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1967/18

IN THE PRIVY COUNCIL

No. 14 of 1966

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

PHILIP SEEVALI WIJEWARDENE (2nd Respondent-  
Contestant-Appellant)

Appellant

- and -

1. GEORGE BENJAMIN SIRISENA GOMES
2. CYRIL ESMOND LUCIEN WICKREMESINGHE  
(Petitioners - Respondents)

As Proving Executors of the Last Will  
and Testament of Tudugallege Don Richard  
Wijewardene ("the testator")

3. RUBY ALICE GERTRUDE WIJEWARDENE (since deceased)  
(1st Respondent)

4. NALINI MERCIA WICKREMESINGHE
5. INDRA RANEE GOMES
6. KUSUMA LILAMANI GOONERATNE
7. RANJIT SUJEVA WIJEWARDENE  
(known to testator as "AGGABODHI")

(3rd, 4th, 5th  
and 6th  
Respondents)

8. LUCIAN MACULL DOMINIC DE SILVA  
(since deceased)
9. DIYASENA SUDHIRA JAYAWICKREMA  
(since deceased)

As Trustees  
under Deed of  
Settlement dated  
28th February  
1950, executed  
by the testator.

(8th and 9th Respondents above-  
named as Added Respondents)

10. DAVID ERNEST MAARTENSZ  
(Substituted in place of the 9th  
Respondent above-named)
11. JAMES AUBREY MAARTENSZ  
(since deceased)
12. GEORGE BENJAMIN SIRISENA GOMES
13. CYRIL ESMOND LUCIEN WICKREMESINGHE

As Trustees of  
the Aggabodhi  
Trust under Clause  
15(5) of the  
Will

..... Respondents

(Of the parties above-named the Appellant and the 7th  
Respondent are the testator's sons. The 3rd Respondent was  
his widow. The 4th, 5th and 6th Respondents are his daughters)

RECORDCASE FOR THE 1ST, 2ND, 4TH, 10TH, 12TH and 13TH  
RESPONDENTS

pp.645-646

pp.610-631

Ex.Pl,  
Annexure  
Record p.p.  
768-788

1. This is an appeal from the Judgment and Decree of the Supreme Court of Ceylon, dated the 24th May, 1963, dismissing an appeal from the Judgment of the District Court of Colombo, dated the 30th May, 1960, whereby, in proceedings for the Judicial Settlement of the Voluntary Final Account instituted by the Executors (present 1st and 2nd Respondents of the Last Will (Ex.Pl), dated the 26th May, 1950, of one Tudugallege Don Richard Wijewardene (hereinafter also referred to as "the testator" or "the settlor") it was held that, with one exception, the accounts filed by the said Executors should be accepted as correct and that, subject to an adjustment caused by the said exception, the testator's estate should be distributed in the manner proposed by the Executors. As to the said exception, see paragraph 2 infra.

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2. The Executors' application for the said Judicial Settlement was objected to only by the present Appellant (hereinafter, also, referred to as "the Contestant"), the elder of the testator's two sons and one of several beneficiaries under the Will. Of the several grounds upon which his Statement of Objections was based, the Contestant succeeded only in respect of one. This related to the ownership of a painting - "The Assembly Hall on Independence Day" - which the Executors had thought was the property of another and not therefore included in the testator's bequest of his paintings to one of his two sons - the choice as between them to be in his wife's discretion (Respondent No. 3 hereto). Her choice fell upon the Contestant who, at the trial, succeeded in establishing that the testator owned the said painting and, accordingly, the District Judge directed the Executors' accounts to be amended by giving credit to the Contestant in respect thereof in a sum of Rs. 10,000/- which he adjudged to be its value. At the hearing of the Contestant's appeal in the Supreme Court, the Executors' cross-objections to the District Court's decision on the said painting resulted in the Supreme Court confirming the decision as to ownership of the painting but reducing its value from Rs.10,000/- to Rs. 1,340/-.

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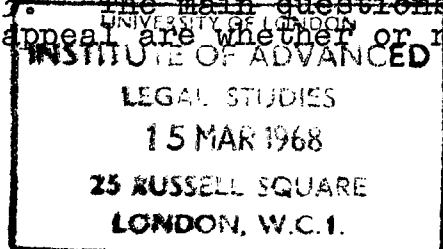
pp.611-614

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pp.645-646

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3. ~~The main questions for determination on this appeal are whether or not -~~



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- (A) Upon an examination of the relevant maps and in the light of the testator's intentions as ascertained from his Will (Ex.P1) it is clear (as was held by both Courts below) that the particular piece of land claimed by the Appellant (Contestant) as included in the land devised to him and to the present 5th Respondent in equal shares was not so included being part of the land devised to the 4th Respondent. The 4th Respondent's claim is supported, inter alia, by the Executors and the 5th Respondent [See paragraph 11 hereof]
- RECORD  
Ex.P1,p.768  
Annexure
- 10
- (B) The date of the distribution of the testator's estate was (as was held by both Courts below) properly postponed by the Executors until after they had received the Final Notice of Assessment of Estate Duty and otherwise had satisfied themselves that it was reasonably safe to make the distribution.
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- (C) With regard to the trust created by the Testator inter vivos in a Deed of Settlement, dated the 28th February, 1950, (Ex.P2) to which trust he had transferred certain Ordinary shares in The Associated Newspapers of Ceylon Limited (hereinafter, also, referred to as "the Company") and a certain number of additional shares in the Company to which he had become entitled by reason of his holding of the said Ordinary Shares -
- Ex.P2,p.752  
Annexure
- 30
- (a) the Trustees of the said trust (hereinafter also called "the Settlement Trustees") were entitled to demand, and receive, from the Executors, the said additional shares in respect of which the testator had paid the amount due on application and which, following his death, were allotted to his Executors; and
- 40
- (b) the Executors were liable to transfer to the Settlement Trustees

RECORD

the said additional shares.

Both (a) and (b) above were answered in the affirmative by both Courts below.

4. Relevant portions of the testator's Last Will, dated the 26th May, 1950, and the Deed of Settlement he executed inter vivos on the 28th February, 1950, are included in an Annexure hereto.

Also the Annexure contains relevant portions of the Estate Duty Ordinance (Cap.187).

pp.28-143

5. On the 16th July, 1958, the Executors (the present 1st and 2nd Respondents) filed, in the District Court of Colombo, accounts of their administration of the testator's estate up to the 31st December, 1957, together with a proposed scheme of distribution of the assets.

pp.145-147

In their Application, dated the 17th July, 1958, for Judicial Settlement of the Voluntary Final Account they stated that probate of the Will had been issued to them on the 21st March, 1951, and that, according to the Inventory which they had caused to be prepared and which was filed in Court "the property and estate amounts as therein set forth to Rs.3,298,960/40 after the deduction of liabilities". They prayed as follows:-

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p.147,  
ll.12-23

"(a) that the Voluntary Final Account of their proceedings as such proving Executors may be judicially settled and that the creditors or persons claiming to be creditors and the legatees be cited to attend such settlement.

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"(b) that the Court do direct and decree the payment and distribution of the estate that remains to be distributed to the persons so entitled according to their respective rights.

"(c) that the Court do decree to whom distributive shares are payable, the sums, if any, to be paid, and all questions concerning the same.

"(d) for costs and for such other and further relief as to this Court seems meet."

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6. The sole objector to the Voluntary Final Account was the present Appellant ("the Contestant").

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In his Statement of Objections, dated the 30th October, 1958, the Contestant claimed, inter alia, to be "entitled to have the income arising from the properties devised to him by the Will brought to his credit in the said Account as from the 1st January, 1954, which is the true date for distribution." Accordingly, he specified certain amendments which he suggested, should be made in the Account. Objecting also to the proposed division and appropriation of land devised to him he said:

pp.148-150

p.148,11.31-33

p.149,11.3-18

"2. The division of Galpokuna Division of Galpokuna Group as shown in Schedule III of Part I of the Voluntary Final Account read with X attached to the said Schedule is contrary to the provisions of the said Will since Field No. 1 of the said Galpokuna Division, 71 acres, 1 rood, .05 perches in extent has been excluded from Tracing 3 annexed to the said Schedule III."

p.149,11.19-23

As to Ordinary shares in Associated Newspapers of Ceylon Limited, the Contestant said that he is entitled to 1,711 shares and that therefore Part I, Schedule III of the Voluntary Final Account (which gives the figure at 1,211) is incorrect. He said, further, that "the Settlement Trustees are not entitled to the 250 remaining shares referred to in the note subjoined to Schedule I of Part I of the Voluntary Final Account". He said also that he was entitled to be credited with the sum of Rs. 12,500 as the true value of a painting of the "Assembly Hall on Independence Day" which had been "disposed of" by the Executors.

p.149,11.24-27

p.149,11.28-30

p.149,11.31-35

7. In their Petition, dated the 24th February, 1959, the Settlement Trustees said:

"3. In fulfilment of the terms of the said Deed of Settlement Ex.P27, the late Mr. D.R. Wijewardene transferred inter alia 6,000 Ordinary shares in the Associated Newspapers of Ceylon Limited to the petitioners and a further 1,000 Ordinary Shares in the said Company out of 1,396 Ordinary shares to be

p.151  
Ex.P2,p.752  
Annexure

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allotted to him for the purposes of the said Trust.

