

9, 1969

IN THE PRIVY COUNCIL

No. 9 of 1968

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

B E T W E E N

DON PETER MELLAARATCHY

Defendant-Appellant  
APPELLANT

- and -

J. A. NAIDOO

Plaintiff-Respondent  
RESPONDENT

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
10 MAR 1970  
25 RUSSELL SQUARE  
LONDON, W.C.1.

C A S E FOR THE APPELLANT

RECORD

- The Defendant-Appellant above named (hereinafter called the Appellant) appeals from the judgment and decree of the Supreme Court of Ceylon dated the 7th September 1966 dismissing the Appellant's appeal from the judgment and decree of the District Court of Nuwara-Eliya dated 29th January 1965 whereby the Appellant was ordered, inter-alia, to pay to the Plaintiff-Respondent above named (hereinafter called the Respondent) three sums of money claimed by him.
- 20
2. On 21st November 1963 the Respondent, in his capacity as executor of the estate of a deceased person named H.J.G. Marley (hereinafter called Marley), instituted the action, from which this appeal arises, in the District Court of Nuwara-Eliya against the Appellant for the recovery of three sums of money alleged to be due on three causes of action:
- 30 (a) a half-share of a sum of Rs. 125,000/=, together with interest, alleged to be payable to the estate of Marley on account of an advance of a like amount made to the Appellant by the Mercantile Bank at the request of Marley and which advance having been guaranteed by Marley was later recovered from Marley by the Bank.
- p.180 1.30 -  
p.182 1.40  
p.155 1.1 -  
p.173 1.30  
p.14 1.23 -  
p.18 1.5

RECORD

- (b) a half-share of a sum of Rs. 17,000/= paid by Marley on account of legal expenses in connexion with the purchase of a certain rubber estate referred to later in this paragraph.
- (c) a sum of Rs. 50,000/= lent to the Appellant by Marley at 2½% interest.

The plaint alleged that the said three sums were paid or made available in pursuance of an agreement between Marley, Marley's wife (hereinafter called Mrs. Marley) and the Appellant in regard to the purchase by Mrs. Marley and the Appellant of a rubber estate known as "Maha Borakande Division" alias Borakande. 10

p.18 l.10 - 3. In his answer filed on 29th May 1964, the  
p.21 l.35 Appellant resisted the claims on the following grounds, inter alia -

- (a) that the claims had been waived by Marley and barred.
- (b) that the Respondent was estopped by reason of the conduct of Marley from making any claim against the Appellant. 20

pp.22 - 27 4. The learned Trial Judge tried the case on  
p.172 l.26 - 19 issues which he answered in his judgment dated  
p.173 l.30 29th January 1965 as follows:-

- (1) In or about November 1960, was it agreed (a) that H.J.G. Marley, now deceased, should through his Bankers, the Mercantile Bank of India Ltd., lend and advance to the defendant and Mrs. Marley jointly in equal shares the sum of Rs. 125,000/= to be repaid by them together with interest thereon as demanded and on such terms as stipulated by the said bank; 30

Answer: Yes.

- (1b) That the said H.J.G. Marley should by way of loan provide and pay on account of the defendant and Mrs. Marley such monies as should be required for legal and other expenses connected with the purchase of the estate called Maha Borakande Division; 40

Answer: Yes.

(1c) That the defendant would be liable to repay one half share of the monies lent and advanced as aforesaid by the said H.J.G. Marley;

Answer: Yes.

10 (2a) Did the Mercantile Bank Ltd., in pursuance of the said Agreement and at the request of the said Marley and upon the personal guarantee and security given to the said Bank by him in or about November 1960, lend and advance a sum of Rs. 125,000/= to the defendant and Mrs. Marley repayable to the said Bank together with interest at 5 per cent per annum or at such or other rate as may, from time to time, be fixed or charged by the Bank;

Answer: Yes.

20 (2b) Did the said Marley for securing such repayment assign to the Bank a sum of Rs. 150,000/= held by him in fixed deposit to the credit of the said Marley;

Answer: Yes.

(3a) Did the said Marley in pursuance of the aforementioned agreement pay a sum of Rs. 17,004/- on account of the legal and other expenses connected with the purchase by the defendant and Mrs. Marley of the said Estate;

30 Answer: Yes.

(3b) Did the defendant become liable to repay to the said Marley a half share of the said amount, to wit Rs. 8,502/-;

Answer: Yes.

40 (4) On or about 7th August, 1960, did the said Marley lend and advance to the defendant and did the defendant borrow and receive from him a sum of Rs.50,000/- repayable on demand together with interest at 2½% per cent per annum:

Answer: Yes.

