

42 OF 1970

S.C. No. 454 of 1965
D.C. Colombo Case
No. 1265/ZL.

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

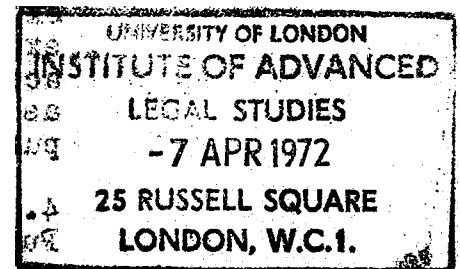
B E T W E E N

10 THE SINGALESE FILM INDUSTRIAL CORPORATION
LIMITED of "Kalyani Studios", Dalugama
Kelaniya(Plaintiff-Respondent)
Appellant

AND

1. HERATHMUDIYANSELAGE CHANDRAWATHIR
MADANAYAKE, also called and known as
Herath Mudiyanseleage Chandrawathie
in her personal capacity as well as
the Administratrix of the intestate
estate of Mudaliyar Jayasena Madanayake
20 also called and known as Madanayake
Jayasena of "Kalyani" Peliyagoda2. SIRINETHA KUMARADASA MADANAYAKE of
"Kalyani" Peliyagoda3. DHARMAWANSA SIRIPALA MADANAYAKE of
No. 93 Rosmead Place, Colombo 7.4. IRANGANI HEMAMALI WIJewardena (nee
Madanayake) of No. 100, Horton Place
Colombo 7.

5. UPALI GOTABHAYA MADANAYAKE and

30 6. MALINI SOMAKUMARI KOTAGAMA (nee
Madanayake) both of "Kalyani"
Peliyagoda(Defendant-Appellants)
Respondents

CASE FOR THE APPELLANT

RECORDThe Appellant Company instituted action
against the heirs and administratrix of the

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estate of late Mudaliyar Madanayake inter alia for specific performance of notarially executed Agreement No. 342 of 2nd March 1959 filed of record marked A.

By the said Agreement marked 'A' the late Mudaliyar Madamayake (vendor) agreed to sell and convey the lands described in the schedule to the plaint to the Appellant Company (purchaser company). The said Agreement recited that the Appellant company had at a meeting of its Board of Directors held on 27th February 1959 (produced D4) resolved to purchase the said lands upon the terms and conditions of the Agreement Pl by which the parties inter alia agreed as follows :- 10

1. The Vendor shall sell and the Purchaser - Company shall Purchase the said property and premises within a period of eighteen (18) months from the date thereof

2. The consideration for the said sale shall be the sum of Rupees Forty Thousand (Rs.40,000/-) of lawful money of Ceylon. 20

3. The Vendor undertakes to perfect the title of the said property and premises before the expiration of the said period at the cost and expense of the Vendor and the purchaser - company accepts the title of the Vendor when perfected as agreed upon between the Vendor and the purchaser-company

4. The Purchase shall be completed by the Purchaser Company on or before the expiration of the said period of 18 months by tendering to the Vendor for completion a deed of conveyance of the said premises in favour of the Purchaser-Company paying to the Vendor the said purchase price of Rupees Forty thousand (Rs. 40,000/-) 30

5. The Purchaser-Company shall be in possession of the said property and premises from date hereof

6. The Purchaser-Company can put up any buildings of any kind permanent or temporary for the purpose of the Purchaser Company 40

7. The Purchaser-Company shall pay to the Vendor at the execution of these presents a sum

of Rupees Fifteen Thousand (Rs. 15,000/-) as part payment of the consideration mentioned herein

10 8. In the event of the Purchaser-Company failing refusing or neglecting to purchase the said property and premises when the title has been duly perfected by the Vendor as agreed upon the Vendor shall be entitled to forfeit the said sum of Rupees Fifteen Thousand (Rs. 15,000/-) as and by way of Liquidated damages and not by way of penalty.