"4. The late Mr. D.R. Wijewardene applied for an allotment of the said 1,396 shares to him for the purposes aforesaid, but the said Mr. D.R. Wijewardene died on the 13th June, 1950, before the said shares were allotted to him.

"5. The said 1,396 shares were thereafter allotted to the Executors of the Last Will of the late Mr. D.R. Wijewardene on the 12th December, 1951. 10

"6. On the 28th January, 1955, the said Executors transferred to the petitioners 750 shares out of the said 1000 Ordinary shares and are desirous of transferring to the petitioners a further 250 shares as indicated by them in the notes subjoined to Schedule I of Part I of the Voluntary Final Account now filed.

"7. The petitioners are entitled to the said remaining 250 shares and to that proportion of bonus shares issued by the said Company in respect of the said 250 shares and are further entitled to have the said shares transferred to them by the said Executors and to receive payment from the said Executors of all dividends received by them, not only in respect of the said 250 shares and bonus shares but also in respect of the said 750 shares before the same were transferred to the Newspaper Settlement Trustees. 20 30

"8. The Contestant in these proceedings contests the right of the petitioners to the said 250 shares and to the said proportion of bonus shares.

"9. The rights of the petitioners as Trustees aforesaid are directly affected by these proceedings and they are parties interested in these proceedings.

"10. The petitioners are parties whose presence is necessary to enable the Court to finally and effectually adjudicate upon the questions involved in these proceedings." 40

The petitioners (Settlement Trustees) prayed that: pp.151-152

"(i) they be added as parties to these proceedings; (ii) the said 250 shares and the relative bonus shares be transferred forthwith by the Executors to them; (iii) the said Executors be directed to pay to the petitioners the amount of all dividends received by them and referred to in paragraph 7 of this petition; they be granted their costs ..."

10 The petitioners were added as parties by Order of the District Court, dated the 9th March, 1959. p.152,1.23

8. Of the several Issues framed at the trial those that now appear to be relevant were, after an examination of the oral and documentary evidence before him, answered thus by the learned District Judge:-

20 "1. (a) Is the true date for distribution the 1st January, 1954, or the 31st December, 1957, or any other date? p.636,11.1-4

" (b) If the date for distribution is a date other than the 31st December, 1957, does the Final Account require amendment?"

Answer: "1(a) 31-12-1957 p.630,11.20-21

(b) Does not arise"

30 "2. (a) (as amended) Does the Field No. 1 described as Lot No. 1 in P21 and expressed to contain the extent of 67 acres 1 rood and 23 perches and the portions of land tinted in blue and yellow to the West of the said Lot 1 form part of Galpokuna Division or of Udubaddawa Division of Galpokuna Group? p.636,11.5-13 p.163,11.25-32

(b) If the said Field forms part of Galpokuna Division should it form part of the corpus of Galpokuna Division to be divided between the Contestant and Ranee in terms of Clauses 15(1) and 15(3) respectively of the Last Will?"

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8.

p.630,11.22-  
23

Answer: "2(a) (as amended). Udabaddawa  
Division

(b) Does not arise"

p.636,11.14-  
18

"3. (a) Are the Settlement Trustees entitled to the 250 remaining shares referred to in the note conjoined to Schedule I Part I of the Voluntary Final Account?

" (b) If not, is the Contestant entitled to 1,711 Ordinary shares in the Associated Newspapers of Ceylon Limited?"

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p.630,11.24-25

Answer: "3(a) Yes

(b) Does not arise"

9. Further Issues, now relevant, were, after an examination of all the evidence, answered thus by the learned District Judge:-

p.636,11.19-  
24  
Ex.P1,  
Annexure.

"4. (a) Was the painting of the Assembly Hall one of the paintings devised to the Contestant in terms of Clause 7 of the Will Ex.P1?

" (b) Was the said painting disposed of by the Executors?

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" (c) If so, is the Contestant entitled to a sum equal to its value?

" (d) If Issues 4(a) 4(b) and 4(c) are answered in the affirmative, to what sum is the Contestant entitled?"

p.630,11.26-29

Answer: "4(a) Yes.

(b) Yes.

(c) Yes.

(d) Rs. 10,000/-".

p.636,11.35-  
37  
Ex.P2,p.759  
Annexure

"8. Are the Settlement Trustees entitled to a thousand shares referred to as Item 2 of the Schedule to the Deed of Settlement Ex.P2 under the terms thereof?"

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Answer: "Yes"

P.630,1.35

"9. If Issue 8 is answered in the negative

p.637,11.1-4

(a) Is the Contestant entitled to 250 of the said shares together with the bonus shares issued thereon?

(b) If so, should accounts be adjusted upon the footing?"

Answer: "Does not arise".

p.631,1.1

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"11. If Issue 8 is answered in the affirmative, are the Executors liable to pay the balance calls on the said shares?"

p.636,11.8-9

Answer: "No."

p.631,1.3

"12. Are the claims of the Settlement Trustees if any to the 250 shares referred to, prescribed?"

p.637,11.1-11

Answer: "No."

p.631,1.4

p.637,11.19-21

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"14. Are the Executors chargeable with the difference between the Profits Tax on the undistributed estate of the testator and the Profits Tax payable if the Estate had been duly distributed according to the Will?"

pp.184-185

This Issue was first raised by the Contestant in his Statement of Amended Objections, dated the 2nd June, 1959

Answer: "Does not arise in view of my finding in regard to the date for distribution."

p.631,11.6-7

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10. By his Judgment, dated the 30th May, 1960, incorporating the said Answers to Issues, the learned District Judge accepted the Executors' accounts as filed in Court and authorised the distribution of the estate as proposed by them - subject to an adjustment whereby the Contestant would be credited with the sum of Rs. 10,000/- in respect of the said painting of "Assembly Hall on Independence Day" which, on the evidence, he held the Contestant was entitled to. On the value of the said painting, he said:-

pp.610-631

p.631

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p.613,1.51 to  
p.614,1.5

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"The Contestant valued the painting at Rs.12,500/- in his Statement of Objections but Atukonale stated in evidence that it was worth Rs.10,000/- and that he attempted to find a buyer for Rs. 10,000/-. Learned Counsel for the Contestant stated that he would accept the figure of Rs. 10,000/- as the reasonable value of that painting. I hold that, in the accounts filed, the Contestant should be given credit in a sum of Rs.10,000/- as the reasonable value of that painting." 10

p.614,11.7-  
25  
Annexure  
Ex.p21,p.  
692B  
Ex.p23d,  
p.692A  
p.614,11.25  
-38

11. On the extent of the lands of the Galpokuna Group devised to the Contestant and to his sister Ranee (present 5th Respondent) in equal shares and to his sister, Nalini (present 4th Respondent) the learned District Judge, having referred to Clause 15 (1) (2) and (3) of the testator's Will and to the relevant plans before him (Ex.P21 and Ex.P23d, both dated the 5th October, 1936) said:-

"The question at issue is whether Field No. 1 of Galpokuna Estate forms part of the corpus described as Udabaddawa Division devised to Nalini under Clause 15(2) or it forms part of the corpus described as Galpokuna Division devised to the Contestant and Ranee. 20

"The case for the Contestant is that Field No. 1 of Galpokuna Estate forms part of Galpokuna Division and should be divided between him and Ranee.

"The Executors state that on the material available to them they are of the view that Field No. 1 should form part of Udabaddawa Division and should be excluded from the corpus that should be divided between the Contestant and Ranee. Nalini and Ranee are the wives of the Executors and Ranee accepts the interpretation placed by the Executors in regard to what the testator meant by Udabaddawa Division and Galpokuna Division respectively although if the contention of the Contestant is accepted she will herself stand to gain." 30 40

12. Reviewing the oral and documentary evidence relevant to the said question at issue, the learned District Judge said:-

- 10 "The volume of title deeds P23 as well as the plan P23d taken along with the instructions given by the testator to Mr. Abeyewardene" /a Proctor whom the testator had instructed to collect together the title deeds of a block of Galpokuna Group in extent 183 acres, 2 roods, 1 perch/ "clearly show that the testator treated at that date the block of A-183-R2-P1 as one entity and the plan P23d shows that that entity was called Udabaddawa Division although it included in it Field No. 1 of Galpokuna Estate. Certain smaller allotments of land which adjoin this entity of A-183-R2-P1 which were acquired from time to time later were also added on to Plan 23d as part of the larger block and the endorsement on the plan shows that that addition was made on 6-11-41 by a Licensed Surveyor. According to the evidence of the Executor Gomes, which I accept, the bundle of deeds P23 inclusive of the Plan P23d were found among the papers of the testator.
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- 30 "It is, in my opinion, a reasonable inference that when the testator referred to 'the divided portion known as the Udabaddawa Division of Galpokuna Group' in the Will, he had in mind and referred to the entity of A183-R2-P1 (together with the smaller allotments that had been added to it), a separate plan of which he had got prepared some years earlier" /i.e. P23d/ "If by the words 'Udabaddawa Division' the testator meant only those allotments which formed Udabaddawa Estate, there was no need for a separate plan" /P23d/ "to be prepared as there was already in existence a plan of Udabaddawa Estate (P23f) which itself formed one of the documents of title in the volume P23".
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13. In further support of his finding that the plan P23d clearly shows that the testator had intended to include, and did, in fact, include, Field No. 1 of Galpokuna Estate in the devise of the Udabaddawa Estate to his daughter Nalini (the present 4th Respondent) the learned District Judge referred to Clause 21 of the Will (Ex.P1) and to the testator's intention,

p.615,11.9-19  
Ex.P23,p.675.  
Ex.P23d,p.692A

P.615,11.20-28  
Ex.P.1, Annexure

Ex.P23d,p.692A

Ex.P23f,p.687A

Ex.P23d,p.692A

p.615,1.29

Ex.P1,Annexure

12.

