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Supreme Court of Ceylon,  
No. 10 of 1960

Income Tax Case Stated  
BRA-283

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
30 MAR 1963  
25 RUSSELL SQUARE  
LONDON, W.C.1.

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

BETWEEN

THE COMMISSIONER OF INLAND REVENUE

..... *Assessor-Appellant*

AND

A.W. DAVITH APPUHAMY of 158, Trincomalee Street, Kandy

..... *Assessee-Respondent*

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RECORD  
OF PROCEEDINGS

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Supreme Court of Ceylon,  
No. 10 of 1960

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..... *Assessor-Appellant*

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A. W. DAVITH APPUHAMY of 158, Trincomalee Street, Kandy

..... *Assessee-Respondent*

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RECORD OF PROCEEDINGS

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**CASE STATED FOR THE OPINION OF THE SUPREME COURT**

(with annexes marked X1 X2)

CASE STATED FOR THE OPINION OF THE HONOURABLE THE SUPREME COURT UNDER THE PROVISIONS OF SECTION 74 OF THE INCOME TAX ORDINANCE (CHAPTER 188) UPON THE APPLICATION OF THE COMMISSIONER OF INLAND REVENUE.

No. 1  
Case Stated  
for the opinion  
of the Supreme  
Court—  
17.11.60.

S. C. 10/'60 (Income tax)

- 10     1. At a meeting of the Board of Review held on 7th July, 1960, the appeal of A. W. Davith Appuhamy, hereinafter called the assessee against the assessment to income tax for the years of assessment 1953-54, 1954-55, and 1955-56 was heard. The Assessee appealed against these assessments on the ground that legal expenses amounting to Rs. 3,260; Rs. 1,100 and Rs. 2,695 incurred by the assessee during the three years ending 31.3.53, 31.3.54, and 31.3.55 were not deducted in assessing the income of the assessee for the years of assessment 1953-54, 1954-55 and 1955-56.
- 20     2. From 28.10.45 the assessee was carrying on the business of aerated water and tea cider manufacturers at No. 18, Brownrigg Street, Kandy, under the name of the Kandy Ice Co., a name registered under the Business Names Registration Ordinance (Chapter 120).
3. Commencing from the year of assessment 1945-46 the assessee has been assessed to income tax on the profits of the business known as the Kandy Ice Co.
- 30     4. In the District Court of Kandy in Case No. X 1233 T. B. S. Godamune and two others sued the assessee who was named as 1st defendant and several others for rights in the business known as the Kandy Ice Co. In the amended plaint filed on 29.11.1948 the plaintiffs prayed for—
- “ (a) a declaration that the 1st defendant was acting throughout for and on behalf of a syndicate in the transaction between the 1st defendant and the owners of the Kandy Ice Co. and that the plaintiffs and 1st to 4th defendants were entitled to all the benefits and advantages from the said transaction.
- (b) that the 1st defendant be ordered to submit for execution by the owners of a deed of transfer of the said business with its good-will and assets prepared by the 1st defendant or alternately by the plaintiff in favour of the plaintiffs and
- 40     1st to 4th defendants.

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—(contd.)

- (c) as an alternative to the relief prayed for in paragraph (b) the Court do order the 1st defendant to instruct or request the owners to execute a transfer as aforesaid.
- (d) an account be taken of the said business as from 26.10.45 and Court do order the 1st defendant to render accounts and pay to the syndicate such sum as the Court finds was the profit earned by the said business in proportion to the sums contributed by the members of the said syndicate respectively.”

5. In the answer filed by the assessee in the said action the assessee stated that— 10

“(a) the business known as the Kandy Ice Co. with all its assets movable and immovable was purchased by the assessee who thereby became the owner thereof and the assessee was placed in possession of the business and its assets and registered as its owner. The execution of a formal conveyance had to be deferred pending the approval and execution of certain other documents.

(b) after the purchase of the said business by the assessee a proposal was made by certain persons to form a limited liability Company for the purpose of acquiring from the 1st defendant the said business and its assets. Certain contributions towards the share capital of proposed Company were made but in consequence of certain differences and disagreements that arose among the prospective shareholders this proposal was abandoned.” 20

6. By deed No. 114 of 16.8.1949 attested by John Wilson, N. P. Robert Wilson sold and conveyed to the assessee the business known as the Kandy Ice Co. together with the good-will and all other assets thereof which included the lands and premises on which the said business was carried on. 30

7. The trial in D. C. Kandy No. X 1233 commenced on 16.3.50. On 31.3.50 the District Judge made order dismissing the action of the plaintiffs. On an appeal against that order by the plaintiffs the Supreme Court set aside the order of the District Judge and sent the case back for a re-trial. At the re-trial the action was settled on the following terms:

“ It is agreed that the 1st defendant is the sole owner as from 1st October, 1948, of all the assets movable and immovable including the good-will of the business which was and is called and known as the Kandy Ice Co. which forms the subject matter of this action. The plaintiffs state that they have not had nor have any rights title or interest or claim to or in the assets or good-will of the business known as the Kandy Ice Co. The 1st defendant agrees to pay the plaintiffs the sum of Rs. 76,500. 40

The plaintiffs are entitled to withdraw from Court the money deposited in Court to the credit of the case by the 1st defendant together with any dividends and interest declared thereon up to date in reduction of the said sum of Rs. 76,500. The balance, if any, to be paid within six months from today without any interest."

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Case Stated  
for the opinion  
of the Supreme  
Court—  
17.11.60.  
—(contd.)

8. The assessee incurred the legal expenses mentioned below in D. C. Kandy X 1233 in protecting the assets and good-will of his business known as the Kandy Ice Co. He claimed a deduction of these legal expenses in computing the profits of the Kandy Ice Co. :

Year ending 31.3.53	...	...	Rs. 3,260
Year ending 31.3.54	...	...	Rs. 1,100
Year ending 31.3.55	...	...	Rs. 2,695

9. The deduction claimed was disallowed by the assessor. On an appeal by the assessee to the Commissioner of Inland Revenue the decision of the assessor was affirmed by the Authorised Adjudicator.

10. The assessee appealed to the Board of Review from the decision of the Authorised Adjudicator. At the hearing of the appeal before the Board of Review it was submitted on behalf of the assessee—

that the sums of money spent in defending the assets and good-will of the said business was an expenditure incurred in the production of income and was an allowable deduction under Section 9 (1) of the Income Tax Ordinance.

11. The assessor who supported the assessment on behalf of the Commissioner of Inland Revenue contended—

- (i) the legal expenses incurred by the assessee in D. C. Kandy X 1233 was a disbursement or expense not being money expended for the purpose of producing income and the deduction of such expenditure was disallowed under Section 10 (b) of the Income Tax Ordinance.
- (ii) the legal expenses incurred by the assessee in D. C. Kandy X 1233 was expenditure of a capital nature and the deduction of such expenditure was disallowed under Section (10)c of the Income Tax Ordinance.

12. We the members of the Board who heard the appeal held by our order dated 12th September, 1960, that the legal expenses incurred by the appellant in D. C. Kandy X 1233 is an allowable deduction in computing the income of the assessee from the said business. A copy of the order made by the Board is attached hereto marked X1.

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for the opinion  
of the Supreme  
Court—  
17.11.60.  
—(contd.)

13. The decision of the Board was communicated to the assessee and the Commissioner of Inland Revenue by letter dated 12th September, 1960. Dissatisfied with the decision of the Board the Commissioner of Inland Revenue by his communication on 29th September, 1960, copy of which is attached hereto marked X2, applied to the Board to have a case stated for the opinion of the Honourable the Supreme Court on the questions of law arising in this case and this case is stated accordingly.

- (1) (Sgd.) A. E. CHRISTOFFELSZ.
- (2) (Sgd.) S. N. B. WIJEYEKOON. 10
- (3) (Sgd.) S. PATHMANATHAN.

*Members of the Board of Review,  
Inland Revenue.*

Colombo, 17th November, 1960.



" X 1 "

**INCOME TAX APPEAL TO THE BOARD OF REVIEW**

MR. A. W. DAVITH APPUHAMY

BRA-283

S. C. 10/'60 (Income Tax)

*Assessment File No. 43/9010.*

*Members of the Board :* Mr. A. E. Christoffelsz, C.M.G.  
 Mr. S. N. B. Wijeyekoon.  
 Mr. S. Pathmanathan.

*Date of hearing:* 7th July 1960.

10 *Present for the Appellant:* Mr. S. Ambalavanar, Advocate, with  
 Mr. C. Pathmanathan, Advocate, instructed  
 by Mr. S. Ganeshan, Proctor.

*Supporting the Assessment:* Mr. B. Mahinda, Assistant Assessor.*Decision of the Board:*

20 On deed No. 114 of 16.8.1949 attested by John Wilson, N. P. (marked X16) A. W. Davith Appuhamy the appellant in this case purchased the business known as the Kandy Ice Co. D. C. Kandy X 1223 was a case filed by T. B. S. Godamunne and 2 others as plaintiffs against the appellant who was named 1st defendant and several others. In the plaint filed (X15) the plaintiffs asked—

- 30 (a) for a declaration that the 1st defendant (the appellant) was acting throughout for and on behalf of a syndicate in the transaction between the 1st defendant and the owners of the Kandy Ice Co., and that the plaintiffs and 1st to 4th defendants were entitled to all the benefits and advantages resulting from the said transaction.
- (b) that accounts be taken of the said business as from 20.10.45 and that court do order the 1st defendant to render accounts and pay to the said syndicate such sums as the court finds was the profit earned by the said business in proportion to the sums contributed by the members of the syndicate.

In the answer filed by the 1st defendant (marked X15) he stated : --

- (a) the business known as the Kandy Ice Co. with all its assets movable and immovable was purchased by the 1st defendant,
- (b) that a proposal was made by certain persons to form a limited liability Co. for the purpose of acquiring from the 1st defendant the said business and its assets. Contributions were

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(i) Annex  
 Marked XI  
 (Decision of the  
 Board of  
 Review—  
 12.9.60).

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for the opinion  
of the Supreme  
Court—  
17.11.60.

made towards the share capital of the proposed Company but in consequence of certain differences and disagreements among the prospective share holders this proposal was abandoned.

(i) Annex  
Marked XI  
(Decision of the  
Board of  
Review—  
12.9.60).  
—(contd.)

2. The trial of this action commenced on 16.3.50. On 17.3.50 after issues were framed the District Judge heard the parties on certain preliminary issues and dismissed the plaintiffs action. The plaintiffs having appealed against the order the Supreme Court set aside the order of the District Judge and sent the case back for a re-trial. When the case was taken up in the District Court for retrial it was settled on the following terms:—

10

“ It is agreed that the 1st defendant is the sole owner as from 1st October, 1949, of all the assets movable and immovable including the goodwill of the business which was and is called and known as ‘ The Kandy Ice Co.’ which forms the subject matter of this action. The plaintiffs state that they have not had nor have any right title or interest or claim to or in the assets or goodwill of the business known as the Kandy Ice Co. The 1st defendant agrees to pay to the plaintiffs a sum of Rs. 76,500. The 1st defendant reserves his right if any to claim a sum of Rs. 6,077.70 which he alleges is due from the 3rd plaintiff and a further alleged claim of Rs. 891.45 as against the 4th plaintiff as administrator of the estate of the deceased 2nd plaintiff. The 3rd and 4th plaintiffs do not admit these alleged claims. Both parties admit that they have no other claims against each other in respect of this transaction either collectively or individually.

20

The plaintiffs are entitled to withdraw from Court the money deposited in Court to the credit of this case by the 1st defendant together with any dividends and interests declared thereon up to date in reduction “ pro tanto ” of the said sum of Rs. 76,500. The balance is to be paid within six months from today without any interest.

30

Writ to issue in the event of non payment of the balance with costs of execution, if any.

Each party to bear his own costs of the case up to date.

The above terms are explained to the parties in open Court and are accepted by them and they sign the shorthand script.”

3. The appellant claimed a deduction of following legal expenses incurred by him in D. C. Kandy X 1223 in computing the profits of the Kandy Ice Co.

40

Year ending 31.3.1953	...	Rs. 3,260
Year ending 31.3.1954	...	Rs 1,100
Year ending 31.3.1955	...	Rs. 2,695

This claim was disallowed by the assessor. An appeal by the appellant against the decision of the assessor was heard by an authorised adjudicator. The authorised adjudicator disallowed this claim to deduct the legal expenses and the appellant has appealed to this Board against that decision.

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for the opinion  
of the Supreme  
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17.11.60.

(i) Annex  
Marked XI  
(Decision of the  
Board of  
Review—  
12.9.60).  
—(contd.)

10 4. The appellant as the owner of the Kandy Ice Co. has been paying income tax on the income derived from this business. In D. C. Kandy X 1223 certain persons claimed that they were entitled to interests in the business and also asked for an accounting of the profits of the business from 20.10.45. If the plaintiffs had succeeded in this litigation the appellant would have become entitled only to a certain share of the income from the business for the past years and only to a share of the income in the future. The result of the litigation would not have affected the profits earned from the Kandy Ice Co. but it could have seriously diminished the income of the appellant from this source. Section 9(1) of the Income Tax Ordinance states "there shall be deducted for the purpose of ascertaining the profits or income of any person from any source all outgoings and expenses incurred by such person in the production thereof."

20 The section refers to the profits or income of "any person." Whether the deduction claimed under this section should or should not be allowed depends not on whether the expense was incurred on the production of the profits of the Kandy Ice Co. but on whether the expense was incurred in the production of the income of the appellant. If the appellant had not defended in Court the claim made against him for shares in the business and a distribution of profits of that business his own income from this source would have been very much less than the assessment made on him in the past.

30 5. The appellant had received certain sums of money from the plaintiffs in D. C. Kandy X 1223 and some others. The plaintiffs claimed that these monies paid to the 1st defendant (the appellant) was the consideration contributed by them for the purchase of the Kandy Ice Co. by a syndicate. The first defendant (the appellant) claimed that it was intended to promote a Company to purchase this business from the defendant and the money paid by plaintiff and others was contributed for purchase of shares in the new Company. The matter directly in issue in this case was the nature of the monetary transactions between these parties in connection with the said business. It was an adjudication on the rights of the parties to the business and the profits of the business. This is apparent from

40 the plaint filed in which the plaintiff asked for an accounting of the profits. The Judgment in D. C. Kandy decided conclusively that the business belonged to the plaintiff and that it was the plaintiff who was entitled to receive the income of the business in the past and also in future.

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of the Supreme  
Court—  
17.11.60.

(i) Annex  
Marked XI  
(Decision of the  
Board of  
Review—  
12.9.60).  
—(contd.)

6. We are of opinion that the legal expenses incurred by the appellant in D. C. Kandy X 1223 is an allowable deduction in computing his income from the said business. The appeal is allowed and the case is remitted to the Commissioner of Inland Revenue to revise the assessment for the years 1953/54, 1954/55 and 1955/56 by allowing a deduction of the legal expenses incurred by the appellant in D. C. Kandy X 1223.

