedies are *prima facie* available to the innocent party as of right, an agreement providing that, in the event of a breach, the defaulter shall forthwith be obliged to pay an agreed sum by way of compensation, *prima facie* raises, in my opinion, a presumption that the parties intended to rule out recourse to the other legal remedy.

For these reasons I have come to the conclusion that the plaintiff has misconceived his remedy. I would allow the appeal and dismiss the plaintiff's action against the appellants with costs in both Courts. In the absence of an alternative prayer in the plaint, we are not required to consider whether the plaintiff is entitled to any other form of relief against all or any of the
20 "vendors."

I should mention that Mr. Nadesan had raised a preliminary objection to the constitution of the 2nd appellant's appeal on two grounds, namely, that his petition of appeal had been signed by a Proctor before his appointment had been filed in Court as required by Section 24 (1) of the Code, and that the revocation of an earlier proxy in favour of another Proctor had not yet been sanctioned in terms of Section 24 (2). I would reject this objection. The revocation of the first Proctor's authority, and the appointment of the second Proctor had both preceded the filing of the petition of appeal, and the further formalities required by Section 24 had also been complied with before
30 the expiry of the time limit for preferring an appeal to this Court. Apart from that, even if the 1st appellant had alone appealed, Section 760 of the Code would in this case have operated to the benefit of the 2nd appellant.

Sgd. E. F. N. GRATIAEN,
Puisne Justice.

PULLE, J.—I agree

„ M. F. S. PULLE,
Puisne Justice.

SANSONI, J.—I agree

„ M. C. SANSONI,
Puisne Justice.

No. 17.**Decree of the Supreme Court.**

ELIZABETH THE SECOND, QUEEN OF CEYLON

and of Her other Realms and Territories, Head of the Commonwealth.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA, and 6 others
all of Colombo.

1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th. *Defendants-Appellants.*

D. C. (F) 389 M
1952

10

Vs.

1. ABDUL CADER ABDEEN of Race Course Avenue,
Colombo *Plaintiff-Respondent.*
- ABDUL CAREEM MOHAMED ISMAIL and 4 others all of
Colombo. 3rd, 4th, 5th, 6th and 7th.. *Defendants-Respondents.*

Action No. 19175/M

In the District Court of Colombo.

This cause coming on for hearing and determination on the 20th, 20
23rd, 25th May and 10th day of June 1955 and on this day, upon an appeal
preferred by the 1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th defendants
before the Hon. Mr. E. F. N. Gratiaen, q.c., Puisne Justice and the Hon.
Mr. M. F. S. Pulle, q.c., Puisne Justice and the Hon. Mr. M. C. Sansoni,
Puisne Justice of this Court, in the presence of Counsel for the Appellants
and Plaintiffs Respondents.

It is considered and adjudged that this appeal be and the same is
hereby allowed and the plaintiff's action against the appellants is dismissed
with costs in both Courts.

Witness the Hon. Mr. Hema Henry Basnayake, q.c., Acting Chief 30
Justice, at Colombo, the 22nd day of June, in the year of our Lord One
thousand Nine hundred and Fifty-five and of Our Reign the Fourth.

Sgd. W. G. WOUTERSZ,
Deputy Registrar, S.C.

No. 18.**Application for Conditional Leave to Appeal to the Privy Council.**

No. 18
Application for
Conditional
Leave to Appeal
to the
Privy Council
27.6.55

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA,
3. AYNUN NAWASIA,
4. SITHY AYNUR RILAH,
5. UMMA FARIDA ZULFIKAR,
6. BADDEATHUSZ ZUHIRIYA,
- 10 7. SITHY ZAMEELATHUL MARLIAH, 3rd to 7th
appellants are minors all of Barnes House, No. 43,
Barnes Place, Colombo, appearing by their Guardian-*ad-litem*,
8. MOHAMED NAFIH MOHAMED of No. 43, Barnes Place,
Colombo. *Defendants-Appellants.*

S. C. No. 389/52
D. C. Colombo No. 19,175/M.

Vs.

ABDUL CADER ABDEEN of Race Course Avenue,
Colombo . . . *Plaintiff-Respondent and*

- 20 2. ABDUL CAREEM MOHAMED ISMAIL,
3. ABDUL CAREEM MOHAMED HAFEEL,
4. ABDUL CAREEM SITHY AYESHA,
5. ABDUL CAREEM SITHY SAEDA,
6. ZAINUL ABDEEN MOHAMED AJWARD
all of Colombo,

3rd, 4th, 5th, 6th, and 7th . . . *Defendants-Respondents,*

ABDUL CADER ABDEEN of Race Course Avenue,

No. 18
Application for
Conditional
Leave to Appeal
to the
Privy Council
27.6.55
—continued

Colombo, Petitioner (Plaintiff-Appellant)

And

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA and
3. AYNUN NAWASIA,
4. SITHY AYNUR RILAH,
5. UMMU FARIDA ZULFIKAR,
6. BLADDEATHUSZZUHURIYA,
7. SIEATHY ZAMELATHUL MARLIAH, 3rd to 10
7th Respondents are minors all of Barnes House,
No 43, Barnes Place, Colombo, appearing by
their Guardian-*ad-litem*,
8. MOHAMED NAFIH MOHAMED of No. 43, Barnes Place,
Colombo.
9. ABDUL CAREEM MOHAMED ISMAIL,
10. ABDUL CAREEM MOHAMED HAFEEL,
11. ABDUL CAREEM SITHY AYESHA,
12. ABDUL CAREEM SITHY SAEDA,
13. ZAINUL ABDEEN MOHAMED AJWARD 20
all of Colombo, Respondents
(Defendants-Respondents)

To

THE HON'BLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF THE
HON'BLE THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 27th day of June, 1955.

The petition of the petitioner abovenamed appearing by John Wilson and his assistants John Wilson (Jr.) and Sydney Rienzie Dharmaratna their Proctors sheweth as follows :—

1. That feeling aggrieved by the judgment and decree of this Honourable Court pronounced on the 11th day of June 1955, the above-named petitioners are desirous of appealing therefrom to Her Majesty the Queen in Council.

2. That the said judgment is a final judgment and the matter in dispute in the appeal is upwards of the value of Rs. 5,000/-.

Wherefore the Petitioners pray for conditional leave to appeal against the judgment and decree of this Court dated the said 11th day of June 1955, to Her Majesty the Queen in Council and for such other and further relief 10 as to Your Lordships shall seem meet.

Sgd. JOHN WILSON,
Proctor for Petitioners.
(Defendants-Appellants).

No. 19.
Decree Granting Conditional Leave to Appeal to the
Privy Council.

ELIZABETH THE SECOND, QUEEN OF CEYLON

and of Her other Realms and Territories, Head of the Commonwealth

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

20 In the matter of an application dated 27th June, 1955,
for Conditional Leave to Appeal to Her Majesty the
Queen in Council by the Petitioner against the decree
dated 11th June, 1955.

ABDUL CADER ABDEEN of Race Course Avenue,
Colombo, Petitioner .. *(Plaintiff-Appellant).*

Vs.