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as expressed therein, that the extent of his devise in each case should be ascertained by reference to the area as shown in the most recent plan of the property appropriated and to the additional land purchased as part of the land so devised.

p.615,1.39  
to p.616,  
1.11

The learned Judge referred to, but rejected, the argument advanced on behalf of the Contestant to the effect that the said Clause 21 cannot be invoked in the interpretation of the testator's words "Galpokuna Division" and "Udabaddawa Division" - that it was applicable solely where smaller allotments of land were purchased by the testator with the intention that they should form part of the adjacent larger allotments. He rejected also the statement that there is no proof that Plan P23d is the most recent plan of the block of land depicted therein. On this subject he said:-

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p.615,1.47  
to p.616,1.5  
Ex.P21,p.692B  
Ex.P23d,p.692A

"It is in evidence that the plans P21 and P23d were among the papers of the testator and if it is the contention of the Contestant that there were in existence more recent plans, the burden is on him to produce them. Both P21 and P23d had been brought up to date to 1941. Whereas P21 is the plan of the entire Galpokuna Group which includes both Udabaddawa Estate and Galpokuna Estate, P23d is the plan of a distinct block termed Udabaddawa Division which included Udabaddawa Estate and a portion of Galpokuna Estate.

p.616,11.5-11

"In the absence of any evidence to the contrary, I hold that P23d is the most recent plan of the property known as Udabaddawa Division and under Clause 21 the Block of land shown in P23d should pass to Nalini as the property known as Udabaddawa Division devised to her under Clause 15(2). Galpokuna Division will, therefore, be the remaining portion of Galpokuna Estate. The testator had nowhere treated Galpokuna Division of Galpokuna Group as identical with Galpokuna Estate."

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p.616,1.12  
to p.617,1.2

14. Further, on the rival claims to the said Field No. 1 of the Galpokuna Estate, the learned District Judge referred to, but, for reasons that he gave, rejected, the argument advanced on behalf of the Contestant that his claim to the said Field No. 1

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was supported by evidence that the testator's estate agents had not worked Udabaddawa Division as shown in plan P23d as a separate entity but had worked Galpokuna Estate and Udabaddawa Estate separately and maintained the crop figures for each of the fields separately.

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Ex.P23d,p.692A

10 15. The learned District Judge's interpretation of the Will (Ex.pl) gave effect to the view that the testator intended to benefit the Contestant and his three sisters (present 4th, 5th and 6th Respondents) equally. On this aspect of the testator's intention he said:-

p.617,11.3-37  
Ex.pl,Annexure

20 "In deciding on the intention of the testator, one may perhaps refer to the nature of the bequests given to each of the children. Sub-Clauses 1 to 4 of Clause 15 show that the testator intended to treat the Contestant and his three daughters alike. They were each given the same number of shares in the Associated Newspapers of Ceylon Limited as well as in the Land and House Property Company and they were each also given an allotment of land at Thimbirigasyaya. In dividing his coconut estates he directed that Nalini was to be given Udabaddawa Division and the Contestant and Ranees equal shares of Galpokuna Division. To the third daughter Kusuma, he gave a divided portion 'not less than 150 acres and not more than 200 acres in extent' to be selected out of his estate called Geekiyanagedera. He further directed that if there was a difference in value between the block of Geekiyanagedera given to Kusuma and the divided portions of Galpokuna given to the Contestant and Ranees, Kusuma should be given a sum of money as compensation to make up the difference in value. It is not unreasonable to infer that he intended that each one of the daughters and the Contestant should get coconut property of similar value".

p.617,11.3-19

40 16. Continuing, on the subject of the testator's intention to confer substantially similar benefits on his eldest son (the Contestant) and each of his three daughters (present 4th, 5th and 6th

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Respondents), the learned District Judge said:-

p.617,11.19-  
27

"If the contention of the Contestant is accepted and Udabaddawa Division is deemed to consist of only Fields 1, 2 and 3 of Udabaddawa Estate, then Nalini will get only an extent of about 111 acres worth about Rs.273,000/-. The Contestant and Ranee will each get about 250 acres worth about Rs.513,000/- and Kusuma will have her compensation increased to make up the value of Rs.513,000/-, i.e. each one of the other daughters and the Contestant will get nearly Rs.240,000/- more than Nalini. It seems most unlikely that the testator intended that one child should get over Rs.200,000/- less than the other three.

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p.617,11.27-  
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"On the other hand, if Udabaddawa Division consists, as I have already held, of Fields 1, 2 and 3 of Udabaddawa Estate and Field No. 1 of Galpokuna Estate, Nalini will get about 185 acres worth about Rs.438,000/- the Contestant will get 215 acres worth about Rs.441,000/- and Ranee and Kusuma also will get land of similar value. This would seem to be more consistent with the intentions of the testator.

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p.617,11.32-37  
Ex.P23d,p.692A  
Ex.P4,p.967

"I hold that Field No. 1 of Galpokuna Estate should form part of Udabaddawa Division as shown on plan P23d and that Tracing No.2 (P4) correctly sets out 'Udabaddawa Division' that should go to Nalini under the Will. I also approve of the division of Galpokuna Division between the Contestant and Ranee as shown in Tracing No.3 - P.71".

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Ex.P71,p.968

17. On the subject of the said 1000 additional shares in the Associated Newspapers of Ceylon Limited which the Settlement Trustees claimed from the Executors, the learned District Judge said:-

p.618,11.7-12  
Ex.P2,p.752  
Annexure

"On 28.2.50 the testator executed a voluntary Deed of Settlement (P2), subject to certain conditions, for the benefit of his children, in favour of Messrs. L.M. D. de Silva and D.E. Maartensz as Trustees in respect of 6000 fully paid Ordinary shares out of the 8026 shares held by him in the Company and 1000 Ordinary shares out of his entitlement in the new issue and

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certain stocks he held in Government loans.

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"Subsequent to the execution of the said Deed of Settlement P2, the testator applied to the Company by P.31 for an allotment of 1396 Ordinary shares in his favour as the holder of 8026 Ordinary shares, enclosing a cheque for Rs.69,800/- being the amount payable on application, and undertook to pay the balance on allotment .. .. .

p.618,11.13-22  
Ex.P31,p.751

10 "On 26-5-50 the testator executed his Last Will P1 and expressly excluded from the provisions of that Will the shares which had formed the subject of the voluntary settlement P2. He directed that the remainder of his holdings of shares in the said Company should pass equally to his eldest son, the Contestant and his three daughters.

p.618,11.23-27  
Ex.P1,p.768  
Annexure  
Ex.P2,p.752  
Annexure

20 "Before the allotment of shares of the new issue was made by the Company, the testator died on 13.6.50. At a meeting of the Directors held on 12.12.51 (P34), on an application made by the Executors, 1396 shares, in respect of which the testator had made an application, were allotted to the Executors."

p.618,11.28-31  
Ex.P34,p.829

18. Continuing, on the subject of the said additional 1000 shares in the Company to which the Settlement Trustees laid claim, the learned District Judge said:-

30 "The question at issue is whether the Settlement Trustees are entitled to a transfer of 1000 shares out of the said allotment of 1396 shares.

p.618,11.32-33

40 "All the beneficiaries, with the exception of the Contestant, agreed to the said transfer. The Contestant, however, objected and, consequently, the Executors transferred to the Settlement Trustees only 750 shares and have asked for a direction in respect of the balance 250 shares, which is the holding that will pass to the Contestant in the event of a finding that the Deed of Settlement P2 is ineffective in so far as the 1000 shares of the new allotment are concerned.

p.618,11.33-39

Ex.P2,p.752  
Annexure

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p.618,1.40 to  
p.619,1.45

"The case for the Contestant is that although the testator intended to create a trust and to transfer to the Settlement Trustees 1000 shares out of the new issue, he did not give effect to his intention before his death and consequently these shares should form part of his estate under the Will. Learned Counsel for the Contestant submitted, on the authority of In Re Pryce /1917/ 1 Chancery page 234 and In Re Kay's Settlement /1939/ Chancery page 329, that volunteers had no right whatever to claim specific performance of a mere covenant which had remained as a covenant and had never been performed. He also relied on the Judgment of Romer J. in Re Fry /1946/ 1 Chancery 312 . . . . Learned Counsel for the Contestant submitted that in the instant case . . . . in the absence of a transfer of the shares, there was no trust created in respect of those shares. He also cited other English cases which lay down the principle that a Court of Equity will not perfect an imperfect gift.

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p.619,1.45 to  
p.620,1.2

"The English authorities, in regard to volunteers, have, however, as pointed out by learned Counsel for the Settlement Trustees, no application in Ceylon as under the Roman-Dutch Law (which is the system of law applicable to transfers of property) a promise deliberately made is enforceable and it is unnecessary that there should be consideration for the promise as understood in English Law."