(Sgd.) A. E. CHRISTOFFELSZ,  
*Chairman.*

Colombo 1, 12th September, 1960.

10

True copy.

(Sgd.) (Illegibly),  
*Clerk to the Board of Review,  
Inland Revenue.*

" X 2 "

My No. SCA 95.

*The Clerk to the Board of Review,  
Inland Revenue.*

No. 1.  
Case Stated  
for the opinion  
of the Supreme  
Court—  
17.11.60.

(ii) Annex  
marked X2  
(Letter from  
the Commis-  
sioner of Inland  
Revenue to the  
Clerk to the  
Board of  
Review—  
29.9.60).

## APPLICATION FOR A STATED CASE—INCOME TAX

### APPEAL OF MR. A. W. DAVITH APPUHAMY

10 In terms of Section 74 (1) of the Income Tax Ordinance (Cap. 188) I hereby require the Board of Review to state a case for the opinion of the Supreme Court on the questions of law arising in the above appeal.

I give below the questions of law on which the case should be stated to the Supreme Court:

I enclose a cheque for Rs. 50.

#### *Questions of law :*

- 20 (1) Is the sum of Rs. 3,260 expended by the assessee in defending action No. X 1233 of the District Court of Kandy during the period 1.4.52 to 31.3.53 an outgoing or expense incurred by him in producing the income of the business known as Kandy Ice Company within the meaning of Section 9 of the Income Tax Ordinance.
- (2) Is the sum of Rs. 1,100 expended by the assessee in defending action No. X 1233 of the District Court of Kandy during the period 1.4.53 to 31.3.54 an outgoing or expense incurred by him in producing the income of the business known as Kandy Ice Company within the meaning of Section 9 of the Income Tax Ordinance?
- 30 (3) Is the sum of Rs. 2,695 expended by the assessee in defending action No. X 1233 of the District Court of Kandy during the period 1.4.54 to 31.3.55 an outgoing or expense incurred by him in producing the income of the business known as Kandy Ice Company within the meaning of Section 9 of the Income Tax Ordinance?
- (4) Are the said sums of Rs. 3,260, Rs. 1,100 and Rs. 2,695 referred to in Clauses (1), (2) and (3) above, or any of them disbursements or expenses not being money expended for the purpose of producing the income of the business known as Kandy Ice Company within the meaning of Section (10)<sup>b</sup> of the Income Tax Ordinance?

No. 1.  
Case Stated  
for the opinion  
of the Supreme  
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(ii) Annex  
marked X2  
(Letter from  
the commis-  
sioner of Inland  
Revenue to the  
Clerk to the  
Board of  
Review—  
29.9.60).  
—(contd.)

- (5) Are the said sums of Rs. 3,260, Rs. 1,100 and Rs. 2,695 referred to in Clauses (1), (2) and (3) above, expenses of a capital nature within the meaning of Section 10 (c) of the Income Tax Ordinance?

(Sgd.) L. G. GUNASEKERA,  
*Commissioner of Inland Revenue.*

Department of Inland Revenue,  
Colombo 1, 29th September, 1960.

True Copy.

(Sgd.) (Illegibly),  
*Clerk to the Board of Review,  
Inland Revenue.*

**JUDGMENT OF THE SUPREME COURT**

*S. C. No. 10/60      Income Tax Case No. BRA—283.*

*Present:* Basnayake C.J., and H. N. G. Fernando J.

*Counsel:* V. Tennakoon, Deputy Solicitor-General, with M. Kanagasunderam, Crown Counsel, for Assessor-Appellant.

S. Ambalavanar with C. Pathmanathan for Assessee-Respondent.

*Argued & Decided on:* July 10, 1961.

10 **BASNAYAKE, C.J.**

THE following are the material facts in the case stated:

By deed No. 114 of 16th August, 1949, the assessee purchased the business known as the Kandy Ice Company. It would appear that after he purchased the business a proposal was made to form a limited liability Company for the purpose of acquiring the Kandy Ice Company and its assets. Contributions towards the capital of the Company were made but in consequence of certain differences between the prospective shareholders the plan was abandoned. Three of those who contributed sued the assessee and some others in D. C. Kandy Case No. X 1233 in which they sought a declaration that—

“ (a) the 1st defendant (the assessee) was acting throughout for an on behalf of a syndicate in the transaction between the 1st defendant and the owners of the Kandy Ice Co., and that the plaintiffs and 1st to 4th defendants were entitled to all the benefits and advantages resulting from the said transaction.

30 “ (b) accounts be taken of the said business as from 20/10/45 and that court do order the 1st defendant to render accounts and pay to the said syndicate such sums as the court finds was the profit earned by the said business in porportion to the sums contributed by the members of the syndicate.”

In his answer the assessee stated:

“ (a) the business known as the Kandy Ice Co., with all its assets movable and immovable was purchased by the 1st defendant,

No. 2.  
Judgment of  
the Supreme  
Court—  
10.7.61.  
—(contd.)

“(b) that a proposal was made by certain persons to form a limited liability Co. for the purpose of acquiring from the 1st defendant the said business and its assets. Contributions were made towards the share capital of the proposed Company but in consequence of certain differences and disagreements among the prospective share holders this proposal was abandoned.”

On 17th March, 1950, the action was dismissed on certain preliminary issues. The plaintiffs successfully appealed and a retrial was ordered. At the retrial the following settlement was reached :— 10

“ It is agreed that the 1st defendant is the sole owner as from 1st October, 1949, of all the assets movable and immovable including the goodwill of the business which was and is called and known as ‘ The Kandy Ice Co. ’ which forms the subject matter of this action. The plaintiffs state that they have not had nor have any right title or interest or claim to or in the assets or goodwill of the business known as the Kandy Ice Co. The 1st defendant agrees to pay to the plaintiffs a sum of Rs. 76,500. The first defendant reserves his right if any to claim a sum of Rs. 6,077.70 which he alleges is due from the 3rd plaintiff and a further alleged claim of Rs. 891.45 as against the 4th plaintiff as administrator of the estate of the deceased 2nd plaintiff. The 3rd and 4th plaintiffs do not admit these alleged claims. Both parties admit that they have no other claims against each other in respect of this transaction either collectively or individually. 20

“ The plaintiffs are entitled to withdraw from Court the money deposited in Court to the credit of this case by the 1st defendant together with any dividends and interest declared thereon up to date in reduction ‘ pro tanto ’ of the said sum of Rs. 76,500. The balance is to be paid within six months from today without any interest. 30

“ Writ to issue in the event of non-payment of the balance with costs of execution, if any.

“ Each party to bear his own costs of the case up to date.”

The assessee who was from the date of his purchase of the Kandy Ice Company being assessed in respect of his profits from the business claimed a deduction of the following legal expenses incurred by him in D. C. Kandy Case No. X. 1233 :—

Year ending 31.3.1953	...	...	Rs. 3,260	
Year ending 31.3.1954	...	...	Rs. 1,100	40
Year ending 31.3.1955	...	...	Rs 2,695	



The assessor disallowed his claim. The authorised adjudicator upheld the decision of the assessor. On an appeal to the Board of Review the claim of the assessee was upheld. The Board came to the following decision:—

No. 2.  
Judgment of  
the Supreme  
Court  
10.7.61.  
—(contd.)

10 “ We are of opinion that the legal expenses incurred by the appellant in D. C. Kandy X1223 is an allowable deduction in computing his income from the said business. The appeal is allowed and the case is remitted to the Commissioner of Inland Revenue to revise the assessment for the years 1953/54, 1954/55 and 1955/56 by allowing a deduction of the legal expenses incurred by the appellant in D. C. Kandy X1223. ”

We agree with the decision of the Board that the legal expenses of the assessee are deductible under section 9 (1) of the Income Tax Ordinance in ascertaining the assessee's profits from his business the Kandy Ice Company.

We confirm the assessment determined by the Board. The assessee is entitled to the costs of his appeal and a refund of the sums paid under subsection (1) of section 74 of the Income Tax Ordinance.

20

(Sgd.) HEMA H. BASNAYAKE,  
*Chief Justice.*

H. N. G. FERNANDO, J.

I agree.

(Sgd.) H. N. G. FERNANDO,  
*Puisne Justice.*

No. 3.  
Decree of the  
Supreme  
Court—  
10.7.61.

**DECREE OF THE SUPREME COURT**

*S. C. 10/'60*  
*(Income Tax)*

**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

The Commissioner of Inland Revenue, Colombo 10  
..... *Assessor-Appellant.*

*against*

A. W. Davith Appuhamy of No. 158, Trincomalee  
Street, Kandy ..... *Assessee-Respondent.*

BOARD OF REVIEW

*Action No. BRA/283*

THIS cause coming on for hearing and determination on the  
10th day of July, 1961, and on this day, upon an appeal preferred  
by the Assessor-Appellant before the Hon. Hema Henry Basnayake,  
Q.C., Chief Justice, and the Hon. Hugh Norman Gregory 20  
Fernando, Puisne Justice of this Court, in the presence of Counsel  
for the Assessor-Appellant and Assessee Respondent.

It is ordered and decreed that the assessment determined by the  
Board be and the same is hereby confirmed.

It is further ordered and decreed that the assessee be entitled  
to the costs of his appeal and a refund of the sum paid under sub-  
section (1) of section 74 of the Income Tax Ordinance.

Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice,  
at Colombo, the 10th day of August, in the year One thousand 30  
Nine hundred and Sixty one and of Our Reign the Tenth.

(Sgd.) B. F. PERERA,  
*Deputy Registrar, S. C.*



No. 4.  
Application for  
conditional  
leave to appeal  
to the Privy  
Council  
4.8.61.  
—(contd.)

2. The Order of the Supreme Court was pronounced on the 10th day of July, 1961, confirming the assessment determined by the Board of Review and the respondent-respondent was awarded costs of his appeal and a refund of the sum paid under Sub-section (1) of Section 74 of the Income Tax Ordinance.

3. That feeling aggrieved by the Order of this Court pronounced on the 10th July, 1961, the petitioner-appellant above-named is desirous of appealing therefrom to Her Majesty in Council.

4. The said Order of 10th July, 1961, was made by the Supreme Court in terms of Section 74 (5) of the Income Tax Ordinance and is in terms of Section 74 (7) (a) and (b) of the said Ordinance a final judgment of the Supreme Court in a civil action between the Commissioner of Inland Revenue and the respondent in which the value of the matter in dispute on appeal is Rs. 5,000. 10

5. That notice of intended application for leave to appeal to Her Majesty in Council was given to the respondent in terms of Rule (2) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance within 14 days of the date of the aforesaid Order of the Supreme Court by— 20

- (i) serving a notice personally on the respondent-respondent on the 14th day of July, 1961.
- (ii) sending a telegram on the 17th day of July, 1961, addressed to the respondent-respondent,
- (iii) sending by registered letter on the 17th day of July, 1961, addressed to the respondent-respondent.

WHEREFORE the Petitioner-Appellant prays that Your Lordships' Court be pleased to grant him leave to appeal to Her Majesty in Council against the judgment of this Court delivered on the 10th July, 1961, and for costs and for such other and further relief as to Your Lordships' Court shall seem meet. 30

(Sgd.) A. H. M. SULAIMAN,  
*Proctor for Petitioner-Appellant.*

Settled by

M. Kanagasunderam,  
Crown Counsel.

No. 5.  
Decree of the  
Supreme Court  
granting  
conditional  
leave to appeal  
to the Privy  
Council—  
25.8.61.

**DECREE OF THE SUPREME COURT GRANTING  
CONDITIONAL LEAVE TO APPEAL TO THE  
PRIVY COUNCIL**

*S. C. Application No. 374/'61.*

**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**

10 In the matter of an application by the Petitioner-Appellant dated  
4th August, 1961, for Conditional Leave to Appeal to Her Majesty  
the Queen in Council against the judgment and decree of this  
Court dated 10th July, 1961, in S. C. 10/'60—Income Tax Case  
No. BRA-283.

The Commissioner of Inland Revenue, Colombo

..... *Petitioner-Appellant.*  
Petitioner.

*against*

A. W. Davith Appuhamy of No. 158, Trincomalee Street,  
Kandy ..... *Respondent-Respondent.*  
Respondent.

20

**BOARD OF REVIEW**

*Action No. B. R. A. 283 (S. C. 10/'60) Income Tax*

THIS cause coming on for hearing and determination on the 25th  
day of August, 1961, before the Hon. Hugh Norman Gregory  
Fernando and the Hon. Leonard Bernice de Silva, Puisne Justices  
of this Court, in the presence of Counsel for the Petitioner-  
Appellant Petitioner and no appearance for Respondent-Respon-  
dent Respondent.

30 It is considered and adjudged that this application be and the  
same is hereby allowed.

Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice,  
at Colombo, the 4th day of September, in the year One thousand  
Nine hundred and Sixty One and of Our Reign the Tenth.

(Sgd.) B. F. PERERA,  
*Deputy Registrar, S. C.*

No. 6.  
Application  
for Final  
Leave to Appeal  
to the Privy  
Council—  
12.9.61.

No. 6

APPLICATION FOR FINAL LEAVE TO APPEAL  
TO THE PRIVY COUNCIL

IN THE SUPREME COURT OF THE ISLAND OF  
CEYLON

In the matter of a Case Stated under Section 74 of the Income Tax Ordinance (Cap. 188) upon the application of the Commissioner of Inland Revenue.

THE COMMISSIONER OF INLAND REVENUE  
..... *Petitioner.*

S. C. (Income Tax)

10

*Vs.*

Appeal No. 10 of 1960

A. W. DAVITH APPUHAMY OF 158, TRINCO-  
MALEE STREET, KANDY ..... *Respondent.*

*and*

In the matter of an application for leave to appeal to Her Majesty in Council.

THE COMMISSIONER OF INLAND REVENUE  
..... *Petitioner-Appellant.*

S. C. Application

20

*Vs.*

No. 374 of 1961

A. W. DAVITH APPUHAMY OF 158, TRINCO-  
MALEE STREET, KANDY ... *Respondent-Respondent.*

*To :* THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUSTICES OF THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 12th day of September, 1961.

The Petition of the Petitioner-Appellant above named appearing by Abdul Hameed Mohamed Sulaiman, his Proctor, states as follows:

1. That the Petitioner-Appellant obtained on the 25th day of August, 1961, leave from this Honourable Court to appeal to Her

30

Majesty in Her Privy Council against the judgment of this Court pronounced on the 10th day of July, 1961, in Supreme Court (Income Tax) Appeal No. 10 of 1960.

No. 6.  
Application  
for Final  
Leave to Appeal  
to the Privy  
Council  
12.9.61.  
—(contd.)

2. That in view of the provisions of Section 74 (7) (c) of the Income Tax Ordinance (Chapter 188) as amended by Section 2 of Ordinance No. 26 of 1939, the Petitioner-Appellant on appeal to Her Majesty in Council is not required to make any deposit or pay any fee or furnish any security prescribed by or under the Appeals (Privy Council) Ordinance (Chapter 85).