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA and
3. AYNUN NAWASIA,
- 30 4. SITHY AYNUR RILAH,
5. UMMU FARIDA ZULFIKAR,
6. BADDEATHUSZ ZUHURIYA,
7. SITHY ZAMEELATHUL MARLIAH, 3rd to
7th respondents are minors all of Barnes House,
No. 43, Barnes Place, Colombo, appearing by their
Guardian-*ad-litem*,

No. 18.
Application for
Conditional
Leave to Appeal
to the
Privy Council
27.6.55
—continued

No. 19.
Decree Granting
Conditional
Leave to Appeal
to the
Privy Council
21.7.55

No. 19
Decree Granting
Conditional
Leave to Appeal
to the
Privy Council
21.7.55
—continued

8. MOHAMED NAFIH MOHAMED of No. 43, Barnes Place,
Colombo,
9. ABDUL CAREEM MOHAMED ISMAIL,
10. ABDUL CAREEM MOHAMED HAFEEL,
11. ABDUL CAREEM SITHY AYESHA,
12. ABDUL CAREEM SITHY SAEDA,
13. ZAINUL ABDEEN MOHAMED AJWARD,
all of Colombo, Respondents (*Defendants-Respondents*)

Action No. 19,175/M—(S.C.389/52) District Court of Colombo.

This cause coming on for hearing and determination on the 21st day of 10 July, 1955, before the Hon. H. H. Basnayake, q.c., Acting Chief Justice and the Hon. M. F. S. Pulle, q.c., Puisne Justice of this Court, in the presence of Counsel for the Petitioner.

It is considered and adjudged that this application be and the same is hereby allowed upon the condition that the applicant do within one month from this date :—

1. Deposit with the Registrar of the Supreme Court a sum of Rs.3000/- and hypothecate the same by bond or such other security as the Court in terms of Section 7 (1) of the Appellate Procedure (Privy Council) Order shall on application made after due notice to the other side approve. 20

2. Deposit in terms of provisions of section 8 (a) of the Appellate Procedure (Privy Council) Order with the Registrar a sum of Rs.300/- in respect of fees mentioned in Section 4 (b) and (c) of Ordinance No. 31 of 1909 (Chapter 85).

Provided that the applicant may apply in writing to the said Registrar stating whether he intends to print the record or any part thereof in Ceylon, for an estimate of such amounts and fees and thereafter deposit the estimated sum with the said Registrar.

Witness the Hon. Hema Henry Basnayake q.c., Acting Chief Justice at Colombo, the 22nd day of August, in the year One thousand 30 Nine hundred and Fifty-five and of our Reign the Fourth.

Sgd. W. G. WOUTERSZ,
Deputy Registrar, S.C.

No. 20.

Application for Final Leave to Appeal to the Privy Council.

No. 20
Application for
Final Leave to
Appeal to the
Privy Council
8.8.55

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA,
3. AYNUN NAWASIA
4. SITHY AYNUR RILAH,
5. UMMU FARIDA ZULFIKAR,
6. BADDEATHUSZ ZUHIRIYA,
- 10 7. SITHY ZAMEELATHUL MARLIAH minors
all of Barnes House, No. 43, Barnes Place, Colombo,
appearing by their Guardian-*ad-litem*.
8. MOHAMED NAFIH MOHAMED of No. 43, Barnes Place,
Colombo,
1st, 2nd, 8th, 9th, 10th, 11th, 12th and 13th. *.Defendants-Appellants.*

S.C. No. 389/52
D.C. Colombo
No. 19,175/M

Vs.

- 20 1. ABDUL CADER ABDEEN of Race Course Avenue,
Colombo *Plaintiff-Respondent.*
2. ABDUL CAREEM MOHAMED ISMAIL,
3. ABDUL CAREEM MOHAMED HAFEEL,
4. ABDUL CAREEM SITHI AYESHA,
5. ABDUL CAREEM SITHI SAEDA,
6. ZAINUL ABDEEN MOHAMED AJWARD all
of Colombo,
3rd, 4th, 5th, 6th and 7th. *Defendants-Respondents.*
1. ABDUL CADER ABDEEN of Race Course Avenue,
Colombo *Plaintiff-Appellant.*

No. 20.
Application for
Final Leave to
Appeal to the
Privy Council
8.8.55
—continued

And

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA and
3. AYNUN NAWASIA,
4. SITHY AYNUR RILAH,
5. UMMU FARIDA ZULFIKAR,
6. BADDEATHUSZ ZUHIRIYA,
7. SITHY ZAMEELATHUL MARLIAH 3rd to
7th respondents minors all of Barnes House, No. 43, Barnes Place,
Colombo, appearing by their Guardian-*ad-litem*. 10
8. MOHAMED NAFIH MOHAMED of No. 43,
Barnes Place, Colombo.
9. ABDUL CAREEM MOHAMED ISMAIL,
10. ABDUL CAREEM MOHAMED HAFEEL,
11. ABDUL CAREEM SITHI AYESHA,
12. ABDUL CAREEM SITHY SAEDA,
13. ZAINUL ABDEEN MOHAMED AJWARD
all of Colombo. *Defendants-Respondents.*

To

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF 20
THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 8th day of August, 1955.

The humble petition of the Plaintiff-Appellant abovenamed appearing by John Wilson and his assistants John Wilson (Jnr.) and Sydney Rienzie Dharmaratne his Proctors states as follows :—

1. That the appellant on the 21st day of July 1955, obtained conditional leave from this Honourable Court to appeal in the above case to Her Majesty the Queen in Council against the judgment of this Court pronounced on the 11th day of June, 1955.

2. That the appellant in accordance with the conditions on which such leave was granted (a) has deposited with the Registrar of this Court a sum of Rupees Three thousand (Rs. 3,000/-) and has hypothecated the same by bond in favour of the Registrar, and (b) has deposited with the said Registrar a sum of Rupees Three hundred (Rs. 300/-) in respect of the amount and fees payable in terms of Section 4 (2) (b) and (c) of Ordinance No. 31 of 1909.

No. 20
Application for
Final Leave to
Appeal to the
Privy Council
8.8.55
—continued

Wherefore the appellant prays for final leave to appeal against the judgment of this Court dated the said 11th day of June, 1955, to her Majesty
10 the Queen in Council.

Sgd. JOHN WILSON,
Proctor for Plaintiff-Appellant.

No. 21.

Decree Granting Final Leave to Appeal to the Privy Council.

ELIZABETH THE SECOND, QUEEN OF CEYLON
and of Her other Realms and Territories, Head of the Commonwealth.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

In the matter of an application by the plaintiff-appellant dated 8th August, 1955, for Final Leave to Appeal to Her Majesty the Queen in Council against the decree of this Court dated 11th June, 1955.

20

1. ABDUL CADER ABDEEN of Race Course Avenue,
Colombo *Plaintiff-Appellant.*

And

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA and
others ... *Defendants-Respondents.*

Action No. 19,175 (S.C. 389) District Court of Colombo.

30 This cause coming on for hearing and determination on the 8th day of September, 1955 before the Hon. H. H. Basnayake, Q.C., Acting Chief Justice and the Hon. M. F. S. Palle, Q.C., Puisne Justice of this Court, in the presence of Counsel for the appellant.