RECORD

(5a) Did the said Marley die in or about February 1963, leaving a Last Will and Codicil which have been duly proved in District Court Nuwara Eliya Case No.T.591:

Answer: Yes.

(5b) Is the plaintiff the lawful executor of the said Last Will and Codicil;

Answer: Yes.

(6a) As at 31st May 1963, was there due and owing to the Mercantile Bank of India Ltd., on account of the aforesaid loan of Rs. 125,000/-, a sum of Rs.136,343/63;

10

Answer: Yes.

(6b) Did the said Bank in satisfaction of the said debt lawfully appropriate an amount equivalent thereto out of the fixed deposit of the late H.J.G. Marley held by and assigned to them;

Answer: Yes.

(7) Did the defendant thereupon become liable to repay one half share of the said debt to wit: Rs.68,171/84 to the plaintiff as Executor as aforesaid;

20

Answer: Yes.

(8) Is the plaintiff as Executor now entitled to recover from the defendant:-

(a) the said sum of Rs. 68,171/84 with legal interest from date of action;

Answer: Yes.

(b) the said sum of Rs. 8,502/- with legal interest from the date of action:

30

Answer: Yes.

(c) the said sum of Rs. 50,000/- with 2½ per cent interest up to date of

action and legal interest thereafter;

Answer: Yes.

- (9) Was Agreement No. 542 to buy Borakande Estate in the names of Eileen Marley and the defendant entered into by the defendant at the express request of H.J.G. Marley deceased?

Answer: No.

- 10 (10) Was it agreed between Marley, the deceased, and the defendant that the consideration for the purchase of Borakande Estate was to be provided;

- (a) in respect of Rs. 25,000/= by the defendant;

Answer: No - Rs. 50,000/-

- (b) in respect of Rs. 125,000/- by the grant of a mortgage for Rs.125,000/- to Borakande Estate Co. Ltd., the vendors;

20 Answer: Yes.

- (c) in respect of the balance Rs. 275,000/- by Marley the deceased and his wife Eileen Marley.

Answer: No.

- (11) Prior to the Deed of Transfer No. 1419 of 29th November 1960 of Borakande Estate to the defendant and Mrs. Marley, was it agreed between H.J.G. Marley, the deceased, and the defendant:

- 30 (a) that the defendant was to be in sole management of Borakande Estate after the transfer;

Answer: Yes.

- (b) that the defendant was to manage the same and pay out the nettincome therefrom:

RECORD

- (i) the sum of Rs. 125,000/- and interest thereon due to Borakande Estate Co. Ltd. on a mortgage to be entered into in favour of the said Company;

Answer: Yes.

- (ii) the sum of Rs. 275,000/- to the said Marley, deceased, and Eileen Florence Marley by crediting the same to a separate account with the Mercantile Bank Ltd. 10

Answer: Yes.

- (iii) the defendant was to maintain an account under the name 'Borakande Estate' for the purpose of running the Estate.

Answer: Yes.

- (12) Was the defendant after the transfer of Borakande Estate on 20th November 1960, in management of same until 20th February 1962. 20

Answer: Yes.

- (13) As at 20. 2.62, had the defendant:-

- (a) expended a sum of about Rs.20,000/- of his own money towards the running of Borakande Estate?

Answer: Not proved.

- (b) placed to the credit of Borakande working A/c. a sum of Rs. 3,993/25; 30

Answer: Yes.

- (c) paid accruing interest on the sum of Rs. 125,000/- to Borakande Estate Co. Ltd., in respect of the Mortgage of Borakande to be duly executed;

Answer: Yes.

(d) paid to the credit of a separate account called the 'Borakande Loan A/c.' a sum of Rs. 6,000/- against the sum of Rs. 275,000/- referred to above?

Answer: Yes.

(14) As at 20.2.62 were there personal belongings of the defendant to the value of about Rs. 2,000/= on the Estate;

10 Answer: Yes.

(15) (a) Did H.J.G. Marley, deceased, and his widow Eileen Florence Marley on 20.2.62 along with some thugs take wrongful and forcible possession of Borakande Estate from the defendant?

Answer: Yes.

20 (b) Did Eileen Florence Marley at the express instigation and with the knowledge of H.J.G. Marley, deceased, remove on the night of 20.2.62 from Borakande Estate, rubber to the value of Rs. 15,000/- and cocoanuts to the value of Rs. 4,000/- and books of account kept by and under the direction of the defendant?

Answer: Not proved.