10 3. That no conditions were imposed under Rule 3 (b) of the Rules contained in the Schedule to the Appeals (Privy Council) Ordinance (Chapter 85).

WHEREFORE the Petitioner-Appellant prays that he be granted final leave to appeal to Her Majesty in Her Privy Council against the said judgment of this Court pronounced on the 10th day of July, 1961, for costs and for such other and further relief as to Your Lordships' Court shall seem meet.

(Sgd.) A. H. M. SULAIMAN,  
*Proctor for Petitioner-Appellant.*

20 Settled by:

M. KANAGASUNDERAM,  
Crown Counsel.

No. 7.  
Decree of the  
Supreme Court  
granting Final  
Leave to  
appeal to  
the Privy  
Council—  
22.9.61.

**DECREE OF THE SUPREME COURT GRANTING  
FINAL LEAVE TO APPEAL TO THE PRIVY  
COUNCIL**

S. C. Application No. 374/'61

**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 dated 12th September, 1961, 10  
for Final Leave to Appeal to Her Majesty the Queen in Council  
by the Petitioner-Appellant against the judgment and decree of  
this Court dated 10th July, 1961, in S. C. 10/'60 Income Tax  
Case No. BRA. 283.

THE COMMISSIONER OF INLAND REVENUE,  
COLOMBO ..... Petitioner-Appellant-Petitioner.

*against*

A. W. DAVITH APPUHAMY OF 158, TRINCOMALEE  
STREET, KANDY ..... Respondent-Respondent-Respondent.

BOARD OF REVIEW 20

*Action No. BRA. (S. C. 10/'60) Income Tax*

THIS cause coming on for hearing and determination on the  
22nd day of September, 1961, before the Hon. Henry Winfred  
Robert Weerasooriya and the Hon. Hugh Norman Gregory  
Fernando, Puisne Justices of this Court, in the presence of Counsel  
for the Petitioner-Appellant-Petitioner.

It is considered and adjudged that the 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., Chief Justice, 30  
at Colombo, the 2nd day of October, in the year One thousand  
Nine hundred and Sixty One and of Our Reign the Tenth.

(Sgd.) B. F. PERERA,  
*Deputy Registrar, S. C.*



**PART II**

**X 15**  
**Plaint and Answers Filed**  
**in D. C. Kandy Case No. X. 1233**

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.

Filed on 20th April, 1950.

' X 15 '

(Sgd.) M. G. ARIYASENA,  
*Secy. D. C.*

4.30.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

10 (1) T. B. S. Godamunne of Colombo Street, Kandy, (2) S. B. Ratnayake of Kahalla, Katugastota, (3) H. G. Hinniappuhamy of Trincomalee Street, Kandy ..... *Plaintiffs-Appellants.*

No. D. C. Kandy X 1233.

(1) A. W. Davith Appuhamy of Trincomalee Street, Kandy,  
 (2) W. A. B. Soysa of "Chula Paya", Hospital Street,  
 Kandy, (3) H. A. C. Wickremaratne, Proctor S. C., Kandy,  
 (4) K. M. Mohamed Youssuf of Colombo Street,  
 Kandy ..... *Defendants-Respondents.*

TO THEIR LORDSHIPS THE CHIEF JUSTICE AND OTHER JUDGES OF  
 THE HONOURABLE THE SUPREME COURT OF THE ISLAND OF CEYLON

20 On this 30th day of April, 1950.

The Petition of Appeal of the Plaintiffs Appellants abovenamed appearing by their Proctor Ariyapala Kalahe Liyanage and Loku Banda Kolugala states as follows:

30 1. The plaintiffs-appellants filed this action on the footing that in or about October, 1945, the 1st and 2nd plaintiffs the 1st, 2nd, 3rd and 4th defendants and three others namely: Messrs. S. M. Perera, N. Palaniandi and N. D. A. Samaranyake on the invitation of the 1st defendant formed themselves into a syndicate to purchase the business of the Kandy Ice Company as a going concern with its goodwill and assets from the owners thereof for the sum of Rs. 100,000 and to carry on the said business pending the promotion of a private limited liability company of which the members of the syndicate were to be the shareholders to the extent of their respective contributions. The Plaintiffs-Appellants further allege that the said sum of Rs. 100,000 was collected by the 1st defendant for the said purpose from the aforementioned persons

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

and was paid by the 1st defendant to the attorney of the owners of the business on or about the 26th October, 1945, the said syndicate was duly placed in possession of the said business and its assets, the management and control of which was entrusted to the 1st defendant by the syndicate. The plaintiffs-appellants further alleged that the transfer of the said business to the syndicate was duly notified to the Registrar of Business Names, Kandy, by the person who was managing the said business for the owners to the time possession thereof was transferred to the syndicate.

The Plaintiffs-Appellants further averred that as moneys were required to carry on the said business a further sum of Rs. 65,000 was contributed by the members of the said syndicate and in pursuance of certain requests made at meetings of the members of the said syndicate held from time to time the amount contributed by the said S. M. Perera, N. Palaniandy and N. D. A. Samaranayake were refunded to them and a sum of Rs. 10,000 was contributed by the 3rd plaintiff-appellant abovenamed who thereupon became a member of the said syndicate with the consent and concurrence of the other members. 10

3. The Plaintiffs-Appellants further averred that the 1st defendant-respondent who had been entrusted with the said business has thereafter carried on this business and all moneys of the said business were received by the 1st defendant-respondent on behalf of the said syndicate. The plaintiffs-appellants further alleged that the 1st defendant respondent undertook at various times to have a limited liability company formed to take over and carry on the said business and further undertook to take all necessary steps to have the said business and its goodwill and assets conveyed and vested in the said company in its formation but has up to date failed to do so and is now refusing to implement any of the said undertakings. 20 30

4. The Plaintiffs-Appellants allege that the 1st defendant-respondent for and on behalf of the said syndicate has managed the said business from 6th October, 1945, and the profits earned by the business which was under the management and control of the 1st defendant-respondent would reasonably amount to the date of 29th November, 1948, to Rs. 100,000 which sum the 1st defendant respondent has failed and neglected to account to the said syndicate or to distribute to the members of the said syndicate.

5. The Plaintiffs-Appellants prayed for a declaration that the 1st defendant-respondent was acting throughout in the transaction between the 1st defendant-respondent and the owners for and on behalf of the said syndicate, that the 1st defendant-respondent be ordered to obtain a transfer of the said business with its goodwill and assets from the owners in favour of the plaintiffs-appellants and the 1st to 4th defendants respondents that an accounting be taken of the said business as from 26th October, 1945, and for a 40

declaration that the members of the syndicate namely the plaintiffs-appellants and the defendants-respondents are entitled to the said business and its property and assets in proportion of the sum contributed the said members respectively. The plaintiffs appellants further aver that they made the 2nd, 3rd and 4th defendants-respondents party to the action as defendants as they were unwilling to join in the action as plaintiffs although requested to do so.

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

10 6. The 1st, 2nd and 4th defendants-respondents in their answer denied the allegations contained in the plaint relating to the formation of a syndicate for the purpose stated and averred that the business of the Kandy Ice Company together with its assets was purchased by the 1st defendant-respondent alone and that the 1st defendant-respondent was duly placed in possession of the said business and its assets and was registered as its owner. These defendants-respondents further averred that after the purchase of the business by the 1st defendant respondent proposals were made by certain persons to form a limited liability company for the purpose of acquiring it from the 1st defendant-respondent, that  
20 a certain contribution to the proposed share capital were made but that in consequence of the difference that arose among the prospective share holders the proposal fell through and was abandoned.

8. The 1st defendant-respondent further pleaded that this action was not maintainable as there was a misjoinder of parties and of causes of action and that the matters alleged in paragraphs 2 to 7 of the plaint cannot be established and or proved and of no force or avail in law in view of the provisions of chapter 57 of the Legislative Enactments and no parol evidence can be led of same

30 9. The 2nd and 4th defendants-respondents further alleged that they subscribed a sum of Rs. 25,000 and Rs. 10,000 respectively being a value of twenty five and ten shares respectively in the proposed Company but that as the proposal fell through no shares were allotted to them. The 3rd defendant-respondent filed no answer.

40 10. At the trial of this case on the 16th and 17th March 16 issues were framed and on application made by Counsel for the 1st defendant-respondent the Learned District Judge allowed Issues 10 to 16 to be taken up for consideration first and tried as preliminary issues of law. This position was supported by the Counsel for the 4th defendant-respondent, and it was agreed that these issues be argued on the basis that all the facts as pleaded in the amended plaint were true.

11. The Learned District Judge by his judgment dated 31st March, 1950, held that the plaintiffs-appellants were attempting to establish a partnership and were prevented from doing so in the

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

absence of a writing and that plaintiffs-appellants claimed to ownership of the business of the Kandy Ice Company and its assets which consists both of movable as well as immovable property must also fail because the plaintiffs-appellants are not in a position to establish a partnership and also in the absence of a Notarial executed document in terms of section 2 of the Prevention of Frauds Ordinance.

12. The Learned District Judge further held with regard to issues 15 and 16 that the authorities cited by Counsel for the plaintiffs-appellants would not apply to the facts of this case as there was no averment at all that the 1st defendant-respondent was holding any property in trust for anybody. 10

13. Regarding issues 10 and 11 on the question of misjoinder of parties and causes of action the Learned District Judge held it was not necessary for him to decide the question whether this action would be maintained as there was misjoinder of causes of action in view of his finding that the entirety of the plaintiffs-appellants claim must fail in view of his finding on the other issues of law.

14. Being aggrieved with the said judgment and decree of the Learned District Judge the plaintiffs-appellants beg to appeal therefrom to Your Lordships' Court on the following amongst other grounds which may be urged by Counsel at the hearing of this Appeal. 20

(a) The said judgment is contrary to law and the weight of evidence in this case.

(b) The learned District Judge was wrong in allowing issues 12 to 16 being tried as preliminary issues of law as it was not possible for him to answer them without hearing evidence and thereafter deciding what the parties intended at the time of the forming of the syndicate. 30

(c) It is respectively submitted that on the averments contained in the amended plaint co-ownership of the business would arise by operation of law and that the establishment of a partnership was not necessary for the purpose of the plaintiffs-appellants' case.

(d) It is further submitted that the claim against the 1st defendant-respondent was not as a partner but as an agent of the other owners of the said business.

(e) The plaintiffs-appellants respectfully state that if the 1st defendant-respondent's objection based on the Statute of Frauds are upheld then there is no clear case where a party would be using the Statute of Fraud to effectuate a fraud. The Learned District Judge has not correctly applied the principles laid down by Your 40

Lordships' Court and the Privy Council in the authorities which were cited to him on behalf of the plaintiffs-appellants regarding the matters raised in issues 15 and 16.

WHEREFORE the plaintiffs-appellants pray that Your Lordships' Court be pleased to set aside the judgment and decree of the Learned District Judge and that this case be sent back for trial on the issues of facts and for costs and for such further and other relief as to Your Lordships' Court may seem meet.

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

10

(Sgd.) A. K. LIYANAGE,  
*Proctor for 1st plaintiff-appellant.*

(Sgd.) L. B. KOLUGALA,  
*Proctor for 2nd and 3rd plaintiffs-appellants.*

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

IN THE DISTRICT COURT OF KANDY

T. B. S. Godamunne of Kandy and  
2 others ..... *Plaintiffs.*

*Vs.*

No. X1233.

A. W. Davith Appuhamy of Kandy  
and 5 others ..... *Defendants.*

(1)

On this 3rd day of March, 1948.

Mr. L. B. Kolugala files Proxy and complaint and moves for 10  
summons on the defendants.

Plaint accepted.

(2) Issue summons for 18.3.

(Sgd.) H. A. DE SILVA,  
*District Judge.*

(3)

8.3.48.

S. S. Issued.

(4)

18.3.48.

20

Mr. Kolugala for Plaintiff.

S. S. served on 1st-6th Defendants.

6th Defendant states that he is not the attorney of Mr. Robert  
Wilson or Mrs. Wilson.

Vide his letter (4a).

Defendants present.

Mr. Wijeyeratnam moves to file Proxy of 2nd and 4th  
Defendants.

Mr. Balasingham moves to file Proxy of 1st and 3rd  
Defendants.

30

Mr. Kolugala moves to re-issue summons on 5th and 6th  
Defendants.

Re-issue for 29.4.

Answer 29.4.

(Intld.)—————

*A. J.*

(5)

29.4.48.

Mr. Kolugala for plaintiff.

M/s. Coomarasamy and Wijeyeratnam to file Proxy of 2nd and 4th Defendants.

Mr. Balasingham to file Proxy of 1st and 3rd Defendants.

S. S. re-issued on 5th and 6th Defendants.

Answer of 1st-4th Defendants.

Proxy of 1, 2 and 4 filed.

10 Proxy and answer of 3rd by Messrs. Wickremaratne and Pinto.

Re summons on 5th and 6th for 24.6.48.

Answers on the same date.

(Intld.)———  
N. C.

(6)

24.6.48.

Mr. Kolugala for Plaintiff.

M/s. Wijeratnam for 2nd and 4th Defendants.

Mr. Balasingham for 1st Defendant.

20 Answer of 1st-4th Defendants.

Proxy and answer of 3rd Defendant by Messrs. Wickremaratne and Pinto for 16.8.

Summons not reissued on 5th and 6th Defendants.

Re-issue for 16.8.

Answer of 1st Defendant filed.

Answer of 2nd and 4th Defendants, for 16.8.

Mr. Fernando for 2nd Defendant.

(Intld.)———  
A. J.

30 (7)

16.8.48.

Mr. Kolugala for Plaintiff.

M/s. Wijeyeratnam for 4th Defendant.

Mr. Balasingham for 1st Defendant.

Mr. Fernando for 2nd Defendant.

1. Answer of 2nd and 4th Defendants.

2. Summons not served on 5th and 6th Defendants.

3. Proxy and (of 3 deft. by M/s. " &amp; Pinto for 6.9

Answer of 4th Defendant filed.

40 Answer of 2nd Defendant 6.9.

(Intld.)———  
A. J.X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)



X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

(8)

6.9.48.

Mr. Kolugala for Plaintiff.

Mr. Balasingham for 1st Defendant.

Mr. Fernando for 2nd Defendant.

M/s. C. &amp; Wijeyeratnam for 4th Defendant.

1. Proxy for 3rd Defendant (Mr. Pinto).

2. Answer of 2nd Defendant filed.

3. Summons not re-issued on 5th and 6th Defendants.

Proxy of 3rd Defendant filed.

10

No relief claimed against him, so answer is not filed. Mr. Kolugala wants to consider what steps should be taken regarding 5th and 6th Defendants who are in England now.

Call 11.10.

(9)

Mr. Kolugala for plaintiff.

11.10.48.