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The learned Judge did not specifically refer (as well he might have done) to the other and more appropriate equitable principle, that equity looks upon that as done which ought to be done which, it is submitted, is applicable to voluntary settlements in Ceylon.

19. On the effectiveness and enforceability in Ceylon of provisions in voluntary settlements, the learned District Judge said:-

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p.620,11.2-16  
\*/1918/A.C.  
869

"The Privy Council held in the case of Jayawickrema v. Amarasuriya (1918) 20 N.L.R. 289\* as follows:-



"It may well be that according to English Law, as a general rule, an existing moral obligation not enforceable at law does not furnish good consideration for a subsequent express promise; but the Roman-Dutch law by which, in their Lordships' view, this case must be governed, is wholly different. According to this latter law it would appear that a promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced at law, the justa causa debendi being sufficient according to the latter system of law to sustain a promise, being something far wider than what the English Law treats as good consideration for a promise.

"The same principle has been laid down by the Supreme Court in more recent cases - Vide 51 N.L.R. 193 and 54 N.L.R. 145".

20. The learned District Judge next referred to, and accepted, the argument advanced on behalf of the Settlement Trustees that "the Deed P2 constitutes a valid transfer by the settlor of the beneficial interest in 1000 shares to the Trustees and when the shares vested in the settlor or his Executors they passed to the Trustees". The learned Judge examined in detail the authorities in support of the said argument, among them, Gilbert v. Overton (1864) 4 New Reports 420; 2 H & M. 110, Nanney v. Morgan (1887) 37 Ch.D. 346 and Re Lind /1915/ 2 Ch.345, 360. He drew particular attention to the following observations of Swinfen Eady L.J., in Re Lind, supra which, he said, having regard to the Roman-Dutch law of Ceylon, would apply with equal force to property in Ceylon forming part of a voluntary settlement:-

p.620, l.17 to  
p.621, l.12  
Ex.P2, Annexure

"It is clear from the authorities that an assignment for value of future property actually binds the property itself directly it is acquired - automatically on the happening of the event, and without any further act on the part of the assignor - and does not merely rest in, and amount to, a right in contract, giving rise to an

p.621, l.14-21

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action. The assignor having received the consideration, becomes, in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him and which he had previously sold and been paid for."

Ex.P2,p.752  
Annexure

21. Still, on the subject of the said 1000 additional shares, the learned District Judge examined relevant Clauses in the Deed of Settlement (Ex.P2). He set out Clause (C) of the recitals in that Deed, the operative part thereof, and Items 1 and 2 of the Schedule thereto, and continued as follows:- 10

p.622,11.10-21

"It will be seen that the operative part of the Deed states 'The Trustees shall hold the said shares' and the Schedule of property shows that the shares to be so held include 'the 1000 Ordinary shares which have been issued but not yet allotted.' In the Deed the Settlor has drawn no distinction between those 1000 shares and the 6000 shares which were already registered in his name. The transfer of a thing not presently in existence but which is likely to come into existence is recognised and is valid in law (vide 22 N.L.R. 385, 46 N.L.R. 457 and 51 N.L.R. 337). The method of transfer of a chose in action is by a writing (24 N.L.R. 42 at p.47). A share in a company being a chose in action can form the subject-matter of a trust (23 N.L.R. 261 at page 262). The 1000 shares though not in existence were capable of being the subject matter of a trust and capable of being transferred by writing. 20 30

p.622,11.21-26  
Ex.P2,p.782  
Annexure

"In my opinion the Deed P2 is effective as a transfer of the rights of the settlor in the 1000 shares and constitutes a valid declaration of trust in respect of those shares. Although the shares were not in existence at the date of P2, when they were allotted in the name of the settlor or his executors, the title to them vested in the trustees. 40

p.622,11.26-27

"I hold therefore that the Settlement Trustees are entitled to demand a transfer of the 1000 shares from the Executors."

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p.622,11.28-37

22. The learned District Judge referred to, but rejected, a further argument advanced on behalf of the Contestant, to the effect that as in the Deed of Settlement the settlor had said that it was a revocable instrument his failure to direct the Company to allot the said 1000 additional shares in the names of the Settlement Trustees had deprived the latter of any right to have them transferred to the trust and had operated as a revocation of his statements or directions in respect of them.

p.622,1.38 to  
p.623,1.30

23. The learned District Judge next considered another aspect of the right of the Settlement Trustees to the transfer of the said 1000 additional shares. He referred to the transfer on the 28th February, 1950, of the original 6000 Ordinary shares by the settlor to the Settlement Trustees which was registered by the Company only on the 17th April 1950. The learned Judge said that the application for the additional shares of the new issue had to be made before the 15th March, 1950, (the testator's application, Ex.P31 was dated the 8th March 1950), and until the transfer of the said 6000 shares was registered in the Company's books, the only person who was entitled to apply for an allotment of the additional shares was the transferor whose name continued in the Company's books as owner. He continued as follows:-

Ex.P.31,p.751

30 "What then was the effect of the transfer of 6000 shares on the testator's right to apply for the allocation of new shares? As was stated by Sir Raymond Evershed (now Lord Evershed) in the course of the Judgment of the Court of Appeal in the case of In Re Rose [1952] 1 All. E.R. 1217\* p.623,11.2-10

\*[1952] Ch.499

40 by the phrase "transfer of shares" must surely be meant the transfer of the shares 'and all the transferor's rights title and interest thereunder'. As Roxburgh J., put it in his Judgment in the lower Court in the same case, where there is a transfer of shares, there is a transfer of the whole beneficial interest, that is, 'the tree and any fruit that might grow on it'.

RECORD

p.623,11.10-14

"The right to apply for a proportionate number of shares in the new issue was a beneficial interest which attached to the ownership of the shares. On the execution of the transfer P35, therefore, the testator divested himself not only of 6000 shares but of the right to apply for a proportionate number of new shares qua the owner of 6000 shares.

Ex.P35,p.760

p.623,11.15-22

"The principles laid down by the Court of Appeal in In Re Rose, referred to above, are applicable to the present case. It was held in that case that where a transfer was effective as between the transferor and the transferee, the circumstance that the transferee must, to perfect his legal title, apply for and obtain registration did not prevent the transfer from being effective to divest the transferor of beneficial ownership and, pending registration, the transferor was the trustee for the transferee of the legal estate in the shares which still remained in him."

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24. The learned District Judge concluded his views on the said additional shares thus:-

p.623,11.23-30  
Ex.P31,p.751

Ex.P2,p.752  
Annexure.

"In my opinion, the testator, when he made the application for shares by P31, must be deemed to have been a trustee of the Settlement Trustees in respect of the 1000 shares referred to in P2 which formed part of the entitlement of the Settlement Trustees qua owners of 6000 shares and the Executors are, therefore, bound to transfer the 1000 shares to the Settlement Trustees.

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"P2" [the Deed of Settlement] "provides for the payment by the Settlement Trustees of all calls on partly paid shares and the Trustees are, therefore, liable to pay to the Executors the balance call on the said shares."

p.625,11.8-27

Ex.P1,p.768

25. As to the date for distribution, the learned District Judge referred to the opening words of Clause 15 of the Will (Ex.P1) to the argument

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10 advanced on behalf of the Contestant that the true date for distribution was the 31st March, 1954 (not the 1st January 1954 as originally pleaded), that, in consequence, the Contestant was entitled to be credited with additional sums of money as income from the property devised to him under the Will, and to the Executors' accounts which had been drawn up on the basis that the earliest date on which any reasonable distribution was possible was the 31st December, 1957.

The learned District Judge referred to the provisions of Clause 14(i) to (iv) of the Will which set out the trusts on the determination of which the date for distribution would arise. He continued, on the contentions of both sides, thus: p.625,1.28 Annexure

20 "The position of the Executors is that the notice of final assessment of estate duty was not received by them until 4.6.58 (P6) and that the amount payable was not finally determined by the Commissioner of Estate Duty until August, 1957. They submit that it was not possible for them to distribute the estate until the amount payable by way of estate duty and pre-death Income Tax and Profit Tax had been finally made known to them by the Commissioner of Estate Duty and Income Tax. Since the amount payable was known only in August, 1957, they state that the date for distribution could not have been fixed earlier than 31.12.57.

