8

In the Privy Council.

12, 1950

No. 51 of 1948.

ON APPEAL FROM THE SUPREME COURT OF CEYLON

BETWEEN

VALIAPPA CHETTIAR, substituted in place of the 3rd and 5th Plaintiffs ... ... APPELLANT

AND

1. J. VANDER POORTEN
2. B. VANDER POORTEN
3. G. BEMELMANS, Executors of the last Will and Testament of A. J. VANDER POORTEN, deceased ... RESPONDENTS.

CASE FOR THE RESPONDENTS

RECORD

1.—This is an appeal from a decree of the Supreme Court of Ceylon, dated the 22nd August, 1946, varying, in favour of the Appellant, a Judgment and Order of the District Court of Colombo, dated the 10th March, 1944, whereby effect was given to the directions contained in an Order in Council, dated the 15th December, 1932, drawn up in accordance with the Judgment of the Judicial Committee of the Privy Council dated the 23rd November, 1932, in previous proceedings between the predecessors-in-title of the parties to the present appeal. pp. 201–202 pp. 183–196 pp. 31–33 pp. 33–43 34 N.L.R. 287

2.—The said directions of the Board related to matters of account, interest, ascertainment of shares, and to incidental questions of fact, all of such matters ascertainable, it is submitted, by the ordinary processes of law and without recourse to any particular principle thereof. They were, in the Respondents' submission, given effect to by the Courts below with due regard to the said processes and to reason.

The questions that now arise for determination are, presumably, concerned with the decisions of the Courts below on the said matters and, as such, they are not, in the Respondents' respectful submission, appropriate questions for determination by the Board.

RECORD

34 N.L.R. 287

3.—The relevant facts of the original dispute between the parties, resulting in the said directions, were thus narrated in the Judgment of the Board, delivered by Lord Tomlin on the 23rd November, 1932 :—

p. 34, ll. 12–17

" In the year 1923 an action as to title to an estate in Ceylon, " consisting of about 14,000 acres of forest land, was in progress " between the Crown and certain persons who and whose successors " in title will be hereafter referred to collectively as a Syndicate. " The appellant is the representative of a person, now deceased, who " was a member of the Syndicate in two capacities, one original, " and the other derivative." [The present Appellant is now the representative of the said deceased person who was both the 3rd and 5th plaintiff in the original suit.]

p. 34, ll. 18–21

" The Syndicate had expended sums to the amount of " Rs. 200,000 in acquiring the estate from those whom they believed " to be the owners of it. After they had done so the Crown asserted "'title to it, and the action in question resulted.

p. 34, ll. 22–27
Ex. P. 1, p. 206

" On the 28th March, 1923, a decree " (Ex. P.1) " was made in " the action between the Crown and the Syndicate whereby it was " declared that the estate was the property of the Crown, but " whereby also the Crown submitted to sell the estate to the " Syndicate provided that a sum of Rs. 275,000 was deposited with " the Settlement Officer within twelve months from the date of the " decree.

p. 34, ll. 28–34

" The Syndicate, towards the end of the period allowed under " the decree of the 28th March, 1923, for making the deposit, had " succeeded in raising no more than Rs. 64,000 towards such " deposit and the respondent " (A. J. Vander Poorten, since deceased, now represented by the present Respondents) " who was approached " to assist the Syndicate provided at the last moment the balance, " viz. : Rs. 211,000. By means of the Rs. 64,000 already raised " and the money provided by the respondent the deposit was in " fact made just before the time for making it expired.

p. 34, ll. 35–36

" A sum of Rs. 5,160 was immediately repaid to the respondent, " so that the sum actually provided by him was Rs. 205,840.

p. 34, ll. 37–40

" No definite agreement appears to have been made between " the Syndicate and the respondent at the time when the money was " provided but the respondent then instructed his Proctor to see " that he was properly protected."

4.—The narrative in the said Judgment of the Board continued as follows :—

p. 35, ll. 1–5
Ex. D.1, p. 221

" On the 29th March, 1924, after the deposit had been made, " the Syndicate executed a deed " (Deed No. 448, Ex. D.1) " which " purported to be an assignment by the Syndicate to the respondent

" for Rs. 30,000 of the benefit of the decree of the 28th March, 1923.
" No sum of Rs. 30,000 was in fact paid or intended to be paid by
" the respondent to the Syndicate.

" Having regard to the circumstances of its execution their p. 35, ll. 6–8
" Lordships are of opinion that the only purpose of this document
" was to give the respondent a temporary security for the money
" he had advanced.