Mr. Kolugalla for plaintiff.

Mr. Balasingham for 1st defendant.

Mr. Fernando for 2nd defendant.

Mr. Pinto for 3rd defendant.

M/s. C. &amp; Wijeyeratnam for 4th defendant.

Steps re 5-6 defendants 29/11.

Mr. Kolugala moves to file amended plaint.

Call 29/11.

20

(Intld.) A. J.

(10)

29.11.48.

Mr. Kolugala for Plaintiff.

Mr. Balasingham for 1st Defendant.

Mr. Fernando for 2nd Defendant.

Mr. Pinto for 3rd Defendant.

M/s. C. &amp; Wijeyeratnam for 5th Defendant.

Vide 9.

Amended plaint filed.

Consideration by Proctors on 31.11.

30

(Intld.) \_\_\_\_\_  
 A. J.

(11)

31/1/49

Mr. Kolugala for plaintiff.  
 Mr. Balasingham for 1st defendant.  
 Mr. Fernando for 2nd defendant.  
 Mr. Pinto for 3rd defendant.  
 M/s. C. & Wijeyeratnam for 4th defendant.  
 Vide 10 consideration finally 21/2.

(Intld.) A. J.

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233  
 —(contd.)

10

(12)

21.2.49.

Mr. Kolugala for Plaintiff.  
 Mr. Balasingham for 1st Defendant.  
 Mr. Fernando for 2nd Defendant.  
 Mr. Pinto for 3rd Defendant.  
 M/s. C. & Wijeyeratnam for 4th Defendant.  
 Consideration finally.  
 Call on 22.2 before D. J. to fix trial.

(Intld.)———  
A. J.

20

(13)

22.2.49.

Vide 12.

(14)

30-31.3.49.

Mr. Kolugala moves as per reasons stated therein that the Court  
 be pleased to refix the trial of this case for some day in September.  
 Proctors for Defendants received notice.  
 Call on bench on 1st April, 1949.

30

(Intld.)———  
A. J.  
D. J.

(15)

1.4.49.

Mr. Kolugala for Plaintiff.  
 Mr. Balasingham for 1st Defendant.  
 Mr. Fernando for 2nd Defendant.  
 Mr. Pinto for 3rd Defendant.  
 M/s. C. & Wijeyeratnam for 4th Defendant.  
 Vide 14. Trial re fixed for 1st and 2nd September 1949.

40

(Intld.) R. R. S.

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

(15a)

22.8.49.

1st Defendant files list of witnesses and takes out Sub 6.

(16)

22.8.49.

As the Registrar of Business Names, Central Division, Kandy, has refused to issue a certified copy of a letter written to him by Mr. Sparkes, in October or November 1945 relating to the registration of the business names of the Kandy Ice Company and as such letter is very material for the purpose of the plaintiffs' case Mr. L. B. Kolugala moves that the Court be pleased to allow him summons on the Registrar of Business Names, Central Division, Kandy, to produce or cause to be produced the letter written to him by Mr. Sparkes in October or November 1945 relating to the alteration of the business names registration of the Kandy Ice Company.

10

(Copy of letter requesting a copy and reply annexed).

Allowed.

(Intld.) R. R. S.

D. J.

20

(17)

22.8.49. As it is very material for the plaintiffs' case to have statements from the Banks namely:—

(a) The Bank of Ceylon, Kandy and Colombo.

1. (b) The National Bank of India Ltd., Kandy, showing the account of 1st defendant for the month of October, 1945, which is the period during all transactions in connection with the matter in dispute were placed Mr. L. B. Kolugala moves that the Court be pleased to issue an Order on the said Banks to issue a certified copy of the said accounts of the 1st defendant for the said period.

30

2. He further moves that it is necessary and very material that the Bank Account in respect of the business which is in dispute in this case would be obtained from the Bank of Ceylon, Kandy, for the purpose of plaintiffs' case from the date 28th October, 1945, up to date, the Court be pleased to issue him a certified copy of the said accounts for the said period. He undertakes to pay the necessary charges required by the Bank for the issue of the said certified copies.

1. Allowed. Statement of accounts for October, 1945.

2. Allowed.

(Intld.) R. R. S.

D. J.

40

(18)

22/8/49 Plaintiffs file list of witnesses and takes out Subs 15.

(19)

20/8/49 K. R. 1603 for Rs. 110 filed by 1st defendant.

(20)

24/8/49 K. R. 1803 for Rs. 41/50 filed.

(21)

21/8/49 1st defendant takes out 5 Subs :

(21a)

10 1/9/49

Trial.

Mr. Kolugala for plaintiff.

Mr. Balasingham for 1st defendant.

Mr. Fernando for 2nd defendant.

Mr. Pinto for 3rd defendant.

Messrs. C. &amp; Wijeyeratnam for 4th defendant.

Mr. Adv. Choksy, K.C., with Messrs. Jonklass and Vernon Wijetunga for plaintiffs instructed by Mr. Kolugala.

20 Mr. Adv. Weerasooria, K.C., with Mr. Adv. Thiyagalingam for 1st defendant instructed by Mr. Balasingham.

Mr. Adv. Thiagalingam instructed by Mr. Coomaraswamy for the 4th defendant.

Mr. Alfred Fernando for the 2nd defendant.

This case is fixed for today and tomorrow.

Tomorrow I would not be sitting here.

This is a heavy case which might take more than two days.

Trial refixed for 16th and 17th March, 1950.

(Sgd.) G. M. DE SILVA.

(22)

30 1/9/49.

		<i>Rs. c.</i>
Amount in deposit vide	(19)	110.00
	(20)	41.50
		<hr/>
		151.50
Reqn. No. 301 K. Vijeyaratnam		31.50
		<hr/>
		Rs. 120.00
		<hr/>

(Intld.) R. R. S.

D. J.

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1238.  
 --(contd.)

(23)  
 28.11.49 D. N. No. A8572 written out for Rs. 28,090.45 issued to defendant to be credited as follows:—  
 1st plaintiff Rs. 10,000  
 2nd plaintiff Rs. 14,108.15  
 3rd plaintiff Rs. 3,922.30

(24)  
 30/11/49 K. R. 2374 J. S. 046359 on 28/11/40 for Rs. 28,090.45 filed.

(25)  
 26/2/50 1st defendant takes out 5 subs.

10

(26)  
 Plaintiff takes out two subs.

(27)  
 4/3/50 Plaintiff files list of witnesses and takes out 13 subs.

(28)  
 7/3/50 1st defendant takes out two subs.

(29)  
 7/3/50 1st defendant takes out one sub.

(30)  
 10/3/50 Mr. A. K. Liyanage tenders revocation of proxy granted to Mr. L. B. Kolugala by the 1st plaintiff T. B. S. Godamunne together with fresh proxy granted to him and moves that the same be accepted and filed.  
 Mr. Kolugala consents.

20

Allowed: File.  
 (Sgd.) J. C. S.

(31)  
 15/3/50 Witness Weeraiah's letter filed.

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

(32)

16/3/50

Trial.

Mr. Kolugala for 2nd and 3rd plaintiffs.

Mr. Liyanage for 1st plaintiff.

Mr. Balasingham for 1st defendant.

Mr. Fernando for 2nd defendant.

Mr. Pinto for 3rd defendant.

Vide Proceedings.

10

Further trial on 17/3/50.

(Intld.) S. J. C. S.

*D. J.*

(33)

17/3/50

Trial contd.:

Mr. A. K. Liyanage for plaintiff.

Mr. P. Balasingham for 1st defendant.

Mr. Fernando for 2nd defendant.

Mr. Pinto for 3rd defendant.

20

Vide proceedings.

Order reserved for 31/3/50.

(Intld.) S. S.

*D. J.*

(34)

22/3/50

Balance in deposit (21)

Req: No. 781 Manager C. D. 20.00

Req: No. 782 Agent Mercantile Bk. 10.00

*Rs. c.*

120.00

Balance

90.00

(Intld.) S. J. C. S.

*D. J.*

30

(35)

31/3/50

Judgment delivered in the presence of Mr. Adv. Jonklass for plaintiff and of Proctor for 1st defendant who takes notice for 4th defendant.

(Intld.) S. S.

*D. J.*

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X, 1233.  
 —(contd.)

(36)

20/4/50 Messrs. A. Liyanage for 1st plaintiff and L. B. Kolu-  
 gala for 2nd defendant, files petition of appeal in this  
 case together with consent motion dispensing with costs  
 of appeal and notice of security. They also tender appli-  
 cation for 6 copies of appeal briefs, together with K. R.  
 1159 of 19/4/50 for Rs. 150 and supply the following  
 stamps:—

	<i>Rs. c.</i>	
S. C. Judgment ...	... 156.00	10
Certificate of appeal ...	... 78.00	
	<hr/> 234.00 <hr/>	

1. File.
2. Forward record to S. C. in due course.

(Intld.) S. S.  
*D. J.*

(37)

13/7/50

Attorney-General by his letter No. C. M. 152/50 of  
 6/7/50 requests that the record in this case be sent to  
 him for reference and return. Forward and ask it to be  
 returned with least possible delay as the case is in appeal.

20

(Intld.) S. S.  
*D. J.*

(38)

20/9/50

Case returned by A. G.

## IN THE DISTRICT COURT OF KANDY

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

- (1) T. B. S. GODAMUNNE of Colombo Street, Kandy,  
 (2) S. B. RATNAYAKE of Kahalla, Katugastota.  
 (3) H. G. HINNI APPUHAMY of Trincomalee Street,  
 Kandy ..... *Plaintiffs.*

No. X 1233

Nature: Miscellaneous

Value: Rs. 100,000

Class: *Vs.*

- 10 (1) A. W. DAVITH APPUHAMY of Trincomalee Street,  
 Kandy.  
 (2) W. A. B. SOYSA of " Chula Paya ", Hospital Road,  
 Kandy.  
 (3) H. A. C. WICKREMARATNE, Proctor S.C., King's  
 Street. Kandy  
 (4) K. M. Mohamed Yoosuf of Colombo Street,  
 Kandy ..... *Defendants.*

On this 29th day of November, 1948.

20 The amended plaint of the plaintiffs above named appearing by  
 their Proctor Loku Banda Kolugala states as follows:—

1. The defendants reside and the premises which are the subject  
 matter of this action situate within the jurisdiction of this Court.

2. In or about October 1945 the 1st and 2nd plaintiffs and 1st,  
 2nd, 3rd and 4th defendants and 3 others namely: S. M. Perera,  
 N. Palaniandy and N. D. A. Samaranayake on the invitation of the  
 1st defendant formed themselves into a syndicate to purchase the  
 business of the Kandy Ice Company as a going concern with the  
 goodwill and assets from the owners thereof for the sum of  
 Rs. 100,000 and to carry on the said business pending the promotion  
 30 of a private limited liability Company of which the members of  
 the syndicate were to be the share holders to the extent of their



X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

respective contributions. The said sum of Rs. 100,000 was collected by the 1st defendant for the said purpose from the following persons as follows:—

	<i>Rs.</i>	
1st Plaintiff ...	10,000	
2nd Plaintiff ...	10,000	
1st Defendant ...	15,000	
2nd Defendant ...	10,000	
3rd Defendant ...	10,000	
4th Defendant ...	10,000	10
S. M. Perera ...	15,000	
N. Palaniandy ...	10,000	
N. D. A. Samaranayake ...	10,000	
	<hr/> 100,000 <hr/>	

3. The said sum of Rs. 100,000 was paid by the 1st defendant to the Attorney of the owners on or about the 26th day of October, 1945, and the said syndicate was duly placed in possession of the said business and its assets the management and control of which was entrusted to the 1st defendant by the syndicate. The transfer of the said business to the syndicate was duly notified to the Registrar of Business Names, Kandy, by the person who was managing the business for the owners at the times possession thereof was transferred to the syndicate. 20

4. As moneys were required to carry on the said business, a further sum of Rs. 65,000 was contributed by members of the said syndicate and eventually the contributions were as follows:—

	<i>Rs.</i>	
A. W. Davith Appuhamy ...	60,000	
W. A. B. Soysa ...	25,000	
S. M. Perera ...	15,000	30
N. Palaniandy ...	10,000	
S. B. Ratnayake ...	15,000	
T. B. S. Godamunne ...	10,000	
K. S. Mohamed Yousuf ...	10,000	
N. D. A. Samaranayake ...	10,000	
H. A. C. Wickremaratne ...	10,000	
	<hr/> 165,000 <hr/>	

5. Meetings of the members of the syndicate were held from time to time and in pursuance of certain requests made at such meetings the amounts contributed by the said S. M. Perera, 40

M. Palaniandy and N. D. A. Samaranayake were refused to them and a sum of Rs. 10,000 was contributed by the 3rd plaintiff above named who thereupon became a member of the said syndicate with the consent and concurrence of the other members.

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

6. The said business which had been entrusted to the 1st defendant as aforesaid has thereafter been carried on by the 1st defendant and all moneys of the said business were received by the 1st defendant on behalf of the said syndicate.

10 7. The 1st defendant at various times undertook to have a private limited liability company formed to take over and carry on the said business and further undertook to take all necessary steps to have the said business and its goodwill and assets conveyed to and vested in the said company on its formation but has up to date failed to do so and is now refusing to implement any of the said undertakings.

20 8. The plaintiffs thereupon requested the owners to execute a formal transfer of the said business and its assets in favour of the members of the said syndicate. The owners were not prepared to execute such transfer unless instructed to do so by the 1st defendant or his Proctor. The plaintiffs thereafter requested the 1st defendant to take necessary steps to obtain such a transfer but he failed and neglected to do so.

9. The 2nd, 3rd and 4th defendants are made parties defendants to this action as they are unwilling to join in this action as parties-plaintiffs although requested to do so.

30 10. The 1st defendant for and on behalf of the said syndicate has managed the said business from the said 25th day of October, 1945, and profits earned by the said business which was under his management and control would reasonably amount up to date hereof to Rs. 150,000 for which sum the 1st defendant has failed and neglected to account for to the said syndicate or to distribute and pay to the members of the said syndicate.

11. The plaintiffs value this action for purpose of stamp duty at Rs. 100,000.

Wherefore the plaintiffs pray—

40 (a) For a declaration that the 1st defendant was acting throughout for and on behalf of the said syndicate in the transactions between the 1st defendant and the owners and that the plaintiffs and the 1st to 4th defendants are entitled to all the benefits and advantages resulting from the said transactions between the 1st defendant and the owners and that the plaintiffs and the 1st to 4th defendants are entitled to all the benefits and advantages resulting from the said transactions:

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

(b) That the 1st defendant be ordered to submit for execution by the owners of a deed of transfer of the said business with its goodwill and assets (prepared by the 1st defendant or alternatively by the plaintiffs) in favour of the plaintiffs and the 1st to 4th defendants or alternatively in favour of the 1st defendant.

(c) As an alternative to the relief prayed for in para (b) above the Court do order the 1st defendant to instruct or request the owners to execute a transfer as aforesaid.