No. 21
Decree Granting
Final Leave to
Appeal to the
Privy Council.
8.9.55

No. 21.
Decree Granting
Final Leave to
Appeal to the
Privy Council
8.9.55
—continued

The appellant has complied with the conditions imposed on him by the order of this Court dated 21st July, 1955, granting Conditional Leave to Appeal.

It is considered and adjudged that the applicant's application for Final Leave to Appeal to Her Majesty the Queen in Council be and the same is hereby allowed.

Witness the Hon. Hema Henry Basnayake, q.c., Acting Chief Justice at Colombo, the 30th day of September in the year One thousand Nine hundred and Fifty-five and of Our Reign the Fourth.

Sgd. W. G. WOUTERSZ,
Deputy Registrar, S.C.

P 2.
Petition, Affidavit and Order in D. C. Colombo Case No. 4603.

IN THE DISTRICT COURT OF COLOMBO.

In the matter of ABDUL CAREEM MOHAMED ABDUL
 CADER of 43, Barnes Place, Colombo, a minor.

ABDUL CAREEM MOHAMED HAFEEL of 43, Barnes Place,
 Colombo *Petitioner.*

No. 4,603/G.

And

- 10 1. ABDUL CAREEM MOHAMED ABDUL CADER
 a minor by his Guardian-*ad-litem*,
2. ABDUL CADER MOHAMED MAZAHIR and
3. ABDUL CADER MOHAMED ISMAIL all of 43, Barnes Place,
 Colombo .. . *Respondents.*

On this 18th day of December 1947.

The petition of the petitioner abovenamed appearing by John Wilson
 his Proctor states as follows :—

1. The 1st respondent abovenamed is a minor of the age of 17 years.
2. The said minor is entitled to 1/8th share of the value of Rs.11,500/-
 20 of premises No. 43, Barnes Place, Colombo.
3. It is necessary that a Curator of the estate and a guardian of the
 person of the said minor be appointed.
4. The petitioner is the maternal uncle of the said minor and is a
 fit and proper person to be appointed curator of the estate of the said minor
 and has no interest adverse to that of the said minor.
5. The 2nd respondent is a brother of the said minor and is a fit and
 proper person to be appointed guardian of the said minor and has no interest
 adverse to that of the said minor.
6. The remaining 7/8th shares are owned by the brothers, sisters and
 30 3 cousins of the said minor and the said parties have received an offer of
 Rs.92,000/- for the entirety of the said premises from Mr. A. C. Abdeen of
 Colombo and have accepted the said offer.

Exhibits
 —
 P 2.
 Petition,
 Affidavit and
 Order in D.C.
 Colombo Case
 No. 4603
 18.12.47

Exhibits
—
P. 2.
Petition,
Affidavit and
Order in
D. C. Colombo
Case No. 4603
18.12.47
—continued

7. A valuation report of the said premises has been obtained from Mr. R. C. McHeyzer Court Valuator, and is annexed hereto marked "A"

8. The Buildings standing on the said premises are very old and in a ruinous condition and in need of extensive repairs. Neither the minor nor the other co-owners have funds to meet the said extensive repairs.

9. It would be in the interests of the minor to join in the transfer of the said premises No. 43, Barnes Place, to the said A. C. Abdeen for the sum of Rs. 92,000/- for the entire premises.

Wherefore the petitioner prays :—

- (a) that he be appointed curator of the estate of the said minor. 10
- (b) that the 2nd respondent be appointed guardian of the person and the 3rd respondent Guardian-*ad-litem* of the said minor for the purpose of these proceedings.
- (c) that the petitioner as curator as aforesaid be authorized to sell the minor's 1/8th share of the said premises No. 43, Barnes Place, Colombo, at a price calculated at Rs.92,000/- for the entirety of the said premises and to join in the execution of the transfer as curator as aforesaid in favour of the said A. C. Abdeen upon the *pro rata* share of purchase price being deposited in Court. 20
- (d) that accounts be dispensed with, and
- (e) for such other and further relief as to this Court shall seem meet.

Sgd. JOHN WILSON,
Proctor for Petitioner.

IN THE DISTRICT COURT OF COLOMBO.

In the matter of ABDUL CAREEM MOHAMED ABDUL
CADER of 43, Barnes Place, Colombo a minor.

ABDUL CAREEM MOHAMED HAFEEL of 43, Barnes Place,
Colombo *Petitioner.* 30

No. 4,603/G And

1. ABDUL CAREEM MOHAMED ABDUL CADER,
a minor by his Guardian-*ad-litem*.
2. ABDUL CADER MOHAMED MAZAHIR, and

3. ABDUL CAREEM MOHAMED ISMAIL, all of 43, Barnes Place,
Colombo Respondents.

Exhibits
—
P. 2.
Petition,
Affidavit and
Order in
D. C. Colombo
Case No. 4603
18.12.47
—continued

I, Abdul Careem Mohamed Hafeel of 43, Barnes Place, Colombo, do hereby, solemnly, sincerely and truly declare and affirm as follows :—

1. I am the petitioner abovenamed.
2. The 1st respondent abovenamed is a minor of the age of 17 years.
3. The said minor is entitled to 1/8th share of the value of Rs.11,500/- of premises No. 43, Barnes Place, Colombo.
4. It is necessary that a Curator of the estate and a guardian of the
10 person of the said minor be appointed.
5. I am the maternal uncle of the said minor and a fit and proper person to be appointed curator of the estate of the said minors and have no interest adverse to that of the said minor.
6. The 2nd respondent is a brother of the said minor and is a fit and proper person to be appointed guardian of the said minor and has no interest adverse to that of the said minor.
7. The remaining 7/8th shares are owned by the brothers, sisters and
3 cousins of the said minor and the said parties have received an offer of
Rs.92,000/- for the entirety of the said premises from Mr. A. C. Abdeen of
20 Colombo and have accepted the said offer.
8. A valuation report of the said premises has been obtained from Mr. R. C. McHeyzer, Court Valuator and is annexed hereto marked A.
9. The buildings standing on the said premises are very old and in a ruinous condition and in need of extensive repairs. Neither the minor nor the other co-owners have funds to meet the said extensive repairs.
10. It would be in the interest of the minor to join in the transfer of the said premises No.43, Barnes Place, to the said A. C. Abdeen for the sum of Rs. 92,000/- for the entire premises.

30 The foregoing affidavit having been duly read-
over and truly explained by me to the affir-
mant in Tamil his own language and he-
appearing to understand the contents therein-
contained wrote his signature hereto and-
affirmed to at Colombo on this 18th day of }
December 1947. } Sgd. A. C. M. HAFEEL

Curator is authorised to execute a conveyance on behalf of the minor of a 1/8th share of the premises in question after the purchase price in respect of this share is deposited in Court.

Issue D/N for Rs. 11,500/-

I am accepting the valuation report as it was made before the new rules were made known. Bond and accounts dispensed with.

Intld. S. J. C. S.
A. D. J.

True copy of petition and affidavit and Order of Court dated 18.12.47
10 in D. C. Colombo Case No. 4603/Guardian.