(16) Was the defendant wrongfully deprived of the possession and management of -

(a) Borakande Estate:

30 Answer: Yes.

(b) of his belongings to the value of Rs. 2,000/- on 20.2.62 by Marley, deceased, and Eileen Florence Marley;

Answer: Yes.

(17) Did the defendant thereupon take necessary steps to regain possession of Borakande

RECORD

Estate, the books of account, rubber, coconuts etc.,

Answer: Yes.

(18) Did the deceased H.J.G. Marley thereupon agree with the defendant whereunder:

(a) the defendant was discharged of all obligations to pay any monies to H.J.G. Marley, deceased, or Eileen Florence Marley, his widow;

Answer: No.

10

(b) Agreement No. 227 of 2.3.62 attested by R.M.S. Karunaratne, Notary Public was entered into between the defendant and Eileen Florence Marley?

Answer: Yes.

(c) the Defendant abandoned all steps taken against Eileen Florence Marley and H.J.G. Marley, deceased?

Answer: Yes.

(19) (a) Has the defendant been released and absolved from liability to pay any sum of money to H.J.G. Marley, deceased, or to Eileen Florence Marley?

20

Answer: No.

(b) Is the Estate of H.J.G. Marley, deceased, estopped and barred from making any claim against the defendant?

Answer: No.

30

p.173 1.29 5. The learned trial judge, having answered the issues as indicated above, gave judgment for the Respondent as prayed for with costs.

p.174 1.20 - 6. The Appellant appealed and the Supreme Court, p.179 1.29 having heard argument, gave judgment on 29th p.180 1.30 - September 1966 dismissing the Appellant's appeal p.182 1.40 with costs.



7. It is respectfully submitted that the District Court and the Supreme Court erred in law in deciding the issue of estoppel against the Appellant.

8. As to the decision of the learned trial judge, it is respectfully submitted that upon the findings of fact, the Appellant was entitled to a decision in his favour on issue 19 (b).

10 9. As to the judgment of the Supreme Court it is respectfully submitted:

(a) that their Lordships took too narrow a view of the nature of estoppel;

(b) that the provisions of section 115 of the Evidence Ordinance should be read in the light of English Law relating to Estoppel.

20 10. It is respectfully submitted that the view expressed by the Supreme Court that the Appellant stood to gain financially whether the transaction in D5 went through or not and that it is not, therefore, inherently credible that the Appellant would not have signed the Agreement but for some inducement offered Marley either expressly or by conduct is not justified by the facts proved in the case. According to the Agreement entered into by the Appellant with Marley and Mrs. Marley prior to the purchase of Borakande, the Appellant was to manage the estate and pay off the loans from the profits of the estate; and, in view of this prospect, the Appellant expended his time and energy, to the exclusion of other business, on running Borakande. When the Appellant was forcibly dispossessed by Marley and Mrs. Marley and the entirety of the estate was given on lease for a period of five years (d 31), the Appellant was left with a bare title and the prospect of a lengthy and expensive litigation to regain possession.

p.294 l.1 -  
p.301 l.10

p.282 l.15 -  
p.287 l.10.

40 11. Even if the Appellant is not entitled to succeed on the issue of estoppel, it is respectfully submitted that the learned trial judge's answer to the issues in the case constitute in law and equity a bar to the money claims made against the Appellant since -

RECORD

- (a) it was understood between the parties to the agreement which preceded the purchase of Borakande that the loans should be paid out of the profits of the estate, and
- (b) the Appellant was dispossessed by Marley and Mrs. Marley.

12. It is respectfully submitted that this appeal should be allowed with costs throughout for the following among other

10

R E A S O N S

- 1. BECAUSE the District Court erred in law on the issue of estoppel.
- 2. BECAUSE the Appellant is entitled in law to succeed on the issue of estoppel.
- 3. BECAUSE the Supreme Court's view of the facts relevant to the issue of estoppel is not justified by the evidence in the case.
- 4. BECAUSE in any event, the answers of the learned trial judge to the issues framed in the case constitute a bar to the Respondent's claims.

20

E. F. N. GRATIAEN

WALTER JAYAWARDENA

BRIAN SINCLAIR

No. 9 of 1968  
IN THE PRIVY COUNCIL  
ON APPEAL FROM  
THE SUPREME COURT OF CEYLON

B E T W E E N

DON PETER MELLAARATCHY

Defendant Appellant  
APPELLANT

- and -

J. A. NAIDOO

Plaintiff-Respondent  
RESPONDENT

---

C A S E    F O R    T H E    A P P E L L A N T

---

FISHER DOWSON & WASBROUGH,  
7, St. James's Place,  
London, S.W.1.