(d) In the event of the 1st defendant failing to do or perform any or all of the matters required to be done by him under clauses (b) or (c) above within 15 days of the date of the decree that the plaintiffs be declared entitled in the name of the 1st defendant or in the name of themselves and the 1st, 2nd, 3rd and 4th defendants to tender to the owners for execution such transfer as aforesaid in favour of themselves and the 1st to 4th defendants. 10

(e) That the accounts be taken of the said business as from 26th October, 1945, and that the Court do order the 1st defendant to render accounts and pay to the said syndicate such sums as the Court find was the profit earned by the said business in proportion to the sums contributed by the members of the said syndicate respectively. 20

(f) For a declaration that the members of the said syndicate namely the plaintiffs and the defendants are entitled to the said business and its property and assets in the proportion of the sums contributed by the said members respectively and that they are entitled to the legal and beneficial interest therein and to take steps to obtain legal title thereto.

(g) That the 1st defendant be ordered to pay the costs of the plaintiffs and the 2nd to 4th defendants and that the Court do grant such further and other relief as to this Court shall seem meet. 30

(Sgd.) L. B. KOLUGALA,  
 Proctor for plaintiffs.

Settled by:

Vernon Wijetunge,  
 Vernon Jonklaas,  
 N. K. Choksy, K.C.,  
 H. V. Perera, K.C.,  
*Advocates.*

## IN THE DISTRICT COURT OF KANDY

- (1) T. B. S. GODAMUNNE of Colombo Street, Kandy.  
 (2) S. B. RATNAYAKE of Kahalla, Katugastota.  
 (3) H. G. Hinni Appuhamy of Trincomalee Street,  
 Kandy. .... *Plaintiffs.*

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

No. X1233

Nature: Miscellaneous

Value: Rs. 100,000

Class: Vs.

- 10 (1) A. W. DAVITH APPUHAMY of Trincomalee Street,  
 Kandy.  
 (2) W. A. B. SOYSA of " Chula Paya ", Hospital Road,  
 Kandy.  
 (3) H. A. C. WICKREMARATNE, Proctor S. C., King's  
 Street, Kandy.  
 (4) K. M. MOHAMED YOUSUF of Colombo Street,  
 Kandy.  
 (5) R. WILSON.  
 (6) Mrs. WILSON, both at present in England ..... *Defendants.*

20 On this 3rd day of March, 1948.

The plaint of the plaintiffs above named appearing by their Proctor, Loku Banda Kolugala, states as follows:—

1. The defendants reside and premises which are the subject matter of this action are situated within the jurisdiction of this Court.

- 30 2. In or about October 1945 the 1st and 2nd plaintiffs the 1st, 2nd, 3rd and 4th defendants and 3 others namely: S. M. Perera, N. Palaniandy and N. D. A. Samaranayake on the invitation of the 1st defendant formed themselves into a syndicate to purchase the business of the Kandy Ice Company as a going concern with its goodwill and assets from the 5th defendant for the sum of Rs. 100,000 and to carry on the said business pending the promotion of a private limited liability Company of which the members of the syndicate were to be the share holders to the extent of their res-

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

pective contributions. The said sum of Rs. 100,000 was collected the 1st defendant for the said purpose and the following persons as follows:—

	<i>Rs.</i>	
1st plaintiff ...	10,000	
2nd plaintiff ...	15,000	
1st defendant ...	15,000	
2nd defendant ...	10,000	
3rd defendant ...	10,000	
4th defendant ...	10,000	10
S. M. Perera ...	15,000	
N. Palaniandy ...	10,000	
N. D. A. Samaranyake ...	10,000	

3. The said sum of Rs. 100,000 was paid by the 1st defendant to the attorney of the 5th and 6th defendants on or about the 26th day of October, 1945 and the said syndicate was duly placed in possession of the said business, the management and control of which was entrusted to the 1st defendant by the syndicate.

The transfer of the said business to the syndicate was duly notified to the Registrar of Business Names, Kandy by the person who was managing the business for the 5th and 6th defendants at the time possession thereof was transferred to the syndicate. 20

4. As moneys were required to carry on the said business, a further sum of Rs. 65,000 was contributed by the members of the said syndicate, and eventually the contributions were as follows:—

	<i>Rs.</i>	
A. W. Davith Appuhamy ...	65,000	
W. A. B. Soysa ...	25,000	
S. M. Perera ...	15,000	
N. Palaniandy ...	10,000	30
S. B. Ratnayake ...	15,000	
T. B. S. Godamunne ...	10,000	
K. S. Mohamed Yousuf ...	10,000	
N. D. A. Samaranyake ...	10,000	
H. A. C. Wickremaratne ...	10,000	

5. Meetings of the members of the said syndicate were held from time to time and in pursuance of certain requests made at such meetings the amounts contributed the said S. M. Perera, N. Palaniandy and N. D. A. Samaranyake were refunded to them and a sum of Rs. 10,000 was contributed by the 3rd plaintiff above named who thereupon became a member of the said syndicate with the consent and concurrence of the other members. 40

6. The said syndicate which had been entrusted to the 1st defendant as aforesaid has thereafter carried on by the 1st defendant and all moneys of the said business were received by the 1st defendant on behalf of the said syndicate.

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

7. The 1st defendant at various times undertook to have a private limited liability company formed to take over and carry on the said business and further undertook to take all necessary steps to have the said business and its goodwill and assets conveyed to and vested in the said company on its formation but has up to date failed to do so and is now refusing to implement any of the said undertakings.

8. The plaintiffs thereupon requested the 5th and 6th defendants to execute a formal transfer of the said business and its assets in favour of the members of the said syndicate. The 5th and 6th defendants were not prepared to execute such transfer unless instructed to do so by the 1st defendant or his Proctor. The plaintiff thereafter requested the 1st defendant to take all necessary steps to obtain such transfer but he has failed and neglected to do so.

9. The 5th and 6th defendants are ready and willing to execute the transfer of the said business and assets if requested to do so by the 1st defendant, and the 5th and 6th defendants are accordingly made parties to this action in order to enable the plaintiffs to obtain effective relief in the premises.

10. The 2nd, 3rd and 4th defendants are made parties defendants to this action as they are unwilling to join this action as parties plaintiffs although requested to do so.

11. The plaintiffs value this action for the purpose of stamp duty at Rs. 100,000.

Wherefore the plaintiff prays—

(a) For a declaration that the 1st defendant was acting for and on behalf of the said syndicate in transaction between the 1st defendant and 5th and 6th defendants and that the plaintiffs and 2nd to 4th defendants are entitled to all the benefits and advantages resulting from the said transaction.

(b) That the 1st defendant be ordered to submit for execution by the 5th and 6th defendants of a deed of transfer of the said business with its goodwill and assets (prepared by the 1st defendant or alternatively the plaintiffs) in favour of the plaintiffs and the 2nd to 4th defendants or alternatively, in favour of the 1st defendant.

(c) As an alternative to the relief prayed for in para (b) above that the Court do order the 1st defendant to instruct or request the 5th and 6th defendants to execute a transfer as aforesaid.

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

(d) In the event of the 1st defendant failing to do or perform any or all of the matters required to be done by him under clauses (b) and (c) above within fifteen days of the date of the decree, that the plaintiffs be declared entitled, in the name of the 1st defendant or in the name of themselves and 2nd, 3rd and 4th defendants, to tender to the 5th defendant to execute such transfer as aforesaid, in favour of themselves and the 1st to 4th defendants.

(e) That the Court do declare that upon the 5th defendant executing such transfer as is referred to above, the 5th defendant shall stand discharge from all obligations arising from or in connection with the said transaction. 10

(f) That the 1st defendant be ordered to pay the costs of the plaintiffs, of the 2nd to 4th defendants and of the 5th and 6th defendants and that the Court do grant such further and other relief as to this Court shall seem meet.

(Sgd.) L. B. KOLUGALA,  
*Proctor for plaintiffs.*

Settled by:

Vernon Wijetunge,  
 Vernon Jonklaas,  
 N. K. Choksy, K.C.,  
 E. F. N. Gratien, K.C.,  
 H. V. Perera, K.C.,  
*Advocates.*

IN THE DISTRICT COURT OF KANDY

(1) T. B. S. Godamunne and 2 others ..... *Plaintiffs.*

No. X 1233. Vs.

(1) A. W. Davith Appuhamy and 5 others ..... *Defendants.*

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

This 24th day of June, 1948.

The answer of the 1st defendant abovenamed appearing by his Proctor Ponnampalam Balasingham states as follows:

10 1. Answering to paragraph one of the plaint this defendant admits that this defendant resides within the jurisdiction of this Court and that certain land and buildings of the Kandy Ice Company are situated within its jurisdiction.

20 2. Answering to paragraphs 2 and 3 of the plaint this defendant says that the business known as the Kandy Ice Company with all its assets, movable and immovable, was purchased by this defendant who thereupon became the owner thereof, that this defendant was duly placed in possession of the said business and its assets and registered as the owner. The execution of a formal conveyance had to be deferred pending the approval and execution of certain documents. This defendant denies all and singular the averments in the said paragraph.

30 3. Answering to paragraphs 4 to 7 of the plaint this defendant says that, after defendant's said purchase, proposals were made by certain persons to form a limited liability company for the purpose of acquiring from this defendant the said business and its assets; that certain contributions towards the proposed share capital of the proposed Company were made but in consequence of certain differences and disagreements that arose among the prospective share holders the proposal fell through and was abandoned. The defendant denies all and singular the averments in the said paragraph inconsistent with this answer.

4. Answering to paragraphs 8 and 9 of the plaint this defendant says that this defendant is solely entitled to the said transfer and that the 5th and 6th defendants, as they lawfully may, have refused to execute a transfer except in the defendant's favour or as instructed by this defendant.

5. This defendant says that the plaintiffs who have no manner of right or title so to do and who are unfit to carry on the said business or to be associated with the same are fraudulently attempting to interfere with this defendant and to assume control of same.



X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

6. This defendant is and has always been ready and willing to refund to the persons who made the said contributions the respective sums contributed by them as aforesaid.

7. As matters of law this defendant says that this action is not maintainable in as much as,

(a) There is a misjoinder of parties and of causes of action;

(b) The matters alleged in paragraphs 2 to 7 of the plaint cannot be established and/or proved and are of no force or avail in law in view of the provisions 2 chapter 57 of the Revised Legislative Enactments and no parol evidence can be led of the same,

10

Wherefore this defendant prays:—

(1) That the plaintiff's action be dismissed;

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

(Sgd.) P. BALASINGHAM,  
*Proctor for 1st defendant.*

Settled by:

N. E. WEERASOORIA, K.C.,  
*Advocate.*

T. A. DUNUWILLE,  
*Advocate.*

20

## IN THE DISTRICT COURT OF KANDY

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X, 1233.  
 —(contd.)

(1) T. B. S. Godamunne of Colombo Street, Kandy and two  
 others ..... *Plaintiffs.*

No. X 1233.

*Vs.*

(2) W., A. B. Soysa of Kandy and 5 others ..... *Defendants.*

On this 6th day of September, 1948.

The answer of the 2nd defendant abovenamed appearing by his proctor Alfred Fernando states follows:—

10 1. This defendant admits the averments in paragraph 1 of the  
 plaint.

2. Answering to paragraphs 2 to 7 of the plaint, this defendant denies all and singular the averments herein inconsistent with this answer.

3. Answering to paragraphs 8 and 9 of the plaint this defendant is unaware of averments therein and puts the plaintiffs to the proof thereof.

4. Answering to paragraph 10 of the plaint this defendant says that he has been unnecessarily made a party to the action and that he is not interested in the alleged dispute.

20 5. By way of further answer this defendant says that there was a proposal in 1945 to form a limited liability company to own and purchase the business then carried on as the Kandy Ice Company and as this defendant was willing to become a shareholder of this proposed company this defendant subscribed a sum of Rs. 25,000 being the value of 25 shares to be allotted to this defendant in the event of such a company being formed.

6. This defendant further says that owing to certain disagreement the proposal to form a limited company as aforesaid fell through and no shares were allotted to this defendant.

30 Wherefore this defendant prays:

1. that the plaintiff's action as against this defendant be dismissed;

2. for costs and;

3. for such other and further relief as to this Court shall seem meet.

(Sgd.) ALFRED FERNANDO,  
*Proctor for 2nd defendant.*

IN THE DISTRICT COURT OF KANDY

X15.  
 Plaint and  
 Answers filed  
 in D. C.  
 Kandy Case  
 No. X. 1233.  
 —(contd.)

(1) T. B. S. Godamunne of Colombo Street, Kandy, (2) S. B. Ratnayake of Kahalla, (3) H. G. Hinniappuhamy of Trincomalee Street, Kandy ..... *Plaintiffs.*

*Vs.*

(1) A. W. Davith Appuhamy of Kandy, (2) W. A. B. Soysa of Kandy, (3) H. A. C. Wickremaratne of Kandy, (4) K. M. Mohamed Yousuf of Kandy, (5) R. Wilson, (6) Mrs. Wilson, both of England ..... *Defendants.*

On this 16th day of August, 1948.

10

The answer of the 4th defendant abovenamed appearing by Nallathamby Coomaraswamy Kadiravel Pillai Vijayaratnam and Kadiravel Pillai Robert Navaratnam in partnership under the name and style and firm "Coomaraswamy and Wijeyeratnam," his proctors, states as follows:

1. This defendant admits the averments in paragraph 1 of the plaint.

2. Answering to paragraph 2 to 7 of the plaint this defendant denies all and singular averments therein inconsistent with the answer.

20

3. Answering to paragraphs 8 and 9 of the plaint this defendant is unaware of the averments therein and puts the plaintiffs to the proof thereof.

4. Answering to paragraph 10 of the plaint this defendant says that he has been unnecessarily made a party to this action and that he is not interested in the alleged dispute.

5. By way of further answer this defendant says that there was a proposal in 1945 to form a limited liability company to own and purchase the business then carried on as the Kandy Ice Company and as this defendant was willing to become a shareholder of this proposed company this defendant subscribed the sum of Rs. 10,000 being the value of 10 shares to be allotted to this defendant in the event of such a company being formed.

30

6. This defendant further says that owing to certain disagreements the proposal to form a limited liability company as aforesaid fell through and no shares were allotted to this defendant.

X15.  
Plaint and  
Answers filed  
in D. C.  
Kandy Case  
No. X. 1233.  
—(contd.)

Wherefore this defendant prays:—

1. That the plaintiff's action as against this defendant be dismissed;
2. for costs and;
3. for such further relief as to this Court shall seem meet.

(Sgd.) COOMARASAMY & VIJAYARATNAM.

10 Settled by:

(Sgd.) N. E. WEERASOORIA,

*Advocate.*

16th March, 1950.

D. C. 1233 X

Trial

Mr. Advocate Choksy, K.C., with Messrs. Advocate Jonklaas and Wijetunge instructed by Mr. Liyanage for Plaintiffs.