9. The Purchaser Company shall bear and pay all expenses stamp duties and other costs of and incidental to the preparation execution and registration of the Transfer in its favour and the expenses, stamp duty and other costs of and incidental to the preparation execution and registration of these presents shall be borne by the parties hereto in equal shares

20 In part payment of the consideration a sum of Rs. 15,000/- had been paid by Appellant to Mudaliyar Madanayake leaving a balance of Rs. 25,000/- to be paid at the stage when the conveyance was to be finally executed. In terms of the agreement the Appellant entered into possession of the said lands and constructed buildings of a permanent nature for the purpose of its business and equipped same at considerable expenses.

30 For the purpose of perfecting the title to these lands partition title being regarded as the one that would serve the purpose Mudaliyar Madanayake (a little over 13 months after the execution of the Agreement 'A') had filed partition actions which were later withdrawn by him on 18th October 1960. At the time Mudaliyar Madanayake died on 13th March 1963 the sale had not been completed in terms of the Agreement

40 The Appellant thereafter expressed its readiness and willingness to pay the balance consideration of Rs. 25,000/- and called upon the Respondents, who as heirs of the deceased had then become entitled to the said lands to execute the necessary conveyance despite the title not having been perfected. The

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Respondents refused to comply with the demand for the said conveyance.

The Respondents in their answer inter alia pleaded that the Appellant is not entitled to the said conveyance as the Appellant on or about 9th November 1960 had resolved to rescind and/or waive and/or abandon its rights under Agreement 'A' and/or negotiated with the Mudaliyar Madanayake for a lease of the said lands.

The Trial Judge (Additional District Judge of Colombo) held :- 10

- a) that the finances of the Appellant company were not at all satisfactory during the period in question and that the Appellant was compelled to consider the future of the Company and for this purpose several meetings were convened and apparently as no decision could be arrived at those meetings were adjourned on a number of occasions; 20

2. The Trial Judge on a consideration of the minutes of the meeting of the Directors of the Appellant marked P10 with regard to the defences raised by the Respondents held that :

- a) in order to constitute abandonment there must be clear and unmistakable evidence to abandon the rights and obligations;
- b) When the Appellant decided at a Board meeting (P10) that a long lease of 50 years is as good a proprietary holding and to place the matter before its lawyers it did not amount to an abandonment of agreement 'A'. 30
- c) the right of appellant to purchase the lands remained though it decided to negotiate for a lease as contemplated in issue 20 (c) suggested by Respondents;
- d) It is extremely unlikely that having entered into Agreement 'A' and taken possession of the lands put up valuable buildings and installed machinery at 40

heavy cost the Appellant would have decided to abandon this very valuable asset which would perhaps wipe out its liabilities

- e) there was no rescission or abandonment of the right to purchase under P1 as urged by Respondents;
- f) Mr. D. L. Gunasekera on behalf of the Appellant had after the death of Mudaliyar Madanayake written to 5th Respondent on such occasion had not denied the rights of Appellant under the said Agreement;

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3. There is no evidence nor is there anything available in the records of those cases (partition) to show as to why the partition actions which were filed were withdrawn;

4. That even after the lapse of the period of 18 months the meeting of Directors of Appellant Company held on 9th November 1960 (P10) and the withdrawal of the partition actions, the watcher of the lands and premises had been asked by Mudaliyar Madanayake to take orders from Mr. Hewavitharane who was acting on behalf of the Appellant

20

5. Throughout and up to the time of institution of this action possession of the said lands and premises was with the Appellant.

6. Mudaliyar Madanayake himself had not considered the time period of 18 months to complete the purchase as of the essence of the agreement 'A'.

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7. Time was not of the essence of the Agreement 'A' and therefore the expiry of the period of 18 months cannot operate as a bar against the Appellant to assert their rights under the said agreement

The trial Judge who held that the Appellant Company is entitled to specific performance of the Agreement marked 'A' and to the permanent injunction prayed for answered the issues at the trial as follows :-

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1. Did Mudaliyar Jayasena Madanayake now deceased hereinafter referred to as the vendor, by deed of Agreement No. 342, dated 2nd March 1959 and attested by H. C. Perera, Notary Public agree to sell and convey to the Plaintiff-Company the property and premises more fully described in the schedule to the plaint on the terms and conditions set out in the said deed at the price of Rs. 40,000/-?