" Subsequently the Crown were requested by the Syndicate to p. 35, ll. 9–11
" make the grant under the decree of the 28th March, 1923, directly
" to the respondent, but this request was refused.

" After the refusal two deeds were executed, respectively dated p. 35, ll. 12–13
" the 2nd March, 1925, and numbered in the record 471 and 472.

" Deed No. 471 " (Ex. P.3) " recited the Deed of the p. 35, ll. 14–20
" 29th March, 1924, and the request made to the Crown, but not the Ex. P.3, p. 259
" Crown's refusal of such request, and was framed as an out and out
" conveyance by the Syndicate to the respondent of the whole
" estate with the exception of a defined portion of 1,000 acres on the
" south-eastern side thereof, which had apparently been otherwise
" disposed of, to hold unto the respondent his heirs, executors.
" administrators and assigns absolutely and for ever."

5.—The said Judgment of the Board, dealing now with Deed No. 472, continued as follows :—

" Deed No. 472 " (Ex. P.4) " was of even date with Deed p. 35, ll. 21–26
" No. 471. Upon its construction and effect the result of this Ex. P.4, p. 262
" appeal mainly depends. It was made between the respondent of
" the first part and the persons then constituting the Syndicate of
" the second and third parts, the group of persons who were of the
" third part being persons claiming derivative interest under
" original members of the Syndicate.

" This Deed contained recitals in the following terms :— p. 35, ll. 27–39

" ' WHEREAS the party of the first part has provided funds p. 263
" ' and assisted the parties of the second part to deposit with
" ' the Settlement Officer the purchase money for the conveyance
" ' to them by the Crown of the lands referred to in the Schedule
" ' hereto in the terms of the decree in their favour in case
" ' No. 3656 of the District Court of Badulla on the 28th day of
" ' March, 1923, and the said parties of the second part have
" ' by a Deed No. 448 dated the 29th day of March, 1924, and
" ' attested by the Notary attesting these presents assigned to
" ' the party of the first part all their right title and interest
" ' in and to the said decree and covenanted therein to convey
" ' the said land to the party of the first part in the event of the
" ' Crown refusing to issue a Crown grant in his favour instead
" ' of issuing a Crown grant in their favour.'

p. 35, l. 40 to p. 36, l. 1
p. 263

" ' AND WHEREAS the Crown grant in question is to be " ' issued in favour of the parties of the second part, and not in " ' favour of the party of the first part and the parties of the " ' second part and third part have therefore at the request of " ' the party of the first part conveyed to him the said lands " ' by Deed No. 471 . . .'

p. 36, ll. 3–5
p. 263

" ' AND WHEREAS the parties of the second and third parts " ' have required the party of the first part to enter into these " ' presents and to declare their interests in the said premises.' "

6.—Continuing, the Judgment of the Board set out the operative part of the said Deed No. 472 as follows :—

p. 36, ll. 7–28
pp. 263–264

" NOW KNOW YE and these presents witness that the party of the " first part shall hold and stand possessed of the said lands as " absolute owner and with full power and authority to manage and " control the same to fell and remove and dispose of the timber " therein and to put the said lands to such use as he shall think fit " in his absolute discretion and to sell the said lands for the best " available price with or without the timber therein such price to " be in his absolute discretion provided that if the price is less than " Rupees one hundred (Rs. 100) per acre he shall obtain the approval " of the parties of the second part for such sale and to apply all " monies realised by him in respect of the sale of such timber and " of the said lands or any portion thereof in payment of such sums " as shall be due and payable to him for monies advanced to the " Crown for the said purchase from the Crown and moneys expended " on the management control and working of the said lands as " aforesaid and of such compensatiom or profits for himself as he " shall think reasonable and equitable in his own discretion and " shall pay over the balance *pro rata* according to their respective " interests among the said parties of the second and third parts or " their successors in title and such other person or persons as shall " have a legal claim to or interest in the said lands, provided however " that it shall not be obligatory on any purchaser from the party of " the first part to see to the application of the purchase money by " the said party of the first part in manner herein provided and " receipt by him shall be a full and complete discharge to such " purchaser for the payment of such purchase money."

7.—The said Judgment of the Board continued as follows :—

p. 36, ll. 29–34

" Possession was taken by the respondent of the property " conveyed by Deed No. 471 after the execution thereof and he has " since remained in possession. The respondent after going into " possession admittedly cut and sold a considerable quantity of " timber and alleges that he expended large sums in cultivating and

"improving the estate. No account of receipts or expenditure has "ever been rendered by the respondent.