20 Mr. Advocate N. E. Weerasooria, K.C. with Messrs. Advocates Thiagalingam and Dunuwille instructed by Mr. Balasingham for 1st Defendant.

Mr. Advocate Thiagalingam instructed by Messrs. Coomaraswamy and Navaratnam for 4th defendant.

2nd Defendant present.

3rd Defendant is absent.

Mr. Advocate Choksy opens his case and suggests the following issues:—

- 30 1. In or about October 1945 did the 1st and 2nd plaintiffs and the 1st to 4th defendants and three others namely: S. M. Perera, N. Palaniandy and N. D. A. Samaranayake at the invitation of the 1st defendant agree to form a private limited liability company to purchase the business and assets movable and immovable and the goodwill of the Kandy Ice Company as a going concern for Rs. 100,000.

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2. Was it agreed that the members of the syndicate consisting at that date of the persons referred to in issue No. 1 were to become share holders in the proposed company in proportion to their respective contributions.

3. Did the members of the syndicate pay to the 1st defendant or provide the respective contributions set out in paragraph 2 of the plaint in pursuance of the agreement referred to in issue 1?

4. (a) Did the 1st defendant pay to the former owners the sum of Rs. 100,000 for and on behalf of the syndicate?

(b) Did the syndicate take possession of the said business and its assets movable and immovable and its goodwill on the footing of the agreement referred to in issue No. 1? 10

5. Did the 1st defendant carry on the said business subsequent to its acquisition by the syndicate for and on behalf of the syndicate?

6. Were the plaintiffs and the defendants the members of the syndicate subsequent to the acquisition of the said business?

7. If issues 1, 2, 3, 4, 5 and 6 are answered in the affirmative is the 1st defendant liable to account to the plaintiffs and defendants for all benefits in respect of the said purchase and of the said business and of all profits accruing therefrom? 20

8. Has the 1st defendant wrongfully failed to take the necessary steps either (a) to form the private liability company in pursuance of the said agreement or (b) to obtain a conveyance in the name of the plaintiffs and defendants?

9. If issue No. 7 and or 8 are answered in the affirmative, are the plaintiffs entitled to all or any one or more and if so, which of the reliefs prayed for in the plaint?

Mr. Adv. Weerasooriya objects to issue No. 1 as it is not in conformity with the averments in paragraph 2 of the plaint and is an attempt to change the nature of the case and/or avoid certain legal objections taken by the 1st defendant. 30

He also objects to issue 2 as it does not arise in that form on the pleadings.

*He objects* to issue No. 3 on two grounds, namely: (1) as it does not indicate the date and (2) as it relates to an agreement referred to in Issue No. 1 which does not arise on the pleadings.

He objects to issue No. 4 (a) as it is not pleaded that Rs. 100,000 was paid to the owners on behalf of the syndicate and to (b) as it is based on the averments in issue No. 1.

He objects to issue No. 6 as it does not arise anywhere on the pleadings. 40

He objects to issue No. 7 as it is based on the earlier issues.

He objects to issue No. 8 because it is framed on the assumption that the 1st defendant has admitted the undertaking referred to in paragraph 7 which the 1st defendant denies.

He objects to issue No. 9 also as it arises from the issues 7 and 8 of which he has taken objection.

10 Mr. Adv. Thiagalingam says that he supported the objections to the issues taken by Mr. Weerasooria. He says that the 4th defendant denies that he came into this syndicate at any stage referred to in paragraph 2. He says that he entered into no syndicate at anytime. He admits that on account of certain tentative proposals between him and the 1st defendant alone he paid the 1st defendant Rs. 10,000. The date of these proposals was on or about the 23rd November, 1945. Mr. Thiagalingam further states that the 4th defendant applies that he be allowed to drop out of this case with payment of costs to him up to date by plaintiffs.

20 Mr. Choksy says that it is not necessary in the issues to raise relating to the various stages referred to in paragraph 2 of the plaint. He says that Issue No. 1 in substance raises the question as to whether or not the plaintiffs and the defendants came together with the object of forming a private company to purchase the business.

### Order

30 I agree with the objections taken by Mr. Weerasooria and Mr. Thiagalingam to Issue No. 1 in its present form the issue is not in conformity with the pleadings in paragraph 2 of the plaint. In view of the fact that the 1st and the 4th defendants have denied the formation of the syndicate to purchase the Kandy Ice Company as a going concern to run it and thereafter form a limited liability company I think Issue No. 1 should be recast in order to bring out the points in dispute between the parties. I therefore uphold the objection.

(Sgd.) S. J. C. SCHOKMAN,  
D. J.

Mr. Choksy suggests Issue No. 1 on the following form:

40 1. In or about October, 1945, did the 1st and 2nd plaintiffs and 1st, 2nd, 3rd and 4th defendants and Perera Palaniandy and Samaranayake at the invitation of the 1st defendant form themselves into a syndicate to purchase the business of Kandy Ice Company as a going concern with its assets movable and immovable and its goodwill from the owners thereof the sum of Rs. 100,000 and to carry on the said business pending the promotion of a private limited liability company?

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Mr. Choksy suggests that Issue No. 2 can stand in the original form suggested as he has now amended Issue No. 1.

With regard to issue No. 3 he deletes the word " or Provide " after the words " 1st defendant " and insert the date " in October 1945 " after the word " syndicate ".

He says that Issue No. 4 can now stand in view of the amended Issue No. 1.

With regard to Issue No. 6 Choksy says that it is based on paragraphs 5 and 6 of the plaint. He says that the position of the plaintiff was that three of the original members of the syndicate, S. M. Perera, N. Palaniandy and N. D. A. Samaranayake dropped out after the acquisition of the business and the 3rd plaintiff became a member of the syndicate. 10

With regard to Issue No. 7 he says it can now stand in view of the amended Issue No. 1.

Mr. Choksy suggests in place of Issue 8 the following Issue 8 (a) Did the 1st defendant at various times between October 1945 and 30th November, 1946, undertake to have a private limited liability company formed and to take all necessary steps to have the said business and its goodwill and assets conveyed to and vested in the said company on its formation with a view to the company taking over and carry on the said business?— 20

(b) Did the 1st defendant fail and refuse to implement the said undertaking?

(c) Did the plaintiffs on or about November, 1946, request the 1st defendant to obtain a transfer from the owners of the business in favour of the members of the syndicate?

(d) Has the 1st defendant failed and neglected to do so?

Mr. Choksy suggests that Issue No. 9 should stand as it is.

Mr. Adv. Weerasooria has no objection to the Issue No. 1 in its new form and also to issue 2, 3, 4a and 5. Mr. Adv. Weerasooria suggests that the words " in term of paragraphs 2, 3, 4 and 5 of the plaint " be added to the end of Issue No. 6 suggested by Mr. Choksy that the Issue would read 6. Were the plaintiffs and the defendant the members of the syndicate subsequent to the acquisition of the said business in terms of paragraphs 2, 3, 4 and 5 of the plaint? 30

Mr. Advocate Choksy has no objection to the Issue.

Mr. Advocate Weerasooria has no objection to issue No. 7. He has no objection to issue 8 (a), (b), (c) and (d). Mr. Advocate Choksy says that he raised his issue on the amended plaint. 40

Mr. Advocate Weerasooria says that in the answer the 1st defendant has denied every one of the statements caught up in issue No. 1 but that he does not suggest a separate issue in regard to each one of them.

He suggests the following further issues:

10. Is there a misjoinder of parties?

11. Is there a misjoinder of cause of action?

10 12. Can the matter alleged in paragraphs 2 to 7 of the amended plaintiff be established or proved or parole evidence led in proof of such matter in view of the provisions of Chapter 57 of the revised Legislative Enactments Vol. 2.?

13. Are the syndicate and agreements referred to in the said paragraphs 2 to 7 of the amended plaintiff of any force or avail in law in view of the provisions of the said Chapter 57?

Mr. Thiagalingam raises no further Issues.

Mr. Choksy does not object to issues 10 and 11.

20 He objects to issue 12. He says it is vague as there are several matters pleaded in paragraphs 2 to 7 of the amended plaintiff. He says that it and when any evidence is led which is objectionable under Chapter 57 objection should be then raised to the particular question or matter at the time it is sought to lead that evidence and that it cannot be framed in the form of a general Issue.

He objects to Issue No. 13 also on the same ground as Issue No. 12 and also says that it is meaningless with reference to the word syndicate. Mr. Weerasooriya suggests in place of Issues 12 and 13 the following issues.

30 12. Can the plaintiffs establish in law in view of the provisions of Chapter 57 of the Revised Legislative Enactments Vol. 2 that the plaintiffs, 1st to 4th defendant and the three others named in paragraph 2 of the amended plaintiff formed themselves into a syndicate (a) to purchase the business of the Kandy Ice Company as a going concern for the sum of Rs. 100,000.

(b) To carry on the said business pending the promotion of a private limited liability company?

13. Can the plaintiffs establish in law in view of the provisions of Chapter 57 of the Revised Legislative Enactments Vol. 2—

(a) The alleged syndicate purchased for a sum of Rs. 100,000 the said business including movable and immovable assets for and on behalf of itself.

40 (b) That the said syndicate entrusted the management and control of the said business to the 1st defendant as a member of the syndicate.



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(c) That to carry on the said business a further sum of Rs. 65,000 was contributed by the members of the syndicate,

(d) that eventually the contributors were as stated in paragraph 4 of the amended plaint,

(e) that the 3rd plaintiff contributed a sum of Rs. 10,000 and thereby became a member of the said syndicate,

(f) That the said business was carried on by the 1st defendant and all moneys received on behalf of the said syndicate,

(g) that the 1st defendant is liable to account to the said syndicate or to distribute and pay to its members any profits of the said alleged business? 10

14. Can the plaintiffs in view of the provisions of Chap. 57 ask for

(a) an account as claimed in paragraph (e) of the prayer to the amended plaint, and

(b) For a declaration as claimed in paragraph (f) of the prayer to the plaint?

Mr. Choksy has no objection to the new issues 12 to 14 in view of these Issues he raises the following consequential issues:—

15. If issues 12 (a) and (b) and/or 13 (a) to (g) or any part thereof and 14 (a) and (b) or any of them are answered in the 1st defendant's favour, will the 1st defendant be using the statute of frauds to effect a fraud on the plaintiffs? 20

16. If so, can the 1st defendant avail himself to the provisions of Chap. 57 of the Revised Legislative Enactments Vol. 2?

Mr. Weerasooriya has no objection to these further Issues.

### Order

I frame the following issues. Issue 1 to 9 in their altered form and 15 and 16 suggested by Mr. Choksy and issues 10 to 14 suggested by Mr. Weerasooria omitting the Issues Nos. 12 and 13 originally suggested by him. 30

(Sgd.) S. J. C. SCHOKMAN,  
 D. J.

16.3.50.

Mr. Weerasooria moves that issues 10 to 14 to be tried first as preliminary issues of law because he says that if the 1st defendant succeeds on these issues the case need not go to trial on the facts.

Mr. Choksy objects. He says that with regard to the issues of misjoinder of parties and causes of action 10 and 11, it is not the present policy to dismiss an action for misjoinder of parties and causes of action but to allow the plaintiff to elect on which causes 40

of action he intends to proceed in the event of the Court holding that there is a misjoinder. With regard to issues 12 to 14 he says it will be necessary for the Court to hear the evidence before it can decide as to whether what is sought to be established in something which falls within the provisions of Chapter 57 and is obnoxious for these provisions. He cites 4 Balasingham notes of cases page 6.

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10 Mr. Weerasooria replies: he submits that the objection raised on misjoinder of parties and causes of action would be decided at this stage and not at the end of the trial. As regards Issues 12 to 14 he says he proposes to argue those issues on the basis that all the facts as pleaded in the amended plaint as true.

20 Mr. Weerasooria replies: he submits that the objection raised defendant's favour on the pleadings there still remains issues 15 and 16 which are raised by him and he says that the Court should have evidence before it can decide on the last issue. Mr. Weerasooria says that even the issues 15 and 16 will have to be decided on the truth of the averments contained in the plaint so that it will be possible for the Court to decide those two issues also along with 30 issues 12 to 14 on the assumption that all the averments contained in the amended plaint are correct.

#### Order

I agree with Mr. Weerasooria that the issues 10 and 11 which relates to misjoinder of parties and causes of action should be dealt with at this stage for if I hold that there had been a misjoinder the plaintiffs should be given an opportunity to elect what they will do. Counsel are not agreed as to whether issues 12 to 14 and 15 and 16 should be agreed as preliminary matters of law. Mr. Weerasooria has stated that he proposes to argue those issues on the footing that all the averments contained in the amended plaint are true and he maintains that even assuming those averments are true the plaintiffs cannot maintain this action. He has also pointed out that for the decision of issues 15 and 16 raised by Mr. Choksy the Court will have to act on the footing that the averments contained in the amended plaint are true. In view of this I think that issues 10 and 16 might be argued as preliminary issues of law and I hold accordingly.

(Sgd.) S. J. C. SCHOKMAN,  
D. J.  
16.3.50.

40 It is now 4.30 p.m. further trial tomorrow.  
17.3.50.

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Same appearances as yesterday.

Mr. Weerasooria addresses Court.

“ Syndicate ” means “ Association of persons joined together for a certain purpose and for certain rights and obligations.” In law they form a partnership.

He refers to Vol. 11, Chapter 57, Section 18 of the prevention of Frauds Ordinance, page 104, Section 2, Section 19. In the concise English Dictionary “ Syndicate ” is defined as “ A body of *sindics* ” the office of a *syndic*; an association of persons formed with the view of promoting some particular enterprise, financial scheme, or the like. 10

Mr. Weerasooria cites:

11 N. L. R. 254.

18 N. L. R. 289.

29 N. L. R. 342.

Mr. Thiagalingam addresses; He cites:

45 N. L. R. 128 at page 131.

Action 1, Partnership Act, of 1890, Halsbury Volume 22 page 12, Note E, 45 N. L. R. 137 at page 140. 20

Mr. Choksy replies:

In Wharton’s Law Lexicon page 831 definition of “ Syndicate ” as follows: A body of persons association temporarily for the purpose of buying a private business or other property and selling it at a profit—usually to a limited Company ”.

*He cites:* Lindley on Partnership Book 1, Chapter 1, “ Nature of Contracts determined ” also page 11.