Yes.

10

2. Was a sum of Rs. 15,000/- out of the purchase price duly paid to the Vendor in pursuance of the said agreement leaving a balance of Rs. 25,000/- payable at the execution of the conveyance in favour of the Plaintiff-Company?

Yes.

3. Did the vendor undertake to perfect the title of the said property and premises before the period of 18 months fixed for the completion of the purchase? 20

Yes.

4. Was it agreed between the parties to the agreement at the time of execution that in order to perfect the title to the said land and premises that a decree under the provisions of the Partition Act No. 16 of 1951 be obtained and that the Vendor should take all necessary steps thereto

Yes.

30

5. Did the Plaintiff-Company in pursuance of the provisions of the said agreement and, with the full knowledge, acquiescence and approval of the Vendor

a) duly enter into possession of the said property and premises?

Yes.

b) at its own cost and expense erect permanent buildings thereon and equip

the same for the purpose of his business as contemplated by the parties to the agreement?

Yes.

6. What is the present value of the said buildings and equipment? As in the Balance Sheet P38, Rs. 379,162/29

10 7. Did the Vendor die on or about 13th March 1963 without having perfected the title of the said land and premises as agreed?

Yes.

8. Did the Defendant as heirs of the vendor become entitled to the said land and premises subject to the said Agreement No. 342?

Yes.

20 9. Did the Plaintiff-Company thereafter express its readiness and willingness to pay to the Defendant the balance purchase price of Rs. 25,000/- and call upon the Defendants to execute a valid conveyance of the said property and premises in favour of the Plaintiff-Company?

Yes.

10. The Defendants having refused to comply with the said request, is the Plaintiff-Company entitled to compel the Defendants to a specific performance of the said Agreement No. 342 and to execute a valid conveyance in favour of the Plaintiff-Company upon payment by the Plaintiff of the balance sum of Rs. 25,000/-?

30 Yes.

11. Were the aforesaid buildings and other improvements effected by the Plaintiff-Company during the life time of the said Mudaliyar Madanayake in pursuance of an agreement between him and the Plaintiff-Company, that the Plaintiff Company would be entitled to the use and enjoyment of the said property and premises with the buildings thereon for the purpose of its business?

40 Yes.

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12. If Issue No. 11 is answered in the affirmative, and in the event of the Plaintiff Company not being entitled to a decree for specific performance, is it entitled to recover from the Defendants;

- a) compensation for the said improvement?
- b) Damages for breach of the said agreement referred to in Issue No. 11?

Does not arise in view of the answer to Issue 10.

13. What is the amount of such;

10

- a) Compensation?
- b) Damages?

Does not arise.

14. If Issue No. 12 is answered in the affirmative, is the Plaintiff entitled to a Jus Rententions?

Does not arise

15. If issues No. 10 or Issue No. 12 and Issue No. 14 are answered in favour of the Plaintiff is the Plaintiff entitled inter alia to the reliefs claimed for in prayer (c) to the Plaintiff?

20

In view of the answer to Issue 10 to the effects that the Plaintiff Company is entitled to compel the Defendants to specific performance of the Agreement No. 342 the Plaintiff Company will be entitled to the reliefs mentioned in parts (a) and (c) and (d)

16. Even if Issues Nos. 9 and 10 are answered in the affirmative, do the facts stated therein entitle the Plaintiff-Company to maintain this action claiming the reliefs claimed therein?

30

Yes.

17. Did the Defendants wrongfully and unlawfully refuse to execute a valid conveyance of the premises described in the schedule to the plaint

in favour of the Plaintiff Company on the Plaintiff Company paying to the Defendants a sum of Rs. 25,000/-.

Yes.

18. Was the said Agreement No. 342 entered into as part and parcel of an agreement entered into on the 27th February 1959 between the Plaintiff Company and the said Mudaliyar Madanayake:

- 10 a) that the Plaintiff Company should buy the proposed studio site from the late Mudaliyar Madanayake paying Rs. 40,000/-.