"On the 30th March, 1925 the Crown executed a conveyance p. 36, ll. 35-38
"of the estate to the Syndicate or the survivors of the original "members thereof."

The Judgment then referred to the fruitless efforts to sell the estate p. 36, l. 37 to p. 37, l. 30
that had apparently been made and to communications between certain members of the Syndicate and the respondent on the amount to be paid by the latter for redemption; to the fact that the amount demanded (Rs. 500,000) by the respondent being considered excessive by those seeking to redeem, the latter instituted an action in the nature of an action for breach of trust and redemption against the respondent and the other members of the Syndicate who did not join as plaintiffs, a subsequently added defendant being one Fombertaux to whom the respondent was p. 39, ll. 5-9
alleged to have given an option of purchase over the site fraudulently and in breach of trust; and to the fact that "before the trial of the action the "respondent settled with all the members of the Syndicate except the two "plaintiffs whom the appellant represents."

8.—The said Judgment of the Board next referred to the pleadings of p. 37, ll. 31-36
the parties which showed "the willingness of the plaintiff to redeem upon p. 39, ll. 10-20
"the footing that the amount due to the respondent was the aggregate "total of the sum advanced, money expended, interest at 9 per centum "per annum to date of the plaint and a sum of Rs. 25,000 for reasonable "compensation and profit for the respondent's services, such aggregate "total amounting, apart from expenditure, to Rs. 274,090"; to the Judgment of the District Judge, dated the 19th July, 1929, in which it was held that the respondent was liable to re-convey the estate if called upon to do so and upon being paid the money due to him, and to re-transfer the shares of the two plaintiffs whom the then appellant represented: and to the formal decree drawn up in accordance therewith, the operative part of which was in the following terms:—

"It is ordered and decreed that the said 1st defendant is holding p. 39, ll. 21-40
"the property set out in Schedule hereto in trust for the plaintiffs "and 2nd to 7th defendants.

"It is further ordered and decreed that the said 1st defendant "do file in Court an account showing the expenses incurred by him "in the management of the property described in Schedule hereto "and all moneys realised by him by the sale of timber or other "products of the said property—this account should be filed within "one month from date hereof with notice to the substituted "plaintiffs (*sic*) in place of the 3rd and 5th plaintiffs deceased who "will be entitled to falsify or surcharge those accounts.

"It is further ordered and decreed that the 1st defendant on "receipt of the money due to him and the amount of money

RECORD

"incurred by him in the management of the said property as "aforesaid do re-convey to the substituted plaintiffs in place of "the 3rd and 5th plaintiffs their shares of the said property.

"It is further ordered and decreed that the 1st defendant do "pay to the substituted plaintiffs in place of the 3rd and 5th plaintiffs "deceased their costs of this action and also to the added defendant "his costs up to the 31st day of July, 1928."

As to the above decree, the Board said in the said Judgment :—

p. 39, ll. 41-46 "This decree even upon the assumption that the learned Judge "was right in his conclusion, does not seem, in their Lordships' 10 "opinion, to give effect accurately to that conclusion. It makes "no provision with regard to interest and contemplates a "reconveyance to the redeeming plaintiff of his shares on payment, "not of his proportion, but of the whole of what was due to the "respondent."

p. 40, ll. 1-15 9.—The Judgment of the Board then referred to the fact that an appeal from the said decision of the District Judge was allowed by the Supreme Court which, by its Judgment and decree, dated the 10th March, 1930, dismissed the action.

Dealing now with the appeal before the Board, the said Judgment 20
p. 40, l. 2 to p. 41, l. 41 referred again to the said Deeds Nos. 471 and 472, and gave reasons for their Lordships' conclusions that the transaction effected by the two deeds
p. 41, ll. 1-5 was "the creation of a security for money advanced which in certain "events imposed upon the respondent, who was the creditor, duties and
p. 41, ll. 35-41 "obligations in the nature of trusts," that "nothing in Deed No. 472 can "preclude the debtors from at any time redeeming the mortgaged property," but "the fact that the respondent settled with all the debtors except one "cannot put that one in a worse position," and that "the appellant, as "representing the person with whom no settlement was made is entitled "to redeem his shares on payment of his rateable proportion of the total 30 "amount due to the respondent." The Judgment of the Board then continued as follows :—

p. 41, l. 42 to p. 42, l. 2 "In ascertaining the amount due their Lordships think that no "regard should be had to the provision of Deed No. 472 as to "'compensation or profits.' That provision is expressed to operate "only in the event which has not happened of the respondent "exercising his power of sale.