Wharton’s Law Lexicon page 632—definition of Part owners or co-owners Joint owners, or tenants in common who have a distinct or at least an independent, although an undivided interest in the property. 30

He also cites:

24 N. L. R. 191;

5 Ceylon Weekly Report, 13 pages 15 and 17;

23 N. L. R. 193 page 197;

9 N. L. R. 177 also page 183;

32 N. L. R. 306.



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management and control would reasonably amount up to the date of the amended complaint (29th November, 1948) to Rs. 150,000 which sum the 1st defendant has failed and neglected to account to the said syndicate or to distributed the members of the said syndicate. They pray for a declaration that the 1st defendant was acting throughout in the transaction between the 1st defendant and the owners for and on behalf of the syndicate, that the 1st defendant be ordered to obtain a transfer of the said business with its goodwill and assets from the owners in favour of the plaintiffs and the 1st to 4th defendants, and that an accounting be taken of the said business as from 26th October, 1945, and for a declaration that the members of the syndicate namely the plaintiffs and the defendants are entitled to the said business and its property and assets in the proportion of the sums contributed by the said members respectively. The plaintiffs aver that they have made the 2nd, 3rd and 4th defendants parties to this action as they are unwilling to join in the action although requested to do so. 10

1st defendant in his answer denies the allegations contained in the complaint relating to the formation of a syndicate for the purpose stated and aver that the business of the Kandy Ice Company together with its assets was purchased by him alone, that he was duly placed in possession of the business and assets and registered as its owner. He further avers that after his purchase of the business proposals were made certain members form a limited liability company for the purpose of the acquiring it from him, that certain contributions towards the proposed share capital of the proposed company were made but that in consequence of differences and disagreements that arose among the prospective shareholders, the proposal fell through and was abandoned. As matters of law, the 1st defendant pleads that this action is not maintainable as: 20

(a) There is a misjoinder of parties and of causes of action, and 30

(b) The matters alleged in paragraphs 2 to 7 of the complaint cannot be established and or proved and are of no force or avail in law in view of the provisions of Chapter 57 of the Legislative Enactments and no parol evidence can be led of the same.

The 2nd defendant in his answer denies of allegations in the complaint regarding the formation of a syndicate for the purposes mentioned and states that there was a proposal in 1945 to form a limited liability company and to own and purchase the business carried on as the Kandy Ice Company that he was willing to be a shareholder of the proposed company and subscribed a sum of Rs. 25,000 being the value of 25 shares, but that owing to certain disagreement that proposal to form the limited liability company fell through and no shares were allotted to him. The 3rd defen- 40

dant filed no answer. 4th defendant filed answer taking up the same position as the 2nd defendant in which he states that he subscribed a sum of Rs. 10,000 being a value of 10 shares to be allotted to him in the event of the proposed company being formed, but that no shares were allotted to him as the proposal fell through.

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10 At the trial 16 issues were framed. On an application made by Counsel for the 1st defendant I allowed issues Nos. 10 to 16 to be taken up for consideration first and argued as preliminary issues of law. Learned Counsel for the 1st and 4th defendants stated that they argue those issues on the basis that all the facts as pleaded in the amended plaint were true.

20 Mr. Weerasooria argues that, although in the plaint the plaintiffs have referred to the formation of a syndicate between themselves and the other persons mentioned the nature of the association between these persons as stated in paragraph 2 of the plaint was to acquire a business as a going concern and to run it for a commercial purpose with a view to profit which in law constituted a partnership among these persons. He urged that the fact that the plaintiffs in their plaint have chosen to call this association by another name would not enable it to escape the provisions of section 18 of the Prevention of Frauds Ordinance (Chapter 57) in as much as the capital of its partnership as stated in the plaint exceeds Rs. 1,000 and there is no averment that the agreement pleaded in the plaint was in writing. He further argued that, in the absence of a written agreement, it is not open to the plaintiffs to call upon the 1st defendant for an accounting based on a partnership even assuming the 1st defendant ran the business as the managing partner and earned profits as alleged in paragraph 10 of the amended plaint, with regard to the averments in the plaint  
30 regarding the failure of the 1st defendant to have the business with its goodwill and assets conveyed to and vested in a company that was to be formed and to the portion of the prayer where the plaintiffs pray that he be ordered to obtain a transfer in favour of the plaintiffs and the 1st to 4th defendants. Mr. Weerasooriya urged that this agreement too offends against section 2 of the same Ordinance as to the assets of the business consist of both movable as well as immovable property and it is not averred that 1st defendant has entered into an agreement notarially attested to obtain a transfer in favour of the Company or of the Syndicate.

40 Counsel for the 4th defendant took up the same position as Mr. Weerasooria.

Mr. Choksy for the plaintiffs urged that the plaint did not aver that then parties mentioned intended to form themselves into a partnership and that the legal objection taken by the counsel for the 1st to 4th defendants could only be upheld if the Court decided after hearing evidence, that the parties had, in fact, intended to form a partnership. He urged that on the averments contained in

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the plaint, co-ownership of the business could arise by operation of law, that the establishment of the partnership was not necessary for the purpose of this case and that the claim against the 1st defendant was not as a partner but as an Agent of the other owners of the business. With regard to issues 15 and 16 suggested by him Mr. Choksy cited various local authorities to support his contention that to uphold the legal obligation raised by the 1st and 4th defendants based on the provisions of the prevention of Frauds Ordinance without hearing evidence as to the exact nature of the agreement between the parties would be to enable the 1st defendant to use the Statute of Frauds to effect a fraud on the plaintiffs. 10

Mr. Weerasooria relied the judgment of the Privy Council in the case of *Pate v. Pate* (18 N. L. R. page 289). I agree with him that mere use of the word "Syndicate" in the plaint would not enable the plaintiffs to take the case out of the operation of Section 18 of the Prevention of Frauds Ordinance if the agreement relied upon by them amounted in law to a partnership. Under the English law, which is applicable a partnership is the relation which subsists between persons carrying on business in common with a view to profit other than those who constitute a company, registered under the companies act or incorporated by statute letters patent or Royal Charter or working within the stan- 20  
 naries various definitions of syndicate were referred to at the argument and I am of opinion that persons who form themselves into what they may call a syndicate for certain purposes may, at the same time, fell within the definition of a partnership under the English Law. Underhill in his law of partnership (Second Edition at page 41) dealing with the question of duration of a partnership states that the exception to the rule that a partnership is a partnership at will in the absence of express stipulation 30  
 is the particular kind of a partnership which is usually now called a syndicate. He defines a syndicate as 2 a partnership formed to carry out some one special financial or industrial project as for instance to purchase develop and sell and particular estate or to erect and sell a particular building. The agreement among the members of the syndicate pleaded in the amended plaint was to purchase the business of the Kandy Ice Company as a going concern ..... and to carry on the said business pending the promotion of a private limited liability company of which the members of the syndicate were to be the shareholders to the extent 40  
 of their respective contributions. According to this agreement once the limited liability company had been formed and the business of the Kandy Ice Company together with its goodwill and assets were transferred to it, the syndicate would have ceased to exist. The agreement among the members of the syndicate as contained

in the plaint would fit in with the definition of syndicate being a particular kind of partnership as given by Underwill. The judgment of the Privy Council in the case of *Pate v. Pate* is stated at page 291, that,

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10 “ In their Lordship’s ” opinion the words for establishing a partnership clearly apply to the present case, which was founded on the allegations of an agreement not expressed in any writing of which parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. This agreement, in their opinion, was of no force, and did not avail in law unless it could be brought within the proviso.”

In the judgment of the Supreme Court in the same case reported in 11 N. L. R. page 254 at page 255 it is stated that :

20 “ The undisputed facts were that a syndicate was formed on or about December 24, 1897, by the plaintiff, first and second defendants, and one Mc Clay to ..... that each member was to contribute Rs. 10,000 and that the plaintiff, who had been working the line before the syndicate took over, was to have his stock-in-trade of coaches, horses, etc., taken over by the syndicate. Each party to be entitled to the profits in equal shares ”.

30 In commenting on this case at the argument, Mr. Weerasooria thought that perhaps in the pleadings in that case too reference had been made to the formation of a syndicate. I have, since the argument was concluded referred to the record of this case, which was one from this Court, and found that the plaintiff in his plaint had pleaded a partnership between himself, 1st and 2nd defendants and one Mc Clay. In his evidence however, he had referred to their having formed a syndicate for the purpose of running the coach lines and the District Judge, in his judgment has also referred to the agreement between the parties as the formation of a syndicate among these persons. In spite however, of the use of the word “ syndicate ” in the proceedings, it was under at any moment questioned that the relationship between the four persons concerned was one of partnership. I am of opinion that in the present case the agreement which the plaintiffs desire to establish and on which the action is founded is one for the formation of partnership as defined in law and that, in the absence of a written agreement, section 18 of the Prevention of Frauds Ordinance prevents the plaintiffs from leading parol evidence to prove the partnership. I do not think it is necessary that evidence should be heard before such a finding is arrived at, because the agreement pleaded in paragraph 2 of the amended plaint is the vary bais of the plaintiffs’ case, and if in the evidence they seek to prove an agreement of some other nature, they would be attempting to alter the entire scope of the action, which would be bound to fail on that ground as well.

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I am unable to agree with the contention of Learned Counsel for the plaintiffs that the claim made against the 1st defendant in this action is an agent of the co-owners of the business. There is no averment that the 1st defendant was acting merely as an agent of the owners. The claim against him is made on the footing that he was the active managing partner of this syndicate or partnership. I also find, that with regard to the claim to ownership of the business of the Kandy Ice Company and its assets, which consist both movable as well as immovable property, the plaintiffs are not in a position to prove it both because they are unable in law to establish a partnership and also in the absence of a notarially attested document in terms of section 2 of the Prevention of Frauds Ordinance relating to the immovable property. I accordingly answer each of the issues 12, 13 and 14 in the negative. 10

With regard to issues 15 and 16, all the authorities cited by Mr. Choksy relating to the dictum that a person should not be allowed to use the Statute of Frauds to effect a fraud relating to actions for a declaration of title to property or to claim for the execution of deeds in favour of a plaintiff based on the footing of a trust. Those were actions where it was held that a trust could be proved in respect of immovable property inspite of the non-compliance of the law with regard to the creation of trust in view of the Provisions of Section 5 (3) of the Trust Ordinance that those rules are not to apply where they would operate so as to effectuate a fraud. In the present case there is no averment at all that the 1st defendant was holding any property in trust for anybody else. I answer issue 15 in the negative and issue 16 in the affirmative. 20

There then remain Issues 10 and 11 on the question of misjoinder. Counsel for the defendant did not press the objection to misjoinder of parties taken in issue 10, and I answer that issue in the negative. With regard to issue 11 he urged that under section 35 of the Civil Procedure Code it was not open to the plaintiffs to join a claim to obtain a declaration to immovable property to their claim for an accounting against the 1st defendant. I agree, that in view of the provisions of this section, it is not open to the plaintiffs to ask for a declaration that they are entitled to the immovable property of the Kandy Ice Company unless they obtained the leave of the Court to do so. 30

It is however not necessary for me to consider whether it can be presumed that Court granted leave when it accepted this plaint or 40

whether such leave can be granted at this stage, in view of the facts that the entire action has to be dismissed in view of my findings on Issues 12 to 14.

I dismiss plaintiffs' action with costs payable to the 1st, 2nd and 4th defendants.

(Sgd.) S. J. C. SCHOKMAN,

*D. J.*

31st March, 1950.

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10 Judgment pronounced in open court in the presence of Mr. Adv. Jonklaas, for plaintiff and of proctor for 1st defendant who takes notice for 4th defendant.

(Sgd.) S. J. C. SCHOKMAN,

*D. J.*

31st March, 1950.

DECREE

IN THE DISTRICT COURT OF KANDY

No. X 1233

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—(contd.)

(1) T. B. S. Godamunne of Colombo Street, Kandy, (2) S. B. Ratnayake of Kahalla, Katugastota, (3) H. G. Hinniappuhamy of Trincomalee Street, Kandy ..... *Plaintiffs.*

*Vs.*

(1) A. W. Davith Appuhamy of Trincomalee Street, Kandy, (2) W. A. B. Soysa of "Chula Paya", Hospital Road, Kandy, (3) H. A. C. Wickramaratne, Proctor S. C., Kandy, (4) K. M. Mohamed Yousuf of Colombo Street, Kandy ..... *Defendants.*

10

THIS action coming on for final disposal before S. J. C. SCHOKMAN, Esq., District Judge of Kandy, on the 31st day of March, 1950, in the presence of the Proctors, on the part of the plaintiffs; and of the defendants:

It is ordered and decreed that the plaintiffs' action for a declaration that the 1st defendant was acting throughout, for and on behalf of the syndicate formed between the plaintiffs and defendants above named for the purpose of purchasing the Kandy Ice Company from its owners, be and the same is hereby dismissed.

It is further ordered that the plaintiffs abovenamed do pay to the 1st, 2nd and 4th defendants abovenamed costs of this action as taxed by the Officer of this Court.

(Sgd.) N. SIVAGNANASUNDERAM,  
*District Judge.*

The 31st day of March, 1950.

## X 16

**DEED No. 114, ATTESTED BY JOHN WILSON,  
NOTARY PUBLIC**

X 16.  
Deed No. 114,  
attested by  
John Wilson,  
Notary Public—  
16.8.49.

PRIOR REGISTRATION: Kandy, G 120/89 & 52/274 &  
movables.

No. 114

10 TO ALL TO WHOM THESE PRESENTS SHALL COME, I,  
Robert Wilson of Prestwick in the County of Ayr in Scotland,  
SEND GREETING:—

WHEREAS Andrew Ewing Fleming of Kandy in the Island of  
Ceylon, deceased originally carried on in Kandy, aforesaid, the  
business of manufacturing and selling aerated and mineral waters  
and ice under the name and style of "The Kandy Natural Spring  
Aerated Water Company".

20 AND WHEREAS for the purposes of the said business the said  
Andrew Ewing Fleming purchased under Deeds of Transfer bearing  
No. 2915, dated the 22nd day of March, 1898, and No. 3157, dated  
the 22nd day of December, 1898, both attested by E. L. Siebel of  
Kandy, Notary Public, the premises in the First Schedule hereto  
particularly described.

AND WHEREAS the said Andrew Ewing Fleming in terms of a  
Deed of Partnership bearing No. 186, dated the 30th day of March,  
1899, and attested by H. P. Borrett of Kandy, Notary Public,  
carried on the said business in partnership with John Francis Way  
of Kandy.

30 AND WHEREAS by a Deed of Transfer bearing No. 185, dated  
the 30th day of March, 1899, and attested by the said H. P. Borrett,  
Notary Public, the said Andrew Ewing Fleming conveyed to the  
said John Francis Way an undivided half ( $\frac{1}{2}$ ) share of the said  
premises in the said First Schedule hereto particularly described.

40 AND WHEREAS the said John Francis Way, died many years  
ago and by a Deed of Transfer bearing No. 170/685, dated the 11th  
and 16th days of August, 1905, and attested by H. Creasy and the  
said H. P. Borrett, Notaries Public, the said Andrew Ewing Flem-  
ing and John Spicer as executors of the Last Will and Testament  
of the said John Francis Way conveyed his undivided half ( $\frac{1}{2}$ ) share  
of the said premises in the said First Schedule hereto particularly  
described to the said Andrew Ewing Fleming.

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—(contd.)