p.626,11.12-20

Ex.P6,p.1153

40 "The contention on behalf of the Contestant is that the Commissioner had issued his first assessment on 3.3.51 and he had no power under the law to issue any additional assessment after 3.3.54 in the absence of any fraud on the part of the Executors in forwarding the declaration or unless some additional property was disclosed by the Executors. On that basis it was argued that the liability on the part of the Executors

p.626,11.21-29

RECORD

- Ex.P5,pp.796,  
803
- in respect of estate duty was the amount that had been mentioned in the notice P5 of 3.3.51 and the Executors could have proceeded to distribute the estate on 31.3.54 provided they had sufficient moneys in their hands to fulfil their other obligations."
- p.626,1.29 to  
p.627,1.6
26. The learned District Judge next referred to certain oral evidence and disputed statements of account in support of the contention on behalf of the Contestant that all the Executors' liabilities could have been met and the estate distributed on the 31st March, 1954. The learned Judge rejected the contention. He referred to the provisions of Clause 16 of the Will (Ex.P1) in support of his view that "the testator himself contemplated the date for distribution to be a date subsequent to the final assessment of his property for estate duty purposes." Accordingly in order to arrive at the true date for distribution, he proceeded to determine when the property was "finally assessed for estate duty purposes." 10
- p.627,11.7-21  
Ex.P1,  
Annexure
- The learned Judge set out Sections 32 and 33(1) of the Estate Duty Ordinance (C.187) and then proceeded as follows:- 20
- p.627,11.22-35  
Annexure
- "On 3.3.51 the Commissioner of Estate Duty sent to the Executors what he called a 'provisional notice of assessment and apportionment' P.5. The notice expressly stated that the assessment was provisional and was liable to revision although the printed portion which had not been scored off required the Assessee to give notice of appeal in writing within 30 days if he objected to the assessment. 30
- p.627,11.37-42  
Ex.P5,pp.796,  
803
- "Learned Counsel for the Contestant submits that that notice though marked 'provisional' was a notice under Section 32 of the Ordinance and it was not open to the Commissioner to make any additional assessments after the expiration of a period of three years from the date of that notice. 40
- p.627,11.42-45  
Annexure
- "The question then is whether P5 is a notice under Section 32 of the Act."
- p.628,1.1  
Ex.P5,pp.796,  
803

The learned Judge answered this question in the negative.

p.628,11.21-43

27. The learned District Judge referred to the departmental and legal practice as to provisional and final notices of assessments of Estate Duty and Certificates of payment, and, continuing, said:-

10 "in the instant case, the Commissioner forwarded to this Court a copy of the final certificate P6 on 19.6.58 along with the final assessment which he described as 'amended assessment of estate duty'. There is no provision in the Ordinance for the issue of a 'provisional notice' or a 'provisional certificate', but the practice appears to have been adopted for the sole purpose of enabling an applicant to obtain Letters or Probate without delay."

p.628,11.15-21  
Ex.P6,p.1153

20 The learned Judge expressed the view that a provisional assessment was not the assessment contemplated by Section 32 of the Ordinance and there could not therefore be an appeal therefrom under Section 34 of the Ordinance. He pointed out that if an appeal from a provisional assessment was in fact filed it would be open to the Commissioner to state that the amount mentioned in the provisional notice was only for a limited purpose and was expressly stated to be subject to revision.

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p.628,11.29-41

28. In further support of his view that the date for distribution of the estate had been properly postponed by the Executors until after the full liability to estate duty had been finally ascertained, the learned District Judge referred to the testator's intentions on the matter. He said:-

p.628,11.26-29

40 "That the testator himself was aware of the practice of the Commissioner issuing a provisional notice for limited purposes and final notice thereafter is shown by the fact that in Clause 16 of the Last Will (Ex.P1) he referred to the

p.628,11.33-41

Ex.P1,p.768  
Annexure

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value of the properties when 'finally assessed for estate duty purposes'. It is only from such a final assessment that an assessee can lodge an appeal. The period of three years after which the Commissioner is debarred from issuing an additional assessment will, in my opinion, commence from the date of the issue of the final notice of assessment and not the provisional notice.

p.628,11.41-44

"I am, therefore, unable to accede to the argument of learned Counsel for the Contestant that the Executors could have distributed the estate after 31.3.54 on the footing that the Commissioner had no power to issue any additional assessments after 31.3.54.

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p.628,11.44-49

"One of the trusts contemplated in Clause 14(1) of the Last Will was the payment of estate duty and, in my opinion, the Executors were under an obligation to await the final notice of assessment from the Commissioner of Estate Duty and to pay the duty in accordance with that assessment before they entered upon a distribution of the estate."

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p.629,11.3-6  
Ex.P46,p.1151  
Ex.P6,p.1153

The learned Judge then pointed out that "In the final assessment P46 (vide also copy attached to Certificate P6) the official valuation of the immovable properties mentioned in the declaration was higher than the value given by the Executors in their declaration - the total increase being Rs.337,473/-".

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p.629,11.30-34

Later, he said that -

"there were three principal matters which contributed towards the delay in the estate being finally assessed, namely, the valuation of A.N.C.L. shares", Associated Newspapers of Ceylon Ltd. "the valuation of immovable properties . . . . and the duty payable in respect of gifted and appointed properties." The learned Judge referred in detail to the differences and difficulties associated with the said valuations and duties.

p.629,1.34 to  
p.630,1.8

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29. Against the said Judgment of the learned District Judge the Contestant alone appealed to the Supreme Court on the several grounds set out in his Petition of Appeal, dated the 13th June, 1960 (see



pages 631 to 644 of the Record).

RECORD

The Executors filed cross-objections objecting to the findings of the learned District Judge on the painting, "Assembly Hall on Independence Day" which the Contestant had successfully claimed.

10 30. The appeal and cross-objections came up for hearing in the Supreme Court before a Bench consisting of Abeysundera and G.P.A. Silva JJ., who, after hearing arguments for eight days in February, 1963, and two days in May, 1963 held, as to the appeal, that there was no reason to disturb the decision of the learned District Judge. They therefore dismissed the appeal with costs.

P.645,11.11-12  
P.645,11.15-17

20 As to the cross-objections filed by the Executors the learned Supreme Court Judges were in agreement with the finding of the Court below that the ownership of the painting - "Assembly Hall on Independence Day" - was in the Contestant but, differing from the Court below as to its value, reduced its value from Rs.10,000/- to Rs.1,340 which, they pointed out, was the value the testator himself had placed on it in his declaration for insurance purposes (See All Risks Policy Ex.D1, Record p.745 Item No.42). For reasons that they gave they held that the Court below had, on the subject of value of the painting, misdirected itself in regard to the evidence of the witness Atukorale.

30 p.645,1.18 to p.646,1.12

31. A Decree in accordance with the Judgment of the learned Judges of the Supreme Court was drawn up on the 24th May, 1963, and against the said Judgment and Decree this appeal is now preferred to Her Majesty in Council, the Appellant having obtained leave to appeal by Orders of the Supreme Court, dated the 4th October, 1963, and the 21st May, 1964.

pp.646-647  
pp.653-659  
pp.666-672

40 In the respectful submission of these Respondents the appeal ought to be dismissed, with costs, for the following among other

RECORDR E A S O N S

1. BECAUSE plainly the concurrent decisions of both Courts below on the several questions of fact and law relevant to this appeal are reasonably correct and proper adjudications of Courts familiar with local conditions and practice.
2. BECAUSE the decision of the said Courts that Galpokuna Field No.1 as shown in plan P23d of Udabaddawa Division is part of that Division of the Galpokuna Group and not - as the Appellant says - part of the Galpokuna Division of the said Group is based on a true and reasonable interpretation of the relevant Clauses in the Will and a correct appreciation of the lands depicted in the relevant plans. 10
3. BECAUSE on any reasonable interpretation of the Settlement Deed it is clear that the Settlement Trustees are entitled to receive from the Executors, and the Executors are under a duty to transfer to them, the said 1000 additional shares in Associated Newspapers of Ceylon Ltd. 20
4. BECAUSE the said right of the Settlement Trustees to receive the additional shares, and the corresponding liability of the Executors to deliver them, are, under Ceylon law, unaffected by the voluntary nature of the trust.
5. BECAUSE, by the terms of the Deed of Settlement, the settlor's rights in respect of the said 1000 additional shares were completely and effectively transferred by him to the Settlement Trustees. 30
6. BECAUSE by the said terms the settlor transferred to the Settlement Trustees not only the ownership of the said 6000 original Ordinary shares but also that of 1000 out of the 1043 additional shares which accrued to the ownership of the said original shares.
7. BECAUSE the settlor's application to the Company in respect of the said 1000 additional shares should be regarded as that of a person who was acting as trustee or agent of the Settlement Trustees. 40

8. BECAUSE the date for distribution of the estate was, in accordance with law, practice and prudence, properly postponed by the Executors until after the liability to estate duty had been officially and finally ascertained.
9. BECAUSE the provisional notice of assessment of estate duty was not a notice upon which the Executors could lawfully or safely act in distributing the estate being expressly stated to be subject to revision and not therefore a notice of assessment under Section 32 of the Estate Duty Ordinance (C.187) from which an appeal lies to the District Court under Section 34 thereof.
10. BECAUSE, in the exceptional circumstances of this case, it would have been wholly wrong for the Executors to have embarked upon a distribution of the estate merely upon the strength of legal arguments, assumptions or inferences as to the inability of the Commissioner of Estate Duty to issue an additional assessment or assessments.
11. BECAUSE it is clear that any delay in the distribution of the estate has been unavoidable being due to delay in the assessment of a large estate for estate duty purposes which in turn was caused by difficulties associated with the valuation of the said shares in the Associated Newspapers of Ceylon Ltd., the valuation of several lands and buildings and the ascertainment of the duty payable in respect of gifts of land and appointed property.
12. BECAUSE the valuation by the Supreme Court of the said painting, "Assembly Hall on Independence Day" is right and ought not to be disturbed.