"It is, however, right that reasonable interest should be "allowed on moneys advanced or expended.

p. 42, ll. 3-6 "Bearing these considerations in mind, their Lordships think 40 "that the appeal should be allowed and that the decree below be "discharged except so far as the costs of the added defendant "Fombertaux were ordered to be paid. That direction should "stand.

"Their Lordships do not, however, think that the decree of p. 42, ll. 7-9
"the District Judge should be restored, but that a decree should be
"framed providing for the following matters . . ."

Of the said matters, those relevant to this appeal were set out finally in the Order in Council referred to in the next paragraph.

10.—The relevant portion of the Order in Council, dated the 15th December, 1932, drawn up in accordance with the said Judgment of the Board, dated the 24th November, 1932, contained the following directions :—

"(4) That appeal ought to be remitted to the Supreme Court p. 32, l. 30 to p. 33, l. 23
"of the Island of Ceylon in order that a Decree should be framed
"providing for the following matters :—

"(*a*) a declaration that upon the true construction of Deeds Nos. 471
"and 472 and in the events which have happened the appellant
"is entitled to redeem upon the terms hereinafter appearing
"the shares of the deceased person whom he represents in the
"property conveyed by Deed No. 471 ;

"(*b*) a direction for the taking of the following enquiry and
"accounts—

"(i) an enquiry as to the amount of the shares in the property
"in question of the person whom the appellant represents ;

"(ii) an account of what is due to the respondent for principal
"monies advanced to provide the deposit under the decree
"of the 28th day of March, 1923, and for monies properly
"expended by him in the management and control of the
"property together with interest at such rate as the Court
"shall deem reasonable upon the monies advanced or
"expended from the respective dates of such advance or
"expenditure to the date of decree ;

"(iii) an account of rent and profits (including proceeds of sale
"of timber and other produce) of the property received by
"the respondent or by any other person or persons by the
"order or for the use of the respondent or which without
"the wilful default of the respondent might have been so
"received, with interest at such rate as aforesaid upon such
"rents and profits from the respective dates of receipt to
"the date of decree ; and

(iv) an account of the costs payable to the appellant by the
"respondent under their Lordships report as to payment
"of costs hereinafter contained and remaining unpaid ;

"(*c*) a direction that the amounts certified under account (iii) ought
"to be deducted from the amount certified under account (ii)

RECORD

" and that upon payment by the appellant to the respondent " of the proportionate part of the balance so found corresponding " with the shares which shall be certified under enquiry (i) to be " the shares in the property of the person whom the appellant " represents less any costs payable to the appellant under " account (iv) remaining unpaid, the respondent shall re-convey " to the appellant the shares in the property of such person ; " and

" (*d*) such other directions as the Court may deem necessary or " appropriate for working out the decree ;

" (5) that the respondent ought to pay the costs of the person " whom the appellant represents and of the appellant of the action " up to the decree of the District Court of Colombo dated the " 19th day of July, 1929, and of the appeal before the Supreme Court " of Ceylon his costs of this appeal incurred in the said Supreme " Court and the sum of £495 4s. 3d. for his costs thereof incurred in " England ; and

" (6) that any subsequent costs in this action in working out " the decree or otherwise ought to remain to be dealt with in due " course by the Court in Ceylon having seisin of the matter."

11.—Following the remittal of the appeal to the Supreme Court for the above-mentioned purpose that Court by an Order directed the District Court of Colombo to hold the enquiry and to take accounts in accordance with the directions of the Board.

p. 198, ll. 27–29

The enquiry was subsequently held and accounts taken in the District Court, the present Appellant being substituted for the previous representative of the 3rd and 5th plaintiffs, and the present Respondents for the defendant No. 1, since deceased.

p. 198, ll. 30–31

12.—At the taking of the said enquiry and accounts, the present Respondents filed accounts under the following heads :—

p. 198, ll. 32–35

(A) Thanketiya Purchase Account (" Thanketiya " it should be mentioned is the name by which the property concerned is known ; (B) Thanketiya Working Account ; and (C) Thanketiya Timber Sales Account.

They calculated the interest payable by or to them in respect of the various amounts at nine per cent.

Various items in the said Accounts were, on the 11th February, 1942, objected to by the Appellant for reasons that appear on pages 53 and 54 of the Record.

13.—On the 16th November, 1942, the learned District Judge who was charged with the enquiry set out the following points which would have to be determined by him in giving effect to the directions of the Board :— RECORD

" (1) The amount of the shares in the property of the pp. 54–55
" representatives in interest of the original 3rd and 5th plaintiffs.
" For the sake of convenience I shall refer to these parties as the
" contesting substituted plaintiffs.