Yes.

b) That Mudaliyar Madanayake should invest in a further 4,000 shares of the value of Rs. 10/- per each share in the plaintiff company?

The investing in shares to be only after the signing of the Deed

- 20 19. After the execution of the said Agreement No. 342 was the Plaintiff Company in financial difficulties and in lack of funds?

Yes.

20. Did the Plaintiff Company on or about 9th November, 1960 resolve:

- a) to rescind the said Agreement No. 342 and/or

No.

b) waive and/or abandon its rights under the said Agreement No. 342 and/or

No.

- 30 c) Negotiate with the said Mudaliyar Madanayake for a lease of the said premises?

Yes but the matter was not proceeded with.

21. If Issues No. 20(a) or 20 (b) are answered in Defendant's favour did the Mudaliyar Madanayake agree to rescind the said agreement

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and accept the said waive and abandonment?

Does not arise.

22. Did the Plaintiff Company in view of its financial difficulties:

- a) abandon its project to lease out the said premises from the said Mudaliyar Madanayake?

No it appears that the project of a long lease was also abandoned by both the parties

- b) Were partition actions brought by the said Mudaliyar Madanayake withdrawn on 18th November 1960 by him in agreement with and/or with the knowledge and acquiescence of the Plaintiff Company? 10

Yes.

23. Did the Plaintiff Company prior to the death of Mudaliyar Madanayake:

- a) Decide to abandon the project of establishing a film studio and engage in the business of film production? 20

No.

- b) Take steps to sell the plant and machinery?

No.

- c) Liquidate the Plaintiff Company?

No.

24. Were

- a) buildings erected on the said premises?

- b) equipment and/or installed in the said premises by the Plaintiff Company equipped and installed with the permission of Mudaliyar Madanayake and at the request of the Plaintiff Company on the footing that the Plaintiff Company would perform and 30

fulfill its obligations on the said agreement?

The buildings and equipment thereon were put up and installed in terms of the agreement filed of record marked 'A'.

25. Has the plaintiff company failed and neglected:

10 a) to fulfill the terms and conditions and obligations on its part contained in the said Agreement No. 342?

No.

b) and/or to enable the said Mudaliyar Madanayake to invest in a further 4,000 shares in the plaintiff Company?

No. as the Deed of transfer had not been signed for the investing in shares by Mudaliyar Madanayake.

20 26. If Issues No. 18 to 25 or any one of them are answered in Defendants' favour, is the Plaintiff Company entitled to any of the reliefs prayed for in the action?

Does not arise.

27. (a) Did the Plaintiff Company represent to the late Mudaliyar Madanayake that it had abandoned and/or waived and/or rescinded the said agreement No. 342?

No.

30 (b) If so, did the said Mudaliyar Madanayake act on such representations to his prejudice?

No.

(c) If Issue No. 27 (a) and/or (b) are answered in Defendants' favour is the Plaintiff Company estopped from claiming the reliefs prayed for?

Does not arise.

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28. (a) Has the Plaintiff Company made false representations

No.

and/or (b) Suppress from Court material facts?

No.

29. If so, has the Court been thereby induced

a) To issue an enjoining order?

b) To issue notice of an injunction on the Defendants?

Does not arise.

10

30. Has the Plaintiff Company under cover of the said enjoining order and notice of injunction entered into forcible and unlawful possession of the said premises?

No.

31. Is the Plaintiff putting up extensions and new buildings and/or preparing to instal further equipment and/or interfering with the possession of the Defendants?

No.

20

32. (a) Are the Defendants entitled to judgment for ejecting the Plaintiff Company and its Agents and servants from the said land and premises as prayed for in paragraph 3 (b) of the prayer.

No.

33. Were the premises described in the schedule to the plaint

a) Much over Rs. 40,000/- in value?

No. And/or

b) Worth two lakhs of rupees more or less?

30

No.

34. If Issue No. 33 is answered in defendants' favour is the Agreement No. 342 unenforceable on the ground of laesio enormis?

Does not arise

35. Did the Plaintiff Company enter into wrongful and unlawful possession of the said land and premises on or about 30th May 1964?