Sgd.
Secretary, District Court,
Colombo. 30.7.51

P 3.
Petition, Affidavit and Order in D. C., Colombo
Case No. 4604

IN THE DISTRICT COURT OF COLOMBO

In the Matter of:-

1. ZAINUL ABDEEN
- 20 2. UMMUL FAIZA
3. HUSSAIN LAFIR all of 43, Barnes Place,
Colombo, Minors.

No. 4604/G.

ZAINUL ABDEEN MOHAMED AJWARD of 43, Barnes Place,
Colombo *Petitioner.*

And

1. ZAINUL ABDEEN
2. UMMUL FAIZA and
3. HUSSAIN LAFIR minors by their guardian-*ad-litem*
- 30 4. ABDUL CAREEM MOHAMED THAHIR, and

Exhibits
—
P. 2.
Petition,
Affidavit and
Order in D. C.
Colombo Case
No. 4603
18.12.47
—continued

P 3.
Petition,
Affidavit
and Order in
D.C. Colombo
Case No. 4604
18.12.47

Exhibits
—
P 3.
Petition,
Affidavit and
Order in
D.C. Colombo
Case No. 4604
18.12.47
—continued

5. A. C. M. ISMAIL, all of 43, Barnes Place,
Colombo . . .

Respondents.

On this 18th day of December, 1947.

The petition of the petitioner abovenamed appearing by John Wilson his Proctor states as follows :—

1. The 1st, 2nd and 3rd respondents abovenamed are minors of the respective ages 12, 6 and 4 years.

2. The said minors by right of inheritance from their mother Abdul Careem Noor Neima are jointly entitled to 7/96th share of the value of Rs. 6,500/- of premises No. 43, Barnes Place, Colombo. 10

3. It is necessary that a curator of the estate and a guardian of the person of the said minors be appointed.

4. The petitioner is the father of the said minors and is a fit and proper person to be appointed curator of the estate of the said minors and has no interest adverse to that of the said minors.

5. The 4th respondent is a maternal uncle of the said minors and is a fit and proper person to be appointed guardian of the said minors and has no interest adverse to that of the said minors.

6. The 5th respondent is a maternal uncle of the said minors and is a fit and proper person to be appointed guardian-*ad-litem* over the said 20 minors for the purpose of the above proceedings and has no interest adverse to that of the said minors.

Exhibits.
—
P 3.
Petition,
Affidavit and
Order in
D. C., Colombo
Case No. 4604
18.12.47
—continued

I, Zainul Abdeen Mohamed Ajward of 43, Barnes Place, Colombo, do hereby solemnly, sincerely and truly declare and affirm as follows :—

1. I am the petitioner abovenamed.

2. The 1st, 2nd and 3rd respondents abovenamed are minors of the respective ages of 12, 6 and 4 years.

3. The said minors by right of inheritance from their mother Abdul Careem Noor Neima are jointly entitled to 7/96th share of the value Rs. 6,500/- of premises No. 43, Barnes Place, Colombo.

4. It is necessary that a curator of the estate and a guardian of the person of the said minors be appointed. 10

5. I am the father of the said minors and am a fit and proper person

- (a) that he be appointed Curator of the estate of the said minors.
- (b) that the 4th respondent be appointed guardian of the person and the 5th respondent guardian-*ad-litem* of the said minors for the purpose of these proceedings.
- (c) that the petitioner as curator as aforesaid be authorised to sell the minors 7/96th shares of the said premises No. 43, Barnes Place, Colombo, at a price calculated at Rs. 92,000/- for the entirety of the said premises and to join in the execution of the transfer as curator as aforesaid in favour of the said A. C. Abdeen upon the *pro rata* shares of purchase price being deposited in Court.
- (d) that accounts be dispensed with and,
- (e) for such other and further relief as to this Court shall seem meet.

Exhibits
—
P 3.
Petition,
Affidavit and
Order in
D. C., Colombo
Case No. 4604
18.12.47
—continued

10

Sgd. JOHN WILSON,
Proctor for Petitioner.

IN THE DISTRICT COURT OF COLOMBO.

In the matter of

1. ZAINUL ABDEEN
2. UMMUL FAIZA and
- 20 3. HUSSAIN LAFIR all of 43, Barnes Place,
Colombo, minors.

No. 4604/G.

ZAINUL ABDEEN MOHAMED AJWARD of 43, Barnes Place,
Colombo *Petitioner.*

And

1. ZAINUL ABDEEN
2. UMMUL FAIZA and
3. HUSSAIN LAFIR minors by their guardian-*ad-litem*
4. ABDUL CAREEM MOHAMED THAHIR, and
- 30 5. A. C. M. ISMAIL, all of 43, Barnes Place,
Colombo *Respondents.*

Exhibits.
—
P 3.
Petition,
Affidavit and
Order in
D. C., Colombo
Case No. 4604
18.12.47
—continued

I, Zainul Abdeen Mohamed Ajward of 43, Barnes Place, Colombo, do hereby solemnly, sincerely and truly declare and affirm as follows :—

1. I am the petitioner abovenamed.
2. The 1st, 2nd and 3rd respondents abovenamed are minors of the respective ages of 12, 6 and 4 years.
3. The said minors by right of inheritance from their mother Abdul Careem Noor Neima are jointly entitled to 7/96th share of the value Rs. 6,500/- of premises No. 43, Barnes Place, Colombo.
4. It is necessary that a curator of the estate and a guardian of the person of the said minors be appointed. 10
5. I am the father of the said minors and am a fit and proper person to be appointed curator of the estate of the said minors and have no interest adverse to that of the said minors.
6. The 4th respondent is a maternal uncle of the said minors and is a fit and proper person to be appointed guardian of the said minors and has no interest adverse to that of the said minors.
7. The 5th respondent is a maternal uncle of the said minors and is a fit and proper person to be appointed guardian *ad-litem* over the said minors for the purpose of the above proceedings and has no interest adverse to that of the said minors. 20
8. The remaining 89/96th share of the said premises are owned by the uncles and aunts and a cousin of the said minors and the said parties have received an offer of Rs. 92,000/- for the entirety of the said premises from Mr. A. C. Abdeen and have accepted the said offer.
9. A valuation report of the said premises has been obtained from Mr. R. C. Mc Heyzer, Court Valuator, and is annexed hereto marked A.
10. The buildings standing on the said premises are very old and in a ruinous condition and in need of extensive repairs. Neither the minors nor the other co-owners have funds to meet the said extensive repairs.
11. It would be in the interests of the minors to join in the transfer 30 of the said premises No. 43, Barnes Place, to the said A. C. Abdeen for the sum of Rs. 92,000/- for the entire premises.

The foregoing affidavit having been duly read over and truly explained by me to the affirment in Tamil his own language and he appearing to understand the contents therein contained wrote his signature hereto and affirmed to at Colombo on this 18th day of December 1947.

Sgd. Z. A. M. AJWARD.

Exhibits
P 3.
Petition,
Affidavit and
Order in
D. C. Colombo
Case No. 4604
18.12.47
—continued

Before me

Sgd. A. V. PUSHPADEVI JOSEPH.
C. O.

10

IN THE DISTRICT COURT OF COLOMBO.