" (2) (a) An account of the amount due to the original defendant
" for principal monies advanced to provide the deposit under the
" decree in case No. 3656 D.C. Badulla.

" (b) The monies properly expended by the original defendant
" in the management and control of the property.

" (c) The interest on monies advanced or properly expended at
" such rate as the Court shall deem reasonable, from the respective
" dates of such advancement or expenditure to the date of the
" decree . . .

" (3) (a) An account of the rents and profits which will include
" proceeds of sale of timber and other produce of the property
" received by the original defendant or by any other person or
" persons by the order of or for the use of the original defendant or
" which without his wilful default might have been so received.

" (b) Interest at such rate as aforesaid upon the rents and profits
" from the respective dates of receipt to the date of decree . . .

" (4) An account of the costs payable to the contesting
" substituted plaintiff by the substituted defendants in the action
" up to the decree in the District Court and of the appeal before the
" Supreme Court and of the appeal to His Majesty in Council
" (Mr. Choksy " [for the substituted defendants] " brings it to my
" notice that the Supreme Court had already entered a decree in
" accordance with the directions of the Privy Council. That decree
" is dated 24th May, 1933 . . . Mr. Choksy points out that the
" Privy Council has directed that the costs of this enquiry should be
" determined by the Court).

" (5) The amounts found by the Court under head (3) should
" be deducted from the amounts found to be due to the substituted
" defendants under head (2).

" (6) An ascertainment of the proportionate part of the balance
" found under head (5) corresponding with the shares as found under
" head (1) less costs found under head (4) payable to the contesting
" substituted plaintiffs."

14.—Following a careful consideration of the oral and documentary evidence which both sides had produced, the learned District Judge, in pp. 183–196

RECORD

his Judgment and Order, dated the 10th March, 1944, dealt with the disputed items under specific headings and held as follows :—

p. 184, l. 10 to p. 185, l. 3
p. 184, ll. 18–20

"PLAINTIFFS INTEREST IN THANKETIYA."

Admittedly the land conveyed by the Crown to the Syndicate amounted in extent to 13,492 acres, and the share of the contesting substituted plaintiffs (hereinafter called "the plaintiffs") to 3,586 acres. But the Syndicate had conveyed only 12,492 acres to the original first defendant, 1,000 acres being set apart for one Simon de Alwis, a member of the Syndicate and one of the grantees under the Crown Grant, who had refused to negotiate with the original first defendant and was not concerned in the transaction effected by the said Deeds Nos. 471 and 472. The correct fraction of the plaintiffs' share was therefore 3,586/12,492 (as was contended by them) and not 3,586/13,492 (as was contended by the other side).

p. 184, ll. 39–40

p. 184, ll. 23–27

"One would have imagined that the plaintiffs would have gladly "accepted the larger fraction represented by the smaller denominator. "Apparently Thanketiya has not turned out the gold mine it was "expected to be, and the plaintiffs are endeavouring to pay as little "as possible to exercise their equity of redemption."

15.—The said Judgment and Order of the learned District Judge continued as follows :—

pp. 185–188

"INITIAL COST OF THANKETIYA."

p. 185, ll. 8–14

It was common ground that (1) Rs. 275,000 was paid to the Crown by the original first defendant on behalf of the Syndicate; (2) Rs. 64,500 of the said sum was contributed by the Syndicate; (3) Rs. 5,160 had been refunded by the Crown because of a shortfall in the acreage; and (4) Rs. 21,000 had been recovered by the Syndicate and the original first defendant from the said Simon de Alwis in respect of the 1,000 acres allotted to him. The parties were not agreed as to how (4) should be dealt with. It appeared correctly in the accounts as a credit item. Against this credit item, however, the plaintiffs should be debited with Rs. 7,875, which amount, the evidence had established, was paid to an agent of the original 3rd plaintiff.