No. The Company entered into possession on the basis of the agreement marked 'A'.

10 36. (a) Did Mudaliyar Madanayake at various times lend and advance to the Plaintiff Company a sum amounting to Rs. 35,922/61?

Yes.

(b) If so, is the said sum due from the Plaintiff Company to the estate of the late Mudaliyar Madanayake?

Yes.

20 37. Are the Defendants entitled to recover the said sum of Rs. 35,922/61 with legal interest from 16th September 1964 from the Plaintiff Company

No, steps will have to be taken to recover this sum in the Testamentary Action in which the estate of Mudaliyar Madanayake is being administered.

38. Vide proceedings of 24th May 1965 there is no issue raised under that number (38). After Issue 37 the next issue is (39).

39. (a) Was the time of 18 months specified in the agreement of the essence of the contract?

30 No.

(b) Was the failure to complete the sale within the said period of 18 months imputable to default on the part of Mudaliyar Madanayake in that he failed in the perfection of the title of the said property as aforesaid?

Yes.

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40. Is the relief of Laeso Enormis canvassed in Issue No. 34 barred by prescription?

Yes.

41. In any event are the Defendants not entitled to impeach Agreement No. 342 on the ground of Laeso Enormis for all or any of the reasons set out in paragraph 2 of the replication?

Yes.

42. Can the claim in reconvention for the sum of Rs. 35,922/61 be sued upon and/or joined and/or maintained by the Defendants in this action?

10

No.

43. Is the Plaintiff's claim if any barred by prescription?

No.

THE TRIAL JUDGE CONCLUDED:

In the result I enter judgment declaring the Plaintiff Company entitled to specific performance of Agreement No. 342 dated 2nd March 1959 filed of record marked 'A' as prayed for in the prayer part (a)

20

(b) The Defendants, their agents and servants and other persons acting through or under them are hereby restrained by injunction from entering upon or into the said premises or buildings and/or disturbing the quiet possession of user and enjoyment of same by the Plaintiff Company by their servants, workman in possession claimed through or under it and/or committing any other act of violation of the Plaintiff Company's rights to the possession, enjoyment and user of the said buildings. That is the Plaintiff is further entitled to part (c) of the prayer. The Plaintiff Company is hereby directed to bring into Court within a period of two weeks from today the balance sum of Rs. 25,000/- for the purchase of the property described in the schedule to the plaint. On this amount being deposited, the Defendants are

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hereby ordered to execute the conveyance within a further period of two weeks of the depositing of this sum of Rs. 25,000/-.

10 If the Plaintiff Company fails or defaults in depositing this amount within a period of two weeks from today, the Plaintiffs action will stand dismissed with costs, but if the amount of Rs. 25,000/- is deposited in Court by the Plaintiff Company within the period of two weeks specified above and if the Defendants fail or default to execute the necessary conveyance in favour of the Plaintiff Company within the further period of two weeks mentioned in the order the Secretary of this Court is directed to execute the necessary conveyance. In any event the costs of conveyance will be borne by the Plaintiff Company - the Plaintiff-Company is further entitled to costs of action.

20 In terms of the Judgment and decree of the Trial Judge the Appellant deposited in Court the balance consideration of Rs. 25,000/-.

On an appeal to the Supreme Court the Decree entered by the Trial Judge for Specific performance was set aside by H. N. G. Fernando C. J. and O. L. De Kretser J on the ground that the Appellant repudiated the sale Agreement 'A'.

30 The Supreme Court granted the Appellant Conditional Leave to Appeal to the Privy Council on 4th October 1969 and Final Leave on 30th October 1969.

The Appellant respectfully submits that the judgment of the Supreme Court is wrong and unjustified and the Appeal of the Appellant be allowed and the Judgment and Decree of the Trial Judge (District Court of Colombo) be restored together with costs of the Appeals to the Supreme Court and to the Privy Council for the following amongst other

R E A S O N S

40 1. BECAUSE the Supreme Court erred in setting aside Judgment and Decree of the Trial Judge on the ground that the Appellant had repudiated the Agreement 'A'. It is

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submitted that repudiation of the Agreement 'A' was not a ground in the Defendant's answer nor was it in issue at the trial nor was it a ground of Respondents' Appeal to the Supreme Court.