In the matter of the Estate of Zainul Abdeen
and 2 others, minors.

No. 4604/G.

Z. A. M. AJWARD *Petitioner.*

Vs.

ZAINUL ABDEEN and 4 others *Respondents.*

18-12-47.

Mr. John Wilson files Proxy, petition and affidavit of petitioner
20 together with valuation report and inventory and moves—

(a) that petitioner be appointed curator of the estate of the minors.

(b) that 4th respondent be appointed guardian of the person and
5th respondent guardian-*ad-litem* of the minors.

(c) that petitioner as curator be authorised to sell the minors' 7/96th
share of premises No. 43, Barnes Place, Colombo, at a price calculated at
Rs. 92,000/- for the entirety of the said premises and to join in the execution
of the transfer as curator in favour of Mr. A. C. Abdeen upon the *pro rata*
share of purchase price being deposited in Court.

(d) that accounts be dispensed

30 He also moves that bond be dispensed with and that Certificate of
Curatorship be issued to the petitioner.

Respondents present. Of consent 5th respondent is appointed
guardian-*ad-litem* over 1st, 2nd and 3rd. He consents to application.

Exhibits
—
P 3.
Petition,
Affidavit and
Order in
D. C. Colombo
Case No. 4604
18.12.47
—continued

Issue certificate of curatorship to petitioner for the limited purpose mentioned in the petition. Curator is authorised to execute a conveyance on behalf of the minors of 7/96th share of the property in question after the purchase price in respect of this share is deposited in Court.

Issue D/N for Rs. 6,500/-

I accept the valuation report as it was obtained before the new rules were made known. Bond and accounts dispensed with.

Sgd. S. J. C. SCHOKMAN,
A. D. J.

True Copy of Petition and Affidavit and Order of Court dated 10 18-12-47 in D. C. Colombo Case No. 4604/G.

Sgd.....
Secretary, District Court,
Colombo. 30/7/51

D 3.
Certificate of
Posting.
23.12.47

D 3.
Certificate of Posting.

Certificate of posting a letter addressed to A. C. Abdeen, Esq., of No. 34, 5th Lane, Kollupitiya. Colombo 23rd December 1947.

Seal of Colombo *Poste Restante* on a five cents stamp.

D. 4
Letter from
1st Defendant to
Plaintiff
23.12.47.

D 4.
Letter from 1st Defendant to Plaintiff.

20

D 4.

23-12-47.

Dear Mr. Abdeen,

I am writing this to you in an hour of great distress I came several times to see you and explain my difficulties, but unfortunately I did not meet you.

We are placed in a very difficult position regarding Barnes House although we made every possible effort to obtain a house so far we have dismally failed. Now we are placed in a very delicate position. The terms of our agreement is on one side and the difficulty of housing problem on the other side press us that we are compelled to turn to you for advice and ultimate relief from you.

Please let us know how we are to act. May I return the advance as suggested by you to my mother.

You will really be with us in this hour of calamity.

Trusting that all the blessings you obtained in your recent visit to the Holy Land may be with you and yours for evermore.

P 5.
Letter from 1st Defendant to Plaintiff.

43, Barnes Place,

Colombo, 29th December 1947.

10 My dear brother-in-law,

As I did not receive a reply to my letter of 23-12-47, I take it that you are quite in sympathy with us in this hour of distress.

I am sending you a cheque for Rs. 2,500/- and I trust you will accept the same and relieve me from the present obligation. Kindly acknowledge receipt.

With salaams.

Yours faithfully,

Sgd. A. C. M. Thahir

Enclosed Cheque No. D 390204 for Rs. 2,500/-

20

D 5.
Letter from 1st Defendant to Plaintiff.

D 5.

29-12-47.

My dear brother-in-law,

As I did not receive a reply to my letter of 23-12-47 I take it that you are quite in sympathy with us in this hour of distress.

I am sending you a cheque for Rs. 2,500/- and I trust you will accept the same and relieve me from the present obligation.

May.

With Salaams.

30

Exhibits
—
D 4.
Letter from 1st
Defendant to
Plaintiff.
23.12.47
—continued

P 5.
Letter from 1st
Defendant to
Plaintiff.
29.12.47

D 5.
Letter from 1st
Defendant to
Plaintiff.
29.12.47

Exhibits
—
P 4.
Letter from 2nd
Defendant to
Plaintiff
29 12.47

P 4.
Letter from 2nd Defendant to Plaintiff.

P 4.

Barnes House,
43, Barnes Place,
Colombo, 29th December 1947.

To A. C. Abdeen, Esq.,
34, 5th Lane,
Kollupitiya.

Dear Mr. Abdeen,

10

I am sorry to inform you that I was not able to secure a house in spite of my several attempts to find one. I have entrusted several brokers to secure a house for me as early as possible in a vacant possession either for lease, rent or to purchase outright anywhere in Colombo from the very day I have spoken to you about the sale. But so far I have failed.

Therefore, I shall be thankful if you would grant me the time to vacate the house and transfer the title as per your agreement No. 4080 dated 3rd October 1947 when I manage to secure a vacant house as I have stated above.

With regard to your advance of Rs. 2,500/- I wish to suggest to you if you would please the return of the said sum till such time I would be in 20 a position to secure a house.

I am awaiting a favourable reply from you regarding this matter.

Thanking you.

Yours faithfully,
Sgd. A. C. MOOMINA UMMA
Mrs. ABDUL CAREEM MOOMINA UMMA,
Wife of M. S. M. HAMSA.

Copy to John Wilson, Esq.,
Proctor & Notary.
365, Dam Street, Colombo.

30

P 7.
Letter from
Plaintiff's
Proctor to 1st
Defendant.
30.12.47.

P 7.
Letter from Plaintiff's Proctor to 1st Defendant.

30th December 1947.

A. C. M. Thaheer, Esq.,
43, Barnes Place,
Colombo

Dear Sir,

Your letter dated 29th instant addressed to my client Mr. A. C. Abdeen has been referred to me for reply.

I annex for your information copy of a letter delivered by me today to the co-owners of the above premises and have to invite your attention to the agreement re vacant possession being given today as set out in the said letter.

I am further instructed by Mr. A . C. Abdeen to inform you that there is no question of his rights under agreement No. 4080 being waived.

10 In the event of vacant possession not being given and transfer executed at 4 p.m., tomorrow, action will be instituted immediately thereafter for specific performance and damages for failure to give possession.

Your cheque for Rs. 2,500/- is returned herewith.

Yours faithfully,

P 6.
Letter from Plaintiff's Proctor to 2nd Defendant.

P 6.

30th December, 1947.

Mrs. A. C. Moomina Umma
No. 43, Barnes Place,
20 Colombo.

Dear Madam,

Your letter dated 29th instant addressed to my client Mr. A. C. Abdeen has been referred to me for reply.

I annex for your information copy of a letter delivered by me today to the co-owners of the above premises and have to invite your attention to the agreement re vacant possession being given today as set out in the said letter.

I am further instructed by Mr. A. C. Abdeen to inform you that there is no question of his rights under agreement No. 4080 being waived.

30 In the event of vacant possession not being given and transfer executed at 4 p.m., tomorrow, action will be instituted immediately thereafter for specific performance and damages for failure to give possession.