AND WHEREAS under a Deed of Partnership bearing No. 687, dated the 16th day of August, 1905, and attested by the said H. P. Borrett, Notary Public, the said Andrew Ewing Fleming and Robert Gordon carried on in partnership the said business of the said "The Kandy Natural Spring Aerated Water Company".

AND WHEREAS in terms of Deed of Partnership bearing No. 103/414 dated the 18th and 29th days of June, 1908, and attested by N. I. Lee of Kandy, and the said H. Creasy, Notaries Public, the said business of the said "The Kandy Natural Spring Aerated Water Company" was carried on in partnership by the said Andrew Ewing Fleming with the said Robert Gordon, Walter Philps and Mathew Wilson. 10

AND WHEREAS by a Deed of Transfer bearing No. 102, dated the 18th day of June, 1908, and attested by the said N. I. Lee, Notary Public, the said Andrew Ewing Fleming and Robert Gordon conveyed an undivided half ( $\frac{1}{2}$ ) share of the said premises in the said First Schedule hereto particularly described to the said Walter Philps and Mathew Wilson.

AND WHEREAS the said Robert Gordon died several years ago and the said Mathew Wilson as Administrator with the Will annexed of the estate of the said Robert Gordon by a Deed of Transfer bearing No. 520 dated the 30th day of August, 1910, and attested by E. R. Williams of Colombo, Notary Public, conveyed to Agnes Samson Gordon the interests of the said Robert Gordon, deceased, in the said premises in the said First Schedule hereto particularly described. 20

AND WHEREAS thereafter the said business of the said "The Kandy Natural Spring Aerated Water Company" was carried on in partnership by the said Andrew Ewing Fleming Walter Philps Doctor George Powell Hay and me the said Robert Wilson. 30

AND WHEREAS by a Deed of Transfer bearing No. 453 dated the 26th day of April, 1921, and attested by W. K. S. Hughes of Colombo, Notary Public, the said Andrew Ewing Fleming transferred and conveyed an undivided half ( $\frac{1}{2}$ ) share of the said premises in the said First Schedule hereto particularly described and of the said business to the said George Powell Hay Walter Philps and me the said Robert Wilson.

AND WHEREAS the interests of the said Mathew Wilson since deceased Agnes Samson Gordon and Walter Philps in the said business of the said "The Kandy Natural Spring Aerated Water Company" and including the said premises in the said First Schedule hereto particularly described were purchased by the said George Powell Hay and me the said Robert Wilson. 40

AND WHEREAS for the purpose of the said business of the said " The Kandy Natural Spring Aerated Water Company " the said George Powell Hay and I the said Robert Wilson purchased by a deed of Transfer bearing No. 515 dated the 28th day of October, 1907, and attested by E. D. W. Siebel of Kandy, Notary Public, the premises in the Second Schedule hereto particularly described.

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John Wilson,  
Notary  
Public—  
16.8.49.  
—(contd.)

10 AND WHEREAS the said George Powell Hay died about ten years ago and his interests in the said business of the said " The Kandy Natural Spring Aerated Water Company " later known as " The Kandy Ice Company " including the said premises in the said First and Second Schedules hereto particularly described were purchased by me the said Robert Wilson.

AND WHEREAS I the said Robert Wilson have for many years past carried on the said business of the " Kandy Ice Company " as the sole proprietor thereof and have been in the undisturbed and uninterrupted possession of the said premises in the said First and Second Schedules hereto particularly described adversely to all others and have acquired a prescriptive title thereto.

20 AND WHEREAS I the said Robert Wilson sold and conveyed the said business together with the goodwill and all other and the assets thereof including the said premises in the said First and Second Schedules hereto particularly described to Ahangama Withanage Davith Appuhamy of Urugala in the District of Kandy.

AND WHEREAS the goodwill of the said business and the said premises in the said First and Second Schedules hereto particularly described were for the purpose of the said sale and assignment valued at Rupees Twenty-five thousand (Rs. 25,000).

30 AND WHEREAS the said Ahangama Withanage Davith Appuhamy (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 Ahangama Withanage Davith Appuhamy his heirs executors administrators and assigns) has requested me the said Robert Wilson to transfer and convey to the said vendee the said premises in the said First and Second Schedules hereto particularly described and the goodwill of the said business.

40 NOW KNOW YE AND THESE PRESENTS WITNESS THAT I the said Robert Wilson do hereby for and in consideration of the said sum of Rupees Twenty-five thousand (Rs. 25,000) lawful money of Ceylon well and truly paid by the said Vendee to me the said Robert Wilson prior to the execution of these presents (the receipt whereof I the said Robert Wilson do hereby expressly admit and acknowledge) sell grant convey assign transfer

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set over and assure unto the said Vendee all those the said premises in the said First and Second Schedules hereto particularly described with the buildings and plantations standing thereon and all rights ways privileges easements servitudes and appurtenances whatsoever to the said premises belonging or in anywise appertaining or used or enjoyed therewith or reputed or known to be part and parcel thereof and all the estate right title interest property claim and demand whatsoever of me the said Robert Wilson of in to upon or out of the said premises in the said First and Second Schedules hereto particularly described and all that the goodwill of the said business in the Third Schedule hereto particularly described.

10

TO HAVE AND TO HOLD the said premises in the said First and Second Schedules hereto particularly described hereby and conveyed and transferred or expressed or intended so to be with all and singular the appurtenance thereunto belonging and the goodwill of the said business of " The Kandy Ice Company " unto the said Vendee absolutely for ever.

AND I the said Robert Wilson do hereby covenant and declare to and with the said Vendee that I have good right and full power to convey and transfer the said premises in the said First and Second Schedules hereto particularly described and that the said Vendee shall and may at all times hereafter peaceably and quietly possess and enjoy the said premises and receive the rents and profits thereof without any interruption or disturbance by me the said Robert Wilson or any other person or persons whomsoever lawfully claiming any right or title thereto and that the said premises in the said First and Second Schedules hereto particularly described are free from any encumbrance and that I the said Robert Wilson shall and will at all times hereafter warrant and defend the title to the said premises in the said First and Second Schedules hereto particularly described and every part thereof unto the said Vendee against any and every person or persons whomsoever and also shall and will at the cost and expense 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 whatsoever for the better and more perfectly assuring and vesting unto the said Vendee the said premises in the said First and Second Schedules hereto particularly described and the goodwill of the said business as by the said Vendee shall, or may be reasonably required.

20

30

40

IN WITNESS WHEREOF I the said Robert Wilson have set my hand hereunto and to two others of the same tenor and date as these presents at 365, Dam Street in Colombo, on this sixteenth day of August One thousand Nine hundred and forty-nine.

## THE FIRST SCHEDULE ABOVE REFERRED TO

(1) All that land called and known as Hilpenkandura of twenty perches in extent with all the buildings and plantations thereon situated at Ampitiya, Uguressapitiya in Gandahaya Korale, Lower Hewaheta in the District of Kandy, Central Province, bounded on the east by the new road, on the south by the limit of the remaining portion and ela (water course), on the west by the limit of Abraham Mudaliyar's garden, and on the north by Demata Tree.

- 10 (2) All that allotment of land situated at Gregory's Road in Ampitiya aforesaid bounded on the north and north-east by Gregory road from Ampitiya to Municipal limit, on the south by Hilpankandura the property of A. E. Fleming, Esq., and on the west by the property of Don Abraham Wijekoon Mudaliyar containing in extent fifteen perches and 6/100ths of a perch (A0. R0. P15 6/100.) as per plan No. 603 dated the 20th day of December, 1898, and made by Francis M. Perera, Licensed Surveyor. Which said premises adjoin each other and now form one property and can be included in one survey and description and now bear assessment No. 38, Gregory's Road.

## 20 THE SECOND SCHEDULE ABOVE REFERRED TO

- All that north-western portion of one rood and sixteen perches (A0. R1. P16.) out of all that allotment of land called Hilpankandurehena or Hilpankandura Seragahamulawatte of five acres three roods and three perches in extent in the whole situated at Ampitiya aforesaid now within the Municipality of Kandy, which said north-western portion now bears assessment No. 44, Gregory's Road, and No. 10, Ampitiya Road and is bounded on the north by the Ampitiya Road, on the east by Soysa's land, on the south-east by the remaining portion of the same land belonging to Leon George  
30 Northway, and on the west by Upper Lake or Gregory Road as per plan of survey dated 15th August, 1907, made by H. Keyt, Licensed Surveyor.

## THE THIRD SCHEDULE ABOVE REFERRED TO

All that the goodwill of the business carried on at Kandy formerly under the name of "The Kandy Natural Spring Aerated Water Company" and now under the name of "The Kandy Ice Company".

Signed in the presence of us:

- 40 (Sgd.) P. W. PERERA.  
(Sgd.) T. P. MALDENIYA.

Robert Wilson by his attorney,

(Sgd.) JOHN WILSON.

(Sgd.) John Wilson (Jr.), N.P.

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16.8.49.  
—(contd.)



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John Wilson,  
Notary Public—  
16.8.49.  
—(contd.)

I, John Wilson Junior of Colombo, Notary Public, do hereby certify and attest that the foregoing Instrument having been duly read over by John Wilson the attorney of the withinnamed Robert Wilson who is known to me and who has signed as " Robert Wilson by his attorney John Wilson " in the presence of Panapitikankanamalage Wilson Perera and Tudor Perera Maldeniya both of 365, Dam Street in Colombo, the subscribing witnesses thereto both of whom are also known to me and who have signed as " P. W. Perera " and " T. P. Maldeniya " respectively the same was signed by the said John Wilson as the attorney and as the act and deed and for and on behalf of the said Robert Wilson duly constituted thereto by a Power of Attorney dated the 6th day of December, 1948, true copies whereof are annexed to the original duplicate and protocol of these presents 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, aforesaid on this sixteenth day of August One thousand nine hundred and forty-nine.

10

I further certify and attest that no consideration was paid in my presence and that in the Original on page 3 in line 5 the last letter " s " in the word " administrators " was deleted in line 23 the fifth letter " i " in the name " Philips " was deleted on page 7 in line 15 the fourth letter " a " in the word " Hewaheta " was interpolated and in the Duplicate on page 2 in line 26 the name " Ewing " was typed on erasure and in line 31 the letter " M " in the name Mathew was typed on the letter " m " on page 4 in line 23 the fifth letter " e " in the word " requested " was typed on the letter " i " and on page 5 in the last line the letter " n " in the word " enjoy " was interpolated before the said instrument was read over and signed as aforesaid and that the Duplicate bears five stamps of the value of Rs. 401 and the original a stamp of Re. 1 which said stamps were supplied by me.

20

30

Date of attestation

16th August, 1949.

Which I attest

(Sgd.) JOHN WILSON (Jnr.),  
*Notary Public.*

(Seal)

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

Colombo, 24th August, 1951.

40

(Sgd.) JOHN WILSON,  
*Notary Public.*

**ORDER MADE BY THE DISTRICT JUDGE IN  
D. C. KANDY CASE No. X. 1233**

Order made  
by the District  
Judge in D. C.  
Kandy Case  
No. X. 1233—  
27.9.55.

IN THE DISTRICT COURT OF KANDY

No. X 1233.

Nature: Miscellaneous.

Value Rs. 100,000.

Class:

10 (1) T. B. S. Godamunne of Colombo Street, Kandy, (2) S. B. Ratnayake of Kahalla, Katugastota, (dead), (3) H. G. Hinni Appuhamy of Trincomalie Street, Kandy, (4) C. Ratnayake of Kahalla substituted in place of 2nd plaintiff, (dead) ..... *Plaintiffs.*

*Vs.*

(1) A. W. Davith Appuhamy of Trincomalie Street, Kandy, (2) W. A. B. Soysa of "Chulapaya", Hospital Road, Kandy, (3) H. A. C. Wickremaratne, Proctor S. C., Kandy, (4) K. M. Mohamed Yousoof of Colombo Street, Kandy ..... *Defendants.*

20 (5) M. K. A. Mohideen Pathuma, (6) K. M. Rahaman Beebee, (7) K. M. Sunthar Madar, (8) Shariffa Umma, (9) K. M. Sulaiman, (10) A. K. M. S. Abdul Cader guardian *ad litem* of 7, 8, 9 defendants substituted in place of 4th defendant, (dead) ..... *Added-Defendants.*

26th September, 1955.

*D. C. No. X. 1233.*

30 Mr. Advocate Choksy Q. C., with Mr. Advocate Jonklaas, instructed by Mr. Liyanage, for the 1st plaintiff, and instructed by Mr. Tittawella for the 3rd and 4th plaintiffs, Mr. Advocate N. E. Weerasooria, Q. C., with Mr. Advocate Thambiah and Mr. Advocate Dunuwille, instructed by Mr. Balasingham for the 1st defendant.

Mr. Alfred Fernando for the 2nd defendants. Messrs. Coomaraswamy and Navaratnam for substituted defendants in place of the 4th defendant, deceased.

Vide proceedings of 16th March, 1950.

Mr. Choksy opens his case.

Trial adjourned for tomorrow, 27th September, 1955.

(Intld.) W. T.,  
D. J.

40

26. 9. 55.

Order made  
by the District  
Judge in D. C.  
Kandy Case  
No. X 1233—  
27.9.55—  
(contd.)

*D. C. X 1233.*

27th September, 1955.

Appearances as before.

Case settled on the following terms:—

It is agreed that the 1st defendant is the sole owner as from 1st October, 1945, of all the assets movable and immovable, including the goodwill of the business which was and is called and known as "The Kandy Ice Company", which forms the subject matter of this action. The plaintiffs state that they have not had nor have any right, title, interest or claim, to or in the assets or goodwill of the business known as the Kandy Ice Company. 10

The 1st defendant agrees to pay to the plaintiffs a sum of Rs. 76,500.

The 1st defendant reserves his right if any, to claim a sum of Rs. 6,077.70, which he alleges is due from the 3rd plaintiff, and a further alleged claim of Rs. 891.45 as against the 4th plaintiff as administrator of the estate of the deceased 2nd plaintiff. The 3rd and 4th plaintiffs do not admit these alleged claims.

Both parties admit that they have no other claims against each other in respect of this transaction either collectively or individually. 20

The plaintiffs are entitled to withdraw from Court the money deposited in Court to the credit of this case by the 1st defendant, together with any dividends and interest declared thereon up to date, in reduction "pro tanto" of the said sum of Rs. 76,500. The balance is to be paid within six months from today without any interest.

Writ to issue in the event of non-payment of the balance, with costs of execution, if any.

Each party to bear his own costs of the case up to date.

The above terms are explained to the parties in open Court and are accepted by them, and they sign the shorthand script. 30

(Sgd.) W. THALGODAPITIYA,

*D. J.*

27.9.55.

(Sgd.) Illegibly (1st Plff.)

(Sgd.) Hinni Appuhamy (3rd Plff.)

(Sgd.) C. Ratnayake (4th Plff.)

(Sgd.) Illegibly (1st Deft.)