2. BECAUSE the Supreme Court erred in holding that although there was no issue which raised the defence of repudiation, the grounds, of waiver rescission and abandonment are wide enough to include the ground of a repudiation in fact. It is submitted that the factual and legal considerations that arise for repudiation are different to those for the grounds urged as defences by the Respondents. 10
3. BECAUSE the Supreme Court has failed to duly consider that the vendor (Mudaliyar Madanayake) had to perfect title before the expiry of the 18 months before the obligation on the purchaser (Appellant) to pay the balance purchase price and obtain the conveyance; 20
4. BECAUSE Document D4 established that upon the conveyance the Mudaliyar Madanayake had agreed to invest in 4,000 Ordinary Shares (i.e. Rs. 40,000/-.) of the Appellant after signing of the transfer. Thus, the Appellant did not require finance to obtain the conveyance. Therefore the Appellant did not require finance to obtain the legal rights to have the right to possession of the said lands. It could not be inferred that the Appellant who had effected considerable improvements was giving up its rights to obtain a conveyance under P1 even without a lease of the said lands for 50 years. 30
5. BECAUSE the Supreme Court based its finding on a purported repudiation when the Respondents had failed to adduce the evidence of Mr. D. L. Gunasekera who was available as a witness, when the evidence of the said witness was absolutely essential to establish repudiation. 40
6. BECAUSE the only Respondent who gave

evidence states thus at pages 126, 127, 132:-

Q. Did Mr. D. L. Gunasekera address any letter to you at any time he has written to you?

A. Yes.

Q. Just two months after your father's death he wrote to you?

A. Yes.

10 Q. And he Addressed as Upali?

A. Yes.

Q. Did he write to you about this agreement that your father had entered into with the plaintiff - Corporation?

(Objection is taken by Mr. Weerasooria to the question and states that is a question which goes into the contents of a document.

O R D E R

20 This witness is a party Defendant in this Case. He is under cross examination. I allow the question.

Q. Did Mr. D. L. Gunasekera write to you about this agreement entered into by your father with the Plaintiff-Corporation?

A. Yes.

Q. Did you reply to that letter?

A. No.

30 Q. Did you deny that the agreement was subsisting at any time? You never denied that that agreement was subsisting at the time of your father's death?

A. (No answer)

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Q. You did not nor did any of your brothers or your mother, or anybody on your behalf have the key of that building?

A. I do not know.

Q. All you know is that you certainly did not have it?

A. Yes.

Q. Is not there in the last paragraph of this letter P23 a clear acceptance that the Company is in possession of the premises?

10

A. There is no such suggestion.

Q. This idea of abandonment had not occurred at the time of the correspondence that came only in the answer?

A. (No answer)

Q. To your knowledge you did not know anything about the abandonment; you knew about the rescinding and lapsing?

A. I did not know anything about the abandonment at the time of the letter P23

20

Q. I suggest to you that the idea of an abandonment is a fiction?

A. (no answer)

7. BECAUSE the defence of rescission abandonment or waiver could not be established in the absence of a formal document as it related to interest affecting land (vide section 2 of Prevention of Frauds Ordinance Chapter 70, Legislative Enactments)

8. BECAUSE the Supreme Court had based its judgment on facts and inferences which were inconsistent with the findings of facts by the Trial Judge and furthermore which could not be necessarily inferred from the facts adduced at the trial;

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9. BECAUSE the Supreme Court erred in holding

that the Board of Directors of the Appellant Company at its meeting on 9th November 1960 resolved not to complete the sale Agreement and thus repudiated the Agreement 'A'. There was no resolution of Appellant Company to rescind or repudiate Agreement 'A'

10. BECAUSE the Supreme Court erred in holding that the Trial Judge did not rely on the truth of the former Manager's assertions;
- 10 11. BECAUSE the finding of facts by the Supreme Court that Mudaliyar Madanayake possessed the land (referable to his ownership of the land) is contrary to the finding of facts by the