Yours faithfully,

Exhibits
P 7.
Letter from
Plaintiff's
Proctor to 1st
Defendant.
30.12.47
—continued

P 6.
Letter from
Plaintiff's
Proctor to 2nd
Defendant.
30.12.47

Exhibits

P 8.
Letter from
Plaintiff's
Proctor to
Vendors.
30.12.47

P 8.**Letter from Plaintiff's Proctor to Vendors.**

P 8.

30th December, 1947.

Messrs. A. C. M. Thaheer, A. C. M. Ismail, A. C. M. Hafeel and Zainul Abdeen Mohamed Ajward.

Mesdames A. C. Sithi Aysha, A. C. Sithi Saeda and A. C. Moomina Umma. Mr. A. C. M. Hafeel as curator of the estate of A. C. M. Abdul Cader and Mr. Zainul Abdeen Mohamed Ajward as curator of the estate of Zainul Abdeen Ummul Faiza and Hussain Mazahir.

No. 43, Barnes Place, Colombo.

10

Dear Sirs and Mesdames,

With reference to Indenture No. 4080 dated 3rd October 1947 and attested by me, I write to confirm that I shall call at the above premises at 4 p.m., tomorrow the 31st December 1947 for execution of the transfer in favour of my client Mr. A. C. Abdeen in terms of the above Indenture, No. 4080.

Upon execution of the said transfer I shall pay you the balance consideration due out of the purchase price of Rs. 92,000/-

On the 18th December 1947 the parties present in the District Court of Colombo in regard to the applications for appointment of Curators were 20 informed that the transfer would be executed tomorrow and agreed on behalf of all the owners to give possession today. I understand that such possession has not been given as yet.

The purchaser will agree to possession being given at the time of purchase.

Yours faithfully,

P 9.**Letter from 2nd Defendant's Proctor to Plaintiff's Proctor**

P 9.
Letter from 2nd
Defendant's
Proctor to
Plaintiff's
Proctor.
31.12.47.

H. V. RAM ISWERA.
JOHN WILSON, ESQ.,
Proctor & Notary,
Colombo.

142, Hultsdorp Street,
Colombo, 31st December, 1947.

30

P 9.

Agreement No. 4080,

Dear Sir,

Your letter dated 30th December 1947 addressed to Mrs. A. C. Moomina Umma of No 43, Barnes Place, Colombo, has been handed to me for attention and reply.

I am instructed to inform you that the transfer by her cannot be executed today at 4 p.m., for the following reasons.

1. You have not obtained the sanction of Court in respect of the sale of the minors' shares.
2. You have not given my client 7 days clear notice of the date on which your client intends to complete the sale.
3. The failure to obtain before 31-12-47 sanction of Court in respect of the minors' shares was not due to any negligence or default on my client's part.

Yours faithfully,
Sgd. H. V. RAM ISWERA.

P 12.
Letter from Plaintiff's Proctor to 1st Defendant.

P 12.

6th February, 1948.

Registered Post.

20 A. C. M. THAHEER Esq.,
"Barnes Hall",
Barnes Place,
Colombo.

Agreement No. 4080 attested by me.

Dear Sir,

I am instructed by my client, Mr. A. C. Abdeen to invite your attention to his letter to you of the 30th December 1947.

In terms of the above agreement the transfer should have been signed at my office.

30 I however in terms of my letter dated 30th December 1947, called at the above premises on the 31st December 1947 and you failed to execute the transfer.

Exhibits
—
P 9.
Letter from 2nd
Defendant's
Proctor to
Plaintiff's
Proctor
31.12.47
—continued

P. 12.
Letter from
Plaintiff's
Proctor to
1st. Defendant.
6.2.48.

Exhibits
 P 12.
 Letter from
 Plaintiff's
 Proctor to 1st
 Defendant.
 6.2.48.
 —continued

A transfer bearing No. 4118 has now been executed in terms of the above indenture by all the parties thereto except yourself and Abdul Careem Moomina Umma.

My client is prepared without prejudice to grant you time till the 15th instant to give vacant possession of the above premises to him and to complete on the 16th instant the deed of transfer in my client's favour.

In the event of your failure to do so my client will have no alternative but to take steps to compel you to the specific performance of the agreement No. 4080 and for the recovery of damages at Rs. 300/- per mensem from 1st January 1948.

Yours faithfully,

10

P 10.
 Letter from
 Plaintiff's
 Proctor to 2nd
 Defendant
 6.2.48

P 10.

Letter from Plaintiff's Proctor to 2nd Defendant.

P 10.

6th February 1948.

Registered.

Mrs. ABDUL CAREEM MOOMINA UMMA.
 "Barnes Hall",
 Barnes Place, Colombo.

Agreement No. 4080 attested by me

Dear Madam,

20

With reference to your Proctor's letter to me of the 31st December 1947 I have already explained to him that the sanction of Court was obtained in respect of the minors share. In any event this is not a matter which concerns you nor its alleged failure entitle you to refuse to execute the transfer of Barnes Hall, Barnes Place, in favour of my client.

In terms of my notice of 30th December 1947 I called at the above premises for execution of the deed of transfer and you failed to execute the said deed.

A transfer bearing No. 4118 has now been executed in terms of the said indenture by all the parties thereto except yourself and Mr. A. C. M. 30 Thaheer.

My client is prepared without prejudice to grant you time till the 15th instant to give vacant possession of the above premises to him and to complete on the 16th instant the deed of transfer in my client's favour.

In the event of your failure to do so my client will have no alternative but to take steps to compel you to the specific performance of the agreement No. 4080 and for the recovery of damages at Rs. 300/- per mensem from 1st January, 1948.

Yours faithfully,

Exhibits
—
P 10.
Letter from
Plaintiff's
Proctor to
2nd Defendant
6.2.48
—continued

P 11.

Letter from 2nd Defendant's Proctor to Plaintiff's Proctor

H. V. RAM ISWERA.

142, Hultsdorp Street,
Colombo, 16th February, 1948.

P 11.
Letter from 2nd
Defendant's
Proctor to
Plaintiff's
Proctor.
16.2.48

10
P 11.

JOHN WILSON, Esq.,
Proctor & Notary,
Colombo.

Agreement No. 4080

Dear Sir,

My client Mrs. Abdul Careem Moomina Umma has requested me to reply to your letter dated the 6th February 1948.

It was specially provided in the above agreement *inter alia* as follows—
20 1. (a) that the sale should be completed on or before the 31st December 1947 by the purchaser, A. C. Abdeen ; (b) by paying to the vendors and depositing to the credit of the curatorship proceedings in the District Court of Colombo relating to the estate of the minors the balance purchase price of Rs. 79,500/-

2. That your client should give to the vendors at least 7 days notice of the date on which your client intended to complete the sale so as to enable the vendors to give to the purchaser vacant possession.

Your client failed to fulfill both the aforesaid conditions. Further the deed tendered for your client's signature did not conform to clause 3 (a) of the said agreement.

30 My client was not present in Court on the 18th December 1947, nor had she authorised any of the co-owners to agree on her behalf to give possession on any particular date.