A N N E X U R E

LAST WILL AND TESTAMENT OF TUDUGALLEGE

DON RICHARD WIJEWARDENE

(Dated the 26th May, 1950) /Ex.P1, pages 768 to 788 of the Record/

2. I appoint my friend James Aubrey Maartensz and my sons-in-law George Benjamin Sirisensa Gomes and Cyril Esmond Lucien Wickremesinghe to be the executors and trustees of this my Will.

4. I declare that my executors and trustees shall have the widest discretion in deciding how best in the exercise of their rights powers and authorities whether by law or by virtue of the provisions of this my Will . . . . they are to pay and discharge my debts if any and my funeral and testamentary expenses (including estate duty and legacy duty and other duties if any) and the pecuniary legacies bequeathed by this my Will . . . with liberty to them from time to time if they shall so think fit to apply to the trustees of a certain voluntary settlement dated the 28th February 1950 made between me as Settlor and Lucian Macull Dominic de Silva and David Ernest Maartensz both of Colombo as trustees (for and to the extent to which the said voluntary settlement may permit) to receive from the trustees thereof any sum of money to be by the executors and trustees of this my Will applied in or towards payment of estate duty and all other duties charges and taxes whatsoever chargeable upon or payable by my executors . . . . .

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7. I give and bequeath the following legacies free of all duties:

- (i) all my pictures and paintings at "Warrington" aforesaid unto such one of my sons as my wife shall nominate in writing on being requested to do so by my executors (who may until such nomination is made and the same are delivered to such son permit the same to remain at "Warrington" without being liable for the loss thereof or of any of the same) . . . . .
- 40

13. I give devise and bequeath all the rest and residue of my property estate and effects . . . . (hereinafter referred to as "my trust estate") unto the said James Aubrey Maartensz, George Benjamin Sirisena Gomes and Cyril Esmond Lucien Wickremesinghe (hereinafter referred to as "my trustees" . . . .) upon the trusts and with and subject to the powers authorities and provisions declared and contained in this my Will . . . .

14. By and out of the nett rents interest dividends and other income of or from my trust estate and by exercising the powers of sale and mortgage hereinafter contained or either of them as my trustees shall in their absolute discretion think proper:-

- (i) my trustees shall pay and discharge my debts if any and my funeral and testamentary expenses (including estate duty and legacy duties and all other duties if any) and the pecuniary legacies bequeathed by this my Will . . . . .
- (ii) my trustees shall pay all calls which may be in arrear and unpaid at my death with all interest thereon in respect of any partly paid shares of which I may be the owner and also all sums of money or calls as shall become payable after my death in respect of such shares.
- (iii) if during my lifetime I shall not have built a house on the land shown as lot 8 in plan No.483 hereinafter referred to my trustees shall realise and set apart a sum of twenty thousand rupees (Rs.20,000) to be applied for the purposes of the trusts set forth in Clause 15(4) of this my Will see infra.
- (iv) if arising from the provisions of Clause 20 of this my Will it should become necessary for my trustees to provide a sum of money representing the

difference in values contemplated in that Clause my trustees shall realise and set apart that sum of money to be applied for the purposes of the trusts set forth in Clause 15 (4) of this my Will.

.....

15. Subject and without prejudice to the trusts aforesaid and to the powers authorities and provisions in this my Will . . . my trustees shall as from the expiration of nine years after the date of my death 10 or as from the determination of the trusts declared in Sub-Clauses (i), (ii), (iii) and (iv) of Clause 14 of this my Will whichever shall be the earlier date (hereinafter referred to as "the date for distribution") hold my trust estate upon the trusts following that is to say:-

1. With respect to (a) such a number of my Ordinary shares whether fully paid or partly paid in the Associated Newspapers of Ceylon Limited as shall be equivalent to one fourth 20 of my holding of Ordinary shares in that Company not including the Ordinary shares which form the subject of the voluntary settlement referred to in Clause 4 of this my Will (b) a divided half share of the Galpokuna Division of my Galpokuna Group situated in the Katugampola Hat Pattu in the District of Kurunegala, North-Western Province (to be allotted in manner prescribed in Clause 20 of this my Will) and (c) 30 the allotment of land situated at Thimbirigasyaya in Colombo and shown as lot 10 in plan No.483 dated 23rd August 1941 made by R.C. Dissanayake Licensed Surveyor AND ALSO with respect to (d) two thousand of my shares in the Land and House Property Company Limited (if I shall not have transferred the same to him during my lifetime) I DIRECT that subject to the provisions of Clause 16 of this my Will my trustees shall hold the same in trust for my son Seevali [the present Appellant] absolutely 40 and the same shall be conveyed and transferred by my trustees to him at the date for distribution or if he shall have died before the date for distribution my trustees shall hold the same in trust in conformity with the provisions of Clause 17 of this my Will.

2. With respect to (a) such a number of my Ordinary shares whether fully paid or partly paid in the Associated Newspapers of Ceylon Limited as shall be equivalent to one fourth of my holding of Ordinary shares in that Company not including the Ordinary shares which form the subject of the voluntary settlement referred to in Clause 4 of this my Will (b) all that divided portion known as the Udabaddawa Division of Galpokuna Group aforesaid and (c) the allotment of land situated at Thimbirigasyaya in Colombo and shown as lot 9 in the said plan No.483 AND ALSO with respect to (d) two thousand of my shares in the Land House and Property Company Limited (if I shall not have transferred the same to her during my lifetime) I DIRECT that subject to the provisions of Clause 16 of this my Will my trustees shall hold the same in trust for my daughter Nalini the present 4th Respondent absolutely and the same shall be conveyed and transferred by my trustees to her at the date for distribution or if she shall have died before the date for distribution my trustees shall hold the same in trust in conformity with the provisions of Clause 17 of this my Will.
3. With respect to (a) such a number of my Ordinary shares whether fully paid or partly paid in the Associated Newspapers of Ceylon Limited as shall be equivalent to one fourth of my holding of Ordinary shares in that Company not including the Ordinary shares which form the subject of the voluntary settlement referred to in Clause 4 of this my Will (b) the other divided half share of the Galpokuna Division of Galpokuna Group aforesaid (to be allotted in manner prescribed in Clause 20 of this my Will) and (c) the allotment of land situated at Thimbirigasyaya aforesaid shown as lot 7 in the said plan No.483 AND ALSO with respect to (d) two thousand of my shares in the Land and House Property Company Limited (if I shall not have

transferred the same during my lifetime)  
 I DIRECT that subject to the provisions of  
 Clause 16 of this my Will my trustees shall  
 hold the same in trust for my daughter Ranee  
 /the present 5th Respondent/ absolutely and  
 the same shall be conveyed and transferred  
 by my trustees to her at the date for  
 distribution or if she shall have died before  
 the date for distribution my trustees shall  
 hold the same in conformity with the provisions 10  
 of Clause 17 of this my Will.

4. With respect to (a) such a number of my  
 Ordinary shares whether fully paid or partly  
 paid in the Associated Newspapers of Ceylon  
 Limited as shall be equivalent to one fourth of  
 my holding of Ordinary shares in that Company  
 not including the Ordinary shares which form  
 the subject of the voluntary settlement referred  
 to in Clause 4 of this my Will (b) a divided 20  
 portion not less than one hundred and fifty  
 acres and not more than two hundred acres in  
 extent to be selected by my trustees in their  
 absolute discretion in one block out of that  
 portion of the estate plantation and premises  
 called and known as Gikiyanegedera . . . . and  
 (c) the allotment of land situated at  
 Thimibirigasyaya aforesaid and shown as lot 8  
 in the said plan No.483 AND ALSO with respect  
 to (d) two thousand of my shares in the Land 30  
 and House Property Company Limited (if I shall  
 not have transferred the same to her during my  
 lifetime) (e) a sum of twenty thousand rupees  
 (Rs.20,000) (if during my lifetime I shall not  
 have built a house on the said land shown as  
 lot 8 in plan No.483) and (f) a sum of money  
 representing the difference in values contem-  
 plated in Clause 20 of this my Will (if arising  
 from the provisions of that Clause it shall  
 become necessary for my trustees to provide that  
 sum of money) I DIRECT that subject to the 40  
 provisions of Clause 16 of this my Will my  
 trustees shall hold the same in trust for my  
 daughter Kusuma /the present 6th Respondent/  
 absolutely and the same shall be conveyed and  
 transferred or paid by my trustees to her at  
 the date for distribution or if she shall have  
 died before the date for distribution my  
 trustees shall hold the same in trust in



conformity with the provisions of Clause 17 of this my Will AND with respect to the said sum of Rs.20,000/- (if the same should become payable to Kusuma) I express the wish that she should apply the same in or towards building a house upon the said land (but if she shall have died before the date for distribution and the said sum shall be held in trust in conformity with the provisions of Clause 17 of this my Will) I authorise and empower my trustees to apply the said sum and any other moneys whether capital or unapplied income held upon the same trusts in building on the said land a house of such size and design as my trustees may determine.