p. 185, ll. 13–14, 28–30
p. 185, ll. 31–35
p. 186, ll. 30–32

The substituted defendants were also entitled to debit the following items: (1) Rs. 250 paid as brokerage for the raising of a loan of Rs. 100,000—"a necessary item of expenditure in finding "the money which the original first defendant had to pay to the "Crown on behalf of the Syndicate"; (2) Rs. 3,500 paid, with the Syndicate's approval, for a settlement of a dispute with the original owners of the land ("the Bandaras")—"a necessary item of "expense in obtaining the Crown Grant . . . as speedily as

p. 186, l. 41
p. 187, ll. 27–32

p. 187, ll. 35–41

"possible"; and (3) two sums of Rs. 4,500 and Rs. 4,612 paid by the original first defendant "in connection with stamp fees, notarial "charges, fees and other disbursements in connection with the "entire transaction." These expenses incurred "in connection with "the assignment of the decree and the execution of deeds 471 "and 472" could rightly be taken into account in ascertaining the moneys advanced by the original first defendant for it was "reasonable that if the plaintiffs are to be permitted to redeem the "property, they should make good to the defendants not only the "amount which the original first defendant had actually paid to "the Crown but also those additional expenses which were incurred "by the original first defendant in executing documents necessary "to secure himself." p. 187, l. 42 to p. 188, l. 43; p. 187, ll. 44–45; p. 188, ll. 25–30

16.—In accordance with the Board's direction to take into account "moneys properly expended by the original first defendant in the "management and control of the property," the learned District Judge next considered the various items which the substituted defendants (hereinafter called "the defendants") sought to charge under the heading— p. 184, ll. 3–4

WORKING EXPENSES. pp. 189–192

Among the said items were :—

"(a) Expenses incurred by the original first defendant in "opening up and planting the land. p. 189, ll. 6–10

"(b) Visiting and Direction Fees.

"(c) Cost of certain machinery imported in order to erect "a saw mill at Thanketiya but which never found its way there."

As to (a), the learned Judge said that there was no dispute as to the correctness of the defendants' figures of the cost of felling and transporting logs from Thanketiya. But, in addition to the felling and transport charges, the defendants had brought into account, on the debit side, expenditure incurred for opening up and planting the land which the plaintiffs contested on the grounds that the original first defendant's experimental plantations had come to nothing and had not improved the land, that he was in the same position as a mortgagee under English law who could not charge for the expenses of improvements that were not of permanent value, and that, although the said Deed No. 472 had given the original first defendant absolute power to deal with the property it had not provided that the Syndicate would be liable for experimental plantations. The defendants had maintained that the English law was not applicable; and that the rights and liabilities of the parties were governed by the said Deed under which the original first defendant could, in the exercise of his absolute discretion to deal with the property, make experimental plantations, the expenses of which would fall on the Syndicate, even though such plantations did not ultimately prove to be of any benefit. p. 189, ll. 11–13; p. 189, ll. 20–33; p. 189, l. 33–39

RECORD

p. 189, l. 40 to p. 190, l. 24

After referring to the relevant portions of the said Deed and of the Board's directions, the learned District Judge said :—

p. 190, ll. 27–41

"The parties are bound by their covenants and the plaintiffs "will have to accept on the debit side all expenses properly incurred "by the original first defendant in an attempt to improve the land "although ultimately the land itself derived no benefit from such "expenditure. It is not suggested that the original first defendant "acted unwisely or extravagantly in making the experimental "plantations. Perhaps if this case had not been instituted the "original first defendant would have persevered in the venture and "success would have crowned his efforts. In the circumstances "I would allow all the items of expenses regarding the exploitation "of Thanketiya in experimental planting, including fees paid to "the various superintendents and conductors, to stand. If there is "any dispute regarding any particular item, the matter will be "dealt with by me when accounts in terms of my order are "submitted. I make this reservation in view of the fact that a few "items may have been inadvertently omitted or improperly "inserted."

p. 190, l. 42

17.—As to "(b) Visiting and Direction fees," which the defendants had sought to debit as part of the "Working Expenses," the learned

p. 191, ll. 1–4

District Judge, said that if these could rightly be included as "money "properly expended in the management and control of the property" (the direction of the Board was in those words) he would allow them.

p. 191, ll. 5–44

Dealing first with "Visiting fees" which totalled Rs. 5,100 for seventeen visits (which the original first defendant had himself paid to the estate) at Rs. 300 per visit, the learned Judge said that such visits of inspection by owners of lands, or their agents, were usual but that in this case out-of-pocket expenses only should be allowed at no more than Rs. 150 per visit. He did not consider that the evidence established that more than seven such visits had been paid. The "Visiting Fees" were

p. 191, l. 44

thus reduced to a total of Rs. 1,050 (seven visits at Rs. 150 per visit).

p. 191, l. 6

The "Direction Fees" totalling Rs. 21,000 at the rate of Rs. 300 a month from May, 1924, to December, 1930, claimed in respect of the use

p. 192, ll. 2–4

of the original first defendant's staff, stationery, books of account, office,

p. 192, ll.4–5, 11–12

and his own time and energy in directing the business, the learned Judge disallowed altogether. He did not see any need for such direction.

p. 192, ll. 16–41

As to sub-head "(c)" of "Working Expenses"—"Cost of certain "machinery imported in order to erect a saw mill at Thanketiya but which "never found its way there"—the learned Judge, for reasons that he gave, said that the defendants could not include this item (Rs. 29,438.93) in the account being taken.