As your client has failed to fulfill the terms and conditions of the agreement as aforesaid, my client is not bound to execute a transfer in favour of your client.

Yours faithfully,
Sgd. H. V. RAM ISWERA.

Exhibits
 —
 P 13.
 Deed No. 4118
 2.1.48

P 13.
Deed No. 4118.

P 13.

No. 4118.

To All to whom these Presents shall come :

Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zaibul Abdeen Mohamed Ajward, Abdul Careem Mohamed Abdul Cader (a minor) and Abdul Careem Mohamed Hafeel curator of the estate of the said Abdul Careem Mohamed Abdul Cader, Zainul 10
 Abdeen Umma Faiza and Hussain Lafir (minors) and the said Zainul Abdeen curator of the estate of the said Zainul Abdeen Umma Faiza and Hussain Lafir all of Colombo in the Island of Ceylon hereinafter called and referred to "as the said vendors" which term as herein used shall where the context so requires or admits mean and include the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward and the said Abdul Careem Mohamed Hafeel as Curator of the estate of the said 20
 Abdul Careem Mohamed Abdul Cader and Zainul Abdeen Mohamed Ajward as Curator of the estate of the said Zainul Abdeen Umma Faiza and Hussain Lafir and the respective heirs, executors and administrators of the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward :

Send Greeting :

Whereas the said vendors are seised and possessed of or otherwise well and sufficiently entitled to all those premises bearing assessment No 43. 30 situated at Barnes Place, in Colombo in the schedule hereto particularly described in the following shares or proportions to wit: the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Saeda and Abdul Careem Moomina Umma and Abdul Careem Mohamed Abdul Cader each to an undivided 1/8th share, the said Abdul Careem Sithi Aysha to an undivided 7/48th share, the said Zainul Abdeen Mohamed Ajward to an undivided 1/32nd share and the said Zainul Abdeen, Umma Faiza and Hussain Lafir jointly to an undivided 7/96th share.

And whereas letters of Curatorship to the estate of the said Abdul 40 Careem Mohamed Abdul Cader were issued to the said Abdul Careem Mohamed Hafeel in Guardianship Proceedings No. 4603 of the District Court of Colombo.

And whereas on an application made by the said Abdul Careem Mohamed Hafeel the District Court of Colombo by its order dated the 18th day of December 1947 and entered in the said Guardianship Proceedings No. 4603 authorised and empowered the said Abdul Careem Mohamed Hafeel as Curator as aforesaid to sell the undivided 1/8th share of the said Abdul Careem Mohamed Abdul Cader for the price or sum of Rupees Eleven thousand Five hundred (Rs. 11,500/-) and to execute the necessary Deed of Conveyance in favour of the purchaser upon the sum of Rupees Eleven thousand Five hundred (Rs. 11,500/-) being credited to the said Guardianship Proceedings in 4603.

Exhibits
—
P 13.
Deed No. 4118.
2.1.48
—continued

And whereas the said sum of Rupees Eleven thousand Five hundred (Rs. 11,500/-) was deposited to the credit of the Guardianship Proceedings No. 4603 on the 22nd day of December 1947.

And whereas Letters of Curatorship to the estate of the said Zainul Abdeen Umma Faiza and Hussain Lafir were issued to the said Zainul Abdeen Mohamed Ajward in Guardianship Proceedings No. 4604 of the District Court of Colombo.

And whereas on an application made by the said Zainul Abdeen Mohamed Ajward the District Court of Colombo, by its order dated the 18th day of December 1947 authorised and empowered the said Zainul Abdeen Mohamed Ajward to sell the said undivided 7/96 shares of the said Zainul Abdeen Umma Faiza and Hussain Lafir for the price or sum of Rupees Six thousand Five hundred (Rs. 6,500/-) and to execute the necessary deed of conveyance in favour of the purchaser upon the said sum of Rupees Six thousand Five hundred (Rs. 6,500/-) being deposited to credit of the said Guardianship Proceedings No. 4604.

And whereas the said sum of Rupees Six thousand Five hundred (Rs. 6,500/-) was deposited to the credit of the said Guardianship Proceedings No. 4604 on the 22nd day of December 1947.

And whereas by an agreement bearing No. 4080 dated the 3rd day of October 1947 and attested by John Wilson Notary Public, the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward agreed with Abdul Cader Abdeen of Colombo (hereinafter called and referred to as "the said vendee" which term as herein used shall where the context so requires or admits mean and include the said Abdul Cader Abdeen his heirs executors, administrators and assigns) to sell and cause to be sold to the said vendee the said premises in the said schedule hereto particularly described for the price or sum of Rupees Ninety-two thousand (Rs. 92,000/-) free from any encumbrance.

Exhibits
 P 13.
 Deed No. 4118.
 2.1.48
 —continued

Now Know Ye and These Presents Witness that the said Vendors do hereby in pursuance of the said agreement and in consideration of the said sum of Rupees Eleven thousand Five hundred (Rs. 11,500/-) deposited to the credit of the said Guardianship Proceedings No. 4603 Rupees Six thousand Five hundred (Rs. 6500/-) deposited to the credit of the Guardianship Proceedings No. 4604 and the balance sum of Rupees Seventy-four thousand (Rs. 74000/-) lawful money of Ceylon well and truly paid to the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward by the 10 said vendee (the receipt whereof is hereby expressly admitted and acknowledged) sell, grant, convey, assign and assure unto the said vendee all that the said premises in the said schedule hereto particularly described together with the buildings and plantations standing thereon and all rights, privileges, easements, servitudes and appurtenances thereto belonging or appurtenanting or usually held, used, occupied or enjoyed therewith or reputed or known to be part, parcel or member of the same and all the right, title, interest, claim and demand of the said vendors in and to the same.

To have and to hold the said premises hereby conveyed and transferred or intended or expressed so to be with all and singular the appurtenances 20 thereto belonging or appurtenanting unto the said vendee absolutely for ever.

And the said vendors do hereby covenant and declare to and with the said vendee that the said premises in the said schedule hereto particularly described are free from any encumbrance whatsoever and that they shall and will warrant and defend the title to the said premises unto the said vendee against any person or persons whomsoever and also shall and will at the request and cost of the said vendee make do and execute or cause to be made done and executed all such further and other acts, deeds, matters, assurances and things for the more perfectly and effectually assuring and vesting the said premises in the said vendee as by him shall or may be reasonably required. 30

In witness whereof the said Abdul Careem Mohamed Thaheer, Abdul Careem Mohamed Ismail, Abdul Careem Mohamed Hafeel, Abdul Careem Sithi Aysha, Abdul Careem Sithi Saeda, Abdul Careem Moomina Umma and Zainul Abdeen Mohamed Ajward and the said Abdul Careem Mohamed Hafeel as Curator of the estate of Abdul Careem Mohamed Abdul Cader and the said Zainul Abdeen Mohamed Ajward as Curator of the estate of the said Zainul Abdeen Umma Faiza and Hussain Lafir do set their respective hands hereunto and to two others of the same tenor and date as these presents at Barnes House, Barnes Place in Colombo, on this second day of January One thousand Nine hundred and Forty-eight. 40

The Schedule above referred to :

All that allotment of land with the buildings standing thereon formerly called "Osborne Lodge" now called "Barnes House" bearing former

assessment No. 1870/5 and presently bearing assessment No. 43, situated at Barnes Place, Cinnamon Gardens in Ward No. 9 within the Municipality and in the District of Colombo, Western Province ; and bounded on the north by the property of W. de Abrew, on the east by premises bearing assessment No. 6, on the south by the road called Barnes Place, and on the west by premises bearing assessment No. 4, containing in extent 3 roods and thirty-four and forty-three one hundredths perches (A.0 R.3 P.34, 43/100) according to figure of survey bearing No. 1262 dated the 23rd day of March 1925 made by Ben. J. Thiedeman, Licensed Surveyor, Registered under
 10 Title A 146/252 and A 175/29 in the Colombo District, Land Registry Office.