5. With respect to (a) my house and premises . . . "Warrington" . . . (b) my estate . . . "Arcadia" . . . (c) my estate . . . Anderson Estate . . . (d) the remainder of the said estate . . . Gikiyanegedera (that is to say after excluding from the whole of the said estate the portion to be selected by my trustees for my daughter Kusuma for the purposes of the trusts set forth in the foregoing Sub-Clause (4) (c) the whole of the land situated at Thimbirigasyaya aforesaid and shown in plan No.483 save and except those portions of the same which may have been disposed of by me during my lifetime and the aforementioned lots 10, 9, 7 and 8 in the said plan and (f) two thousand of my shares in the land and House Property Company Limited (all of which or so much thereof as having regard to the provisions of Clause 16 hereof shall be available and also any other property which by the terms of this my Will is declared to be an accretion to the same shall comprise and are hereinafter referred to as "Aggabodhi's trust fund") I DIRECT that my trustees shall hold the same but subject always to the provisions of Clauses 18 and 19 of this my Will IN TRUST for my son Aggabodhi upon his attaining the age of twenty five years or on the date for distribution (whichever shall be the later) but subject as aforesaid or if he shall have

died before attaining the age of twenty five years or the date for distribution (whichever shall be the later) my trustees shall hold Aggabodhi's trust fund IN TRUST in conformity with the provisions of Clause 17 of this my Will but subject as aforesaid AND as from the date for distribution if my said son shall not then have attained the age of twenty five years UPON TRUST but subject always to the provisions of Clauses 18 and 19 of this my Will out of the income from Aggabodhi's trust fund to pay or apply such part thereof as they may in their absolute discretion think fit for or towards the maintenance education benefit and advancement in life of Aggabodhi until he attains the age of twenty one years with liberty to pay the same to his guardian or guardians for the purposes aforesaid without being liable to see to the application thereof or to call for an accounting therefor and (subject as hereinafter provided) to accumulate the residue of the nett annual income and dividends from the same by investing such residue and the income thereof to the intent that such accumulations shall be added to the Aggabodhi trust fund and shall devolve therewith but with power for my trustees at any time to apply such accumulations or any part thereof as if the same were income of the then current year PROVIDED always that notwithstanding the aforesaid trust for accumulation but subject always to the provisions of Clauses 18 and 19 of this my Will my said son Aggabodhi shall on attaining the age of twenty one years be entitled to receive the whole of the nett annual income and dividends from Aggabodhi's trust fund and from any such accumulations until he shall acquire a vested interest therein or until he shall previously die.

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20(i) For the purpose of giving effect to Sub-Clauses (1) and (3) of Clause 15 of this my Will I hereby direct my trustees as soon after my death as possible to cause the said Galpokuna Division of Galpokuna Group to be divided into two portions in such a way that each portion may be of the same value as nearly as is reasonably possible but not necessarily of the same extent.

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(ii) For effecting such division of the said Galpokuna Divison and also for effecting the division of the said Gikiyanegedera Estate for the purposes of Sub-Clauses (4) and (5) of Clause 15 of this my Will I declare that my trustees shall be entitled to consult some person or persons who in the opinion of the trustees shall be competent to advise as to the value of land in the districts in which the said properties are respectively situated and as to the respective values of the two portions in which each such property is to be divided and I further declare that such divisions when effected by my trustees shall not be open to question by but shall be final conclusive and binding upon those of my children who shall be affected by or concerned in such divisions and upon all other persons whomsoever interested in my estate.

(iii) If upon effecting the division of Galpokuna Division and of Gikiyanegedera Estate for the purposes of Clause 15 the value of the divided portion of Gikiyanegedera selected for the purpose of Clause 15 (4) shall be less than the value of each of the portions of Galpokuna Division my trustees shall set apart such a sum of money (to the nearest one thousand rupees) as shall represent the difference between the value of each portion of Galpokuna Division and the value of that portion of Gikiyanegedera selected for the purpose of Clause 15(4) to be applied for the benefit of my daughter Kusuma or otherwise under the trusts set forth in Clause 15(4) of this my Will.

21. In regard to the estates plantations and premises or divisions or portions thereof appropriated to each of my children by Clause 15 of this my Will I hereby declare that in each such appropriation shall be included not only all land depicted in the most recent plan of the property appropriated as may be in existence at the date of my death but also all

such further and additional land as may have been purchased by me prior to the date of my death or as may be comprised in or included in or be treated or form or be cultivated or worked as part of the said estates plantations and premises respectively though not included in such plans and I declare that my trustees shall be the sole judges as to whether or not any such additional lands shall be comprised in each such appropriation and that the decision and determination of my trustees shall not be open to question by but shall be final conclusive and binding upon all my children and all other persons whomsoever interested in my estate I further declare that every appropriation in respect of the said estates plantations and premises or divisions or portions thereof shall (unless for the purpose of effecting any such divisions as aforesaid my trustees shall in their absolute discretion otherwise determine) include all the buildings stores machinery furniture and fixtures thereon and such live and dead stock thereon or thereto respectively appertaining at the date of my death as my trustees may in their like discretion determine.

DEED OF SETTLEMENT

(Dated the 28th February, 1950) [Ex.P2,pp.  
752 to 760]

THIS DEED OF SETTLEMENT is made the twenty-eighth day of February One thousand nine hundred and fifty Between Tudugallage Don Richard Wijewardene . . . of the one part and Lucian Macull Dominic de Silva and David Ernest Maartensz both of Colombo aforesaid (hereinafter called "the trustees" which term as herein used shall mean and include the said Lucian Macull Dominic de Silva and David Ernest Maartensz and the survivor of them and the trustees or trustee for the time being of this settlement) of the other part

## W H E R E A S :-

- (A) the settlor is the Chairman of the Board of Directors of and the principal shareholder of THE ASSOCIATED NEWS-PAPERS OF CEYLON LIMITED a company incorporated in Ceylon . . . . . (hereinafter sometimes referred to as "the Company")
- (B) the issued Ordinary share capital of the Company at the date hereof consists of 11,500 fully paid shares of the nominal value of Rs.100/- each whereof the settlor is the registered holder of 8,026 shares, 2000 further shares of the nominal value of Rs.100/- each (which further shares have been recently issued but have not yet been allotted) whereof the settlor's entitlement is 1,396 shares.
- (C) the settlor being desirous of making the revocable provision hereinafter set forth for the benefit of his children has transferred or is about to transfer or to cause to be allotted into the names of the trustees the shares in the Company (being part of his aforesaid holding of 8,026 fully paid Ordinary shares in the Company and of his aforesaid entitlement of 1,396

further Ordinary shares in the Company) and the other investments particulars of all of which are set forth in the Schedule hereto to the intent that the same may be held upon the trusts hereinafter expressed

NOW in consideration of the premises this deed witnesseth as follows:

3. The shares and investments so transferred or allotted to the trustees as aforesaid as well as any other shares and investments which the settlor may hereafter transfer to the trustees as aforesaid and the investments money or property for the time being representing the same or which may be or become subject to the trusts hereby declared (except so much of the foregoing or of the proceeds of sale thereof as may be applied by the trustees in or towards payment of the said estate duty) and all investments money or property which may be purchased out of or form part of or for the time being represent the Reserve Fund hereinafter referred to (but subject in the case of such last mentioned investments money or property to the application thereof by the trustees for any or all of the purposes prescribed in Clauses 10(i) and (10)(iv) of this settlement) are hereinafter called "the trust fund" which expression is intended to mean the constituents for the time being of the said fund. 10 20
4. The term or expression "the date of vesting" as used in this settlement shall mean the date of the death of the settlor or the date on which AGGABODHI the youngest son of the settlor shall attain the age of twenty five years whichever shall be the later PROVIDED always that if after the death of the settlor the said Aggabodhi shall die before attaining the age of twenty five years then the date of vesting shall be the date of Aggabodhi's death. 30
5. The term or expression "the said duties and taxes" as used in this settlement shall mean the said estate duty and all other duties charges or taxes of every kind chargeable upon or in respect of the trust fund or any part thereof whether the trustees or any other person or persons whomsoever 40

shall be accountable for the same.

10 6. The trustees shall set up or establish a RESERVE FUND to which there shall be credited all income and accumulations of income which the trustees are required by the terms of this settlement to hold as part of the Reserve Fund and to which there shall be debited all payments which the trustees shall make in exercise of their powers under Clause 10 hereof.

7. The trustees shall hold the trust fund (but subject always to the provisions of Clause 10 hereof) upon the trusts following that is to say:-

20 (i) they shall out of the income of the trust fund pay and discharge all stamp duties and legal expenses in connection with the preparation and execution of this settlement and in transferring to or vesting in them the shares and investments specified in the Schedule hereto and all expenses incurred by them in connection with the trusts of this settlement including remuneration payable to themselves as in Clause 13 hereof provided

30 (ii) the trustees shall hold the whole of the balance of such income as shall accrue during the lifetime of the settlor IN TRUST (a) to pay so much thereof as the trustees may in their absolute discretion from time to time determine unto the settlor for his own use (b) to pay all calls on the further Ordinary shares of the Company mentioned in the Schedule hereto and (c) to  
40 accumulate the remainder thereof by investing the same and the resulting income thereof in any investments hereby authorised and

shall hold the said accumulations and resulting income and any uninvested part thereof respectively as part of the RESERVE FUND to be applied for any or all of the purposes hereinafter presented.