18.—The learned District Judge next considered

RECORD

INTEREST

p. 192, l. 42 to p. 193, l. 18

saying on this subject as follows :—

"The Privy Council further directed that the Court should "allow reasonable interest upon moneys advanced or expended by "the original first defendant from the respective dates of such "advance or expenditure to the date of decree. The date of the "decree has been agreed upon, *viz.*, 24–5–1933, but parties are not "in agreement as regards what would be a reasonable rate of "interest. The defendants have in their accounts calculated "interest at 9%. Advocate Chelvanayagam" [for the substituted plaintiffs] "submits that 9% is too high and suggests 6% instead.

"The legal rate of interest in Ceylon is 9% and under the "Money Lending Ordinance 9% would not be deemed to be an "excessive rate of interest however vast the sum involved may be. "In fixing a reasonable rate of interest I think I should have regard "to another consideration, *viz.*, what was the prevailing rate of "interest during the period 1926 to 1934. There is no evidence "before me to suggest that during that period 9% would have been "considered too high. There is yet another factor which induces "me to allow 9% in this case. When the original plaintiffs came "to Court seeking to redeem their shares in the property they were "prepared to pay not only 9% interest but even compensation to "the original first defendant as provided in deed 472. The Privy "Council has disallowed compensation, and I think the contesting "substituted plaintiffs ought to consider themselves lucky to have "to pay only legal interest especially as the original plaintiffs "themselves were prepared to pay that rate of interest when they "instituted this action." p. 193, ll. 4–18

19.—And so the learned District Judge came to his last important heading which was

RENTS AND PROFITS

p. 193, l. 19 to p. 195, l. 26

The only profit derived from Thanketiya was from the sale of timber—satinwood logs. The plaintiffs said that Forest Department permits for the transport of timber showed that 680 satinwood logs were removed from the estate ; the defendants maintained that the number so shown was 457. For reasons that he gave the learned District Judge was clear that the said permits could not be taken as the true criterion of the exact number of logs removed from the estate. From the evidence he found that the correct number of logs removed from Thanketiya and received in Colombo was 402. He presumed that these were all satinwood logs—no evidence had been led as to the price of timber other than satinwood—and

p. 193, l. 26

p. 193, l. 37

p. 193, l. 39 to p. 194, l. 13

p. 193, ll. 14, 18, 22

p. 193, ll. 18–20

RECORD

he found it impossible to say whether or not any logs were surreptitiously removed.

p. 193, ll. 23–25 The books accounted for :

(1) 249 logs

(2) A quantity of sawn timber supplied to the Dalada Maligawa

(3) One lot of timber sold by J. Vander Poorten.

p. 194, ll. 26–32 As to (2) above, the evidence was that the quantity of sawn timber was 12,916 square feet for which, according to the learned Judge's reckoning, about 53 logs must have been used.

p. 194, l. 45 to p. 195, l. 9 As to (3) above, the number of logs sold was not given but the evidence was that the seller had received Rs. 550 which, according to the documentary evidence on record, could not have been the price of more than 11 logs.

Thus the learned Judge arrived at the figure 313 as representing the total number of logs accounted for (i.e., 249+53+11). Deducting this total from 402 (the number of logs which he had found were removed from the estate and received in Colombo) he held that the defendants would

p. 195, l. 10 have to bring into account the price of the balance of the 89 logs unaccounted for.

p. 195, ll. 13–26 From the documentary evidence on record, he estimated, for this purpose, the price of a log at Rs. 150 : so that, in respect of the said 89 logs, the defendants were directed to bring into account the sum of Rs. 13,350.

pp. 195–196 20.—Other headings in the said Judgment of the learned District Judge were " Costs " (on which there was no dispute) and " Bad Debts " amounting to about Rs. 25,000 which the defendants had sought to put down on the debit side but all of which were disallowed.

Concluding, the learned District Judge said :—

p. 196, ll. 23–32 " Let an account be submitted by the defendants' proctor in " terms of these directions on or before 5th April, 1944. The " account so submitted will then be referred to the proctor for " plaintiffs for scrutiny and if the parties do not agree or if any " further debits or credits have to be made with regard to the " working expenses account, I shall fix the matter for further " enquiry before finally deciding the amount payable by the " plaintiffs to the defendants in order to obtain a reconveyance of " their shares in the property.