Exhibits
 —
 P 13.
 Deed No. 4118.
 2.1.48
 —continued

Signed in the presence of us by—

Abdul Careem Mohamed Hafeel,	Sgd. A. C. M. HAFEEL
Abdul Careem Mohamed Ismail,	Sgd. A. C. M. ISMAIL
Abdul Careem Sithi Saeda,	Sgd. A. C. S. SAEDA
Abdul Careem Sithi Aysha,	Sgd. A. C. S. AYSHA
Zainul Abdeen Mohamed Ajward,	Sgd. Z. A. M. AJWARD
Abdul Careem Mohamed Hafeel and	Sgd. A. C. M. HAFEEL
Zainul Abdeen Mohamed Ajward	Sgd. Z. A. M. AJWARD

at Barnes Place in Colombo on this 2nd day of January 1948.

20

Sgd. JOHN WILSON,
Notary Public.

Signed Podi Singho in Sinhalese

This is the signature of— VITHARATCHI KORALALAGE PODI SINGHO

Sgd. A. C. M. NAZAHIR

I, John Wilson of Colombo, Notary Public, do hereby certify and attest that the foregoing Instrument having been duly read over and explained by me to Abdul Careem Mohamed Hafeel, Abdul Careem Mohamed Ismail, Abdul Careem Sithi Saeda, Abdul Careem Sithi Aysha, Zainul Abdeen Mohamed Ajward, Abdul Careem Mohamed Hafeel and Zainul Abdeen
 30 Mohamed Ajward seven of the executants therein named who are known to me and who have signed as “ A. C. M. Hafeel ” “ A. C. M. Ismail ” “ A. C. S. Saeda ”, “ A. C. S. Aysha ”, “ Z. A. M. Ajward ” “ A. C. M. Hafeel,” and “ Z. A. M. Ajward,” respectively in the presence of Vitharatchi Korallalage Podi Singho and Abdul Cader Mohamed Nazahir of Barnes Place, in Colombo, the subscribing witnesses thereto both of whom are also known

Exhibits
 P 13.
 Deed No. 4118
 2.1.48
 —continued

to me and who have signed as the first named in Sinhalese characters and the second named as "A. C. M. Nazahir" respectively the same was signed by the said executants and by the said witnesses and by me the said Notary in my presence and in the presence of one another all being present together at the same time at Barnes Place in Colombo on this Second day of January One thousand Nine hundred and Forty-eight.

I further certify and attest that no consideration was paid in my presence and that in the original on page 3 in line 27 the letter "d" was deleted on page 5 in line 1 the word "Conferred" was deleted and "conveyed" was substituted, in line 11 the word "made" was interpolated and in the Duplicate on page 1 in line 16 the word "Saeda" was typed on an erasure, on page 2 between the lines 9 and 10 the interpolated words "Abdul Careem Sithy Aysha" were deleted in lines 23 and 29 the words "Hafeel" and "Eleven" were typed on erasures on page 3 in line 32 the words "to the said Vendee" were interpolated, on page 4 in line 8 the word "Thaheer" was typed on an erasure, in line 14 the words "And that" were deleted, on page 5 in line 2 the word "conferred" was deleted and "conveyed" substituted, in line 13 the word "made" was interpolated, in line 15 the word "perfectly" was typed on an erasure, on page 6 in the witnesses declaration, in lines 5 and 7 the word "Abdeen" was corrected in ink before the said Instrument was read over and explained and signed as aforesaid and that the Duplicate bears eight stamps of the value of Rs. 1471 and the Original a stamp of Re 1/- which said stamps were supplied by me.

Which I attest :

Date of Attestation : 2nd January, 1948.

Sgd. JOHN WILSON,
Notary Public.

D 1.
 Tax Receipt
 30.10.46

D 1
Tax Receipt.

D 1.

No. 16707. 30

COLOMBO MUNICIPAL COUNCIL,
 Treasurer's Department.

31-10-1946.

Treasurer's Department.

Received from A. C. M. Thaheer the undermentioned amount being the rates due on the annual value of premises shown below under the Municipal Council Ordinance for 3rd Quarter 1946.

No. 43, Barnes Place (part).....Rs. 10/00

Sgd.
for Municipal Treasurer

Exhibits
—
P 13.
Deed No. 4118
2,1.48
—continued

D 2.
Tax Receipt.

D 2.
Tax Receipt
8.5.51

D 2.

No. 43,851.

COLOMBO MUNICIPAL COUNCIL,
Treasurer's Department.

10

Date: 8-5-51.

Received from A. C. M. Thaheer the sum of Rs. 20 and cents 62 being rates and costs due on the annual value of No. 43, Barnes Place, Cinnamon Gardens, under the Municipal Council Ordinance made up as follows:—

For 4th quarter 1950 Rates	18.75
Warrant costs	.		1.87
			<hr/>
			20.62
			<hr/>

Sgd. L. L. ATTYGALLE,
Municipal Treasurer.

Supreme Court of Ceylon
No. 389 (Final) of 1952.

District Court, Colombo.
No. 19175.

*In Her Majesty's Privy Council
on an Appeal from
The Supreme Court of Ceylon*

BETWEEN

ABDUL CADER ABDEEN OF RACE COURSE AVENUE,
Colombo.....*Plaintiff—Appellant.*

VERSUS

1. ABDUL CAREEM MOHAMED THAHEER,
2. ABDUL CAREEM MOOMINA UMMA,
3. ABDUL CAREEM MOHAMED ISMAIL,
4. ABDUL CAREEM MOHAMED HAFEEL,
5. ABDUL CAREEM SITHI AYSHA,
6. ABDUL CAREEM SITHI SAEDA, and
7. ZAINUL ABDEEN MOHAMED AJWARD, all of
"Barnes House," No. 43, Barnes Place, Colombo,
8. AYNUM NAWASIA,
9. SITHY AYNUR RILAH,
10. UMMU FARIDA ZULFIKAR,
11. BADDEATHUZ ZUHIRIAH,
12. SITHY ZAMEELATHUL MARLIAH, Minors
(8th - 12th), all of "Barnes House," No. 43,
Barnes Place, Colombo, appearing by their
Guardian-ad-litem,
13. MOHAMED NAFIH MOHAMED of No. 43,
Barnes Place, Colombo.....*Defendants—Respondents.*

RECORD OF PROCEEDINGS