- (iii) the trustees shall hold the whole of the balance of such income as shall accrue from and after the death of the settlor IN TRUST (a) to pay so much thereof as the trustees may in their absolute discretion from time to time determine unto the settlor's eldest son SEEVALI unto his three daughters NALINI, RANEE and KUSUMA and unto the trustees of the Last Will and Testament of the settlor to be by them held or applied upon the same trusts and with the same powers for the benefit of the settlor's youngest son the said AGGABODHI as the income receivable by the trustees of his said Last Will and Testament from the property devised to them thereby for the benefit of the said AGGABODHI PROVIDED that in making such payments as aforesaid the trustees of this settlement shall pay equal sums to each of them the said SEEVALI, NALINI, RANEE and KUSUMA and shall pay to the trustees of the settlor's said Last Will and Testament four times as much as they pay to each of them the settlor's eldest son and three daughters and (b) to hold the remainder thereof as part of the RESERVE FUND to be applied for all or any of the purposes hereinafter prescribed. 10  
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- (iv) the trustees shall hold one equal eighth part of the trust fund in trust for each of the settlor's said children SEEVALI, NALINI, RANEE and KUSUMA to be absolutely vested in him or her on the date of vesting without prejudice however to the proviso next hereinafter appearing 40
- (v) the trustees shall hold one equal half part of the trust fund IN TRUST for



the settlor's son AGGABODHI to be absolutely vested in him on the date of vesting without prejudice however to the proviso next hereinafter appearing PROVIDED ALWAYS that if at the date of vesting any of the said duties and taxes shall remain unpaid it shall be optional for the trustees notwithstanding such absolute vesting as aforesaid EITHER (a) to retain the trust fund under their control until all duties and taxes have been discharged and thereupon to transfer the trust fund to the persons entitled thereto in accordance with the foregoing provisions OR (b) at the date of vesting or at any time thereafter to transfer the trust fund to the persons entitled thereto in accordance with the foregoing provisions whereupon such persons shall be liable to pay and discharge the unpaid part of the said duties and taxes in the proportions in which and to the extent to which they receive the trust fund and shall indemnify the trustees accordingly.

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10. From and after the death of the settlor the trustees shall hold the RESERVE FUND upon trust to apply the same for any or all of the purposes following that is to say:-

(i) the trustees shall thereout pay and discharge the said duties and taxes and all expenses which they may incur in settling and paying the same.

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(ii) the trustees are hereby directed (but subject always to the provisions of the foregoing sub-Clause (i) having been fully complied with or in the opinion of the trustees having been adequately provided for) to apply any part of the Reserve Fund (a) in

taking up that proportion of any new issue of Ordinary shares in the Company hereafter to be made which shall together with any Ordinary shares held by the trustees at the time of such new issue bear the same proportion to the total issue of Ordinary shares (including such new issue) as 6,000 bears to 11,500 or as near such proportion as the trustees may in their discretion determine and (b) 10 in paying all or any part of the calls on any partly paid shares of the Company which with the consent of the trustees may have been transferred by the settlor to them or allotted to them at the request of the settlor.

(iii) the trustees are hereby authorised and empowered (but subject always to the provisions of the foregoing Sub-Clause (i) having been fully complied with or in the opinion of the trustees having been adequately provided for) to apply any part of the Reserve Fund in the purchase of any Ordinary shares in the capital of the Company which may be or become available for purchase by them. 20

(iv) subject to the provisions of the foregoing Sub-clause (i) the trustees may out of the Reserve Fund pay to the executors of the Last Will and Testament of the settlor 30 any sum which they may request the trustees to pay to them to be by them applied in or towards payment of estate duty and all other duties charges and taxes whatsoever chargeable upon or payable by the said executors but without any obligation on the trustees to see the application thereof by the executors or to call for an accounting thereof.

THE SCHEDULE above referred to 40

1. Six thousand (6,000) fully paid Ordinary shares of Rs.100/- each bearing Numbers . . . . . in THE ASSOCIATED NEWSPAPERS OF CEYLON LIMITED.
2. One thousand (1,000) further Ordinary shares of Rs.100/- each in the ASSOCIATED NEWSPAPERS OF CEYLON

LIMITED which have been issued but not yet allotted and which the settlor is about to cause to be allotted into the names of the Trustees.

3. Forty five thousand rupees (Rs.45,000) stock of Ceylon Government  $3\frac{1}{4}\%$  NATIONAL LOAN 1956
4. Twenty five thousand rupees (Rs.25,000) stock of Ceylon Government  $3\frac{1}{4}\%$  NATIONAL LOAN 1957
- 10 5. Twenty thousand rupees (Rs.20,000) stock of Ceylon Government  $3\frac{1}{2}\%$  LOAN 1959-1964
6. Forty five thousand rupees (Rs.45,000) stock of Ceylon Government 3% WAR LOAN 1959-69.
7. Fifty thousand rupees (Rs.50,000) stock of Ceylon Government  $3\frac{1}{2}\%$  NATIONAL LOAN 1964-69.
8. Fifty thousand rupees (Rs.50,000) stock of Ceylon Government 3% NATIONAL DEVELOPMENT LOAN 1965-1970.

THE ESTATE DUTY ORDINANCE

Assessment

Assessor to  
make  
assessments

32. An Assessor may at any time, whether the declaration of property has been delivered or not, assess the estate duty payable in respect of the estate of a deceased person, and shall issue to the person or persons whom he considers liable to pay such estate duty a notice of such assessment.

Additional  
assessments

33.(1) Where it appears to an Assessor that the amount which any person is liable to pay as estate duty has been assessed at less than the proper amount the Assessor may at any time within three years of the date of the notice of the original assessment make an additional assessment of the amount which such person is in his opinion liable to pay:

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Provided that -

- (a) where the under-assessment is due to fraud . . . . .
- (b) an Assessor may, notwithstanding that the above-mentioned period of three years has expired assess at any time any liability for additional duty which may be brought to his notice by an executor or by any other person liable to pay estate duty under this Ordinance; 20
- (c) an additional assessment under this section shall not affect, or create a charge upon, any property mentioned in a certificate issued under section 50 except in the circumstances referred to in sub-section (4) of section 50.

(2) Where an additional assessment of estate duty has been made under sub-section (1), an executor shall not, except in the case of fraud, be personally liable for any estate duty under any such additional assessment by reason of having administered or distributed the estate of the deceased without retaining assets to satisfy the duty. 30

Appeals

Appeals to  
District  
Court

34. Any person aggrieved by the amount of any assessment of estate duty made under this Ordinance,

whether on the ground of the value of any property included in such assessment or the rate charged or his liability to pay such duty or otherwise, may appeal to the appropriate District Court in the manner hereinafter provided.

Payment of Estate Duty

44. (1) Estate duty shall be paid in the manner directed in a notice of assessment on or before the date specified in such notice. Manner of payment of estate duty

10 (2) Estate duty shall be paid notwithstanding any appeal or notice of objection unless the Commissioner orders that payment of the duty or any part thereof be held over to a date specified in such order.

20 (3) Any estate duty not paid on or before the date specified in the notice of assessment or in any order made under sub-section (2) shall be deemed to be in default unless the Commissioner has agreed to accept payment of estate duty by instalments.

Certificate of Payment and Release

49. When any executor shall have paid or secured to the satisfaction of the Commissioner the payment of all estate duty for which he is liable, the Commissioner shall issue a certificate to that effect to which shall be attached a copy of the declaration of property in respect of which estate duty has been paid or secured. Certificate of payment

30 50.(1) The Commissioner on being satisfied that the full estate duty has been or will be paid in respect of all property passing on the death of a deceased person for which the executor is liable to pay estate duty under this Ordinance shall, if required by the executor, give a certificate to that effect, which shall discharge from any further claim for estate duty the property mentioned in that certificate. Certificate of release

(2) Where a person other than the executor is liable to pay estate duty in respect of any property passing on a death, such person may, if the executor has not delivered under section 29 a declaration which includes a reference to that property, furnish to the Commissioner a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto; and the Commissioner may determine the rate of the estate duty in respect of the property for which the applicant is liable, and on payment of the duty at that rate, that property and the applicant, so far as regards that property, shall be discharged from any further claim for estate duty, and the Commissioner shall give a certificate of such discharge. 10

(3) On the application of the executor or of any person having an interest in any property passing on the death of a deceased person, the Commissioner may, if he thinks fit, determine the estate duty payable in respect of that property, and, on due payment of such estate duty, may issue a certificate which shall discharge from any further claim for estate duty the property mentioned in that certificate. 20

(4) A certificate of the Commissioner under this section shall not discharge any person or property from estate duty in case of fraud or failure to disclose material facts . . . . . 30

Grant of Probate and Letters of Administration

Probate not to be issued until estate duty is paid

52. No probate or letters of administration shall be granted by the Court in respect of the estate of a deceased person until -

- (a) the Commissioner has issued the certificate that the estate duty for the payment of which the executor is liable under this Ordinance has been paid or secured; and 40
- (b) the certificate so issued has been filed in Court.

No. 14 of 1966

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME  
COURT OF CEYLON

B E T W E E N :

PHILIP SEEVALI WIJEWARDENE  
Appellant

- and -

GEORGE BENJAMIN SIRISENA GOMES  
and 12 others  
Respondents

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CASE FOR THE 1ST, 2ND, 4TH, 10TH,  
12TH and 13TH RESPONDENTS

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STEPHENSON HARWOOD & TATHAM,  
Saddlers' Hall,  
Gutter Lane,  
Cheapside,  
London, E.C.2.  
Solicitors for the Respondents.