" I think success has been divided and I therefore direct costs " also should be divided."

21.—Against the said Judgment and Order of the District Court, the present Appellant (who now represented the original 3rd and 5th plaintiffs) preferred an appeal to the Supreme Court of Ceylon.

RECORD

The appeal was argued in the Supreme Court on the 20th and the 21st February, 1946, before a Bench consisting of Soertsz, A.C.J. and Cannon, J., who reserved judgment. p. 200, l. 20

By their Judgment, dated the 22nd August, 1946, the learned Supreme Court Judges dismissed the appeal subject to the variation that, in respect of the logs unaccounted for, a credit of Rs. 20,000 should be allowed instead of the credit of Rs. 13,350 which the Court below had directed. pp. 200–201

22.—Delivering the Judgment of the Court, Soertsz, A.C.J., said :—

"At the hearing of this appeal, the matters that appeared to p. 200, ll. 26–29
"us to require consideration were the question of Rents and Profits,
"particularly the profits derived from the sale of timber, the
"question of what the working expenses ought to be held to be, and
"the question of interest.

"For the purpose of considering the matter of the sale of p. 200, l. 30 to p. 201, l. 1
"timber, a good many documents appeared to require examination
"and, for that reason, we reserved judgment. We have now
"examined these documents and the oral evidence relating to these
"sales. They are very confusing and we are satisfied that a fairer
"rough estimate—it was a rough estimate that the Trial Judge
"made—would be, in all the circumstances, to allow a credit of
"Rs. 20,000 for logs not accounted for instead of the sum of
"Rs. 13,350 allowed by the Trial Judge. The respondent Joe
"Vanden Poorten's absence from the witness-box appears to have
"been studied and deliberate and deprived the Court of material
"it would, otherwise, have had for a better estimate of the position
"in regard to these sales of timber."

23.—As to "working expenses" and "interest," the learned Judges of the Supreme Court said :—

"In regard to the question of 'working expenses, after p. 201, ll. 1–4
"consideration of the very careful judgment of the Trial Judge, we
"are satisfied with the directions he has given.

"In regard to interest, there is no doubt that, having regard p. 201, ll. 4–8
"to the amount involved, nine per centum per annum is a high rate,
"but that was a matter within the discretion of the Trial Judge and
"it would be wrong for us to interfere with his order for which he
"gives cogent reasons. We are far from being able to say that he
"has exercised his discretion wrongly.

"In regard to the point taken that in connection with the p. 201, ll. 9–13
"expenses of working, controlling and managing these lands, the
"respondents should account on the footing that the deceased
"1st defendant was a mortgagee, we agree with the Trial Judge

RECORD

" that that doctrine has no place in this case as there are special " covenants governing the question.

" In the result the appellant succeeds only to the extent of some " six thousand rupees and, in dismissing his appeal subject to that " variation, we direct that the appellant do pay four-fifths of the " costs of the appeal."

pp. 201–202

24.—A decree in accordance with the Judgment of the Supreme Court was drawn up on the 22nd August, 1946, and against the said decree this appeal to His Majesty in Council is now preferred, the Appellant having

pp. 204–205

been granted Final leave to Appeal by a decree of the Supreme Court, dated the 1st October, 1946.

The Respondents humbly submit that this appeal should be dismissed, with costs, for the following among other

REASONS

1. BECAUSE the subject-matter of this appeal relates only to accounts, ascertainment of shares, incidental questions of fact, and matters within the discretion of the Courts below and not to any question or principle of law and the appeal is therefore not a fit and proper one for adjudication by the Board.

2. BECAUSE the said directions of the Board (with the carrying out of which this appeal is solely concerned) have been given effect to by the Courts below with due regard to reason and to law.

L. M. D. DE SILVA.

R. K. HANDOO.

In the Privy Council.

No. 51 of 1948.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

BETWEEN

VALIAPPA CHETTIAR, substituted in place of the 3rd and 5th Plaintiffs

APPELLANT

AND

1. J. VANDER POORTEN
2. B. VANDER POORTEN
3. G. BEMELMANS, Executors of the last will and testament of A. J. VANDER POORTEN, deceased ... RESPONDENTS.

CASE FOR THE RESPONDENTS

BURCHELLS,
9 Bishopsgate, E.C.2,
Respondents' Solicitors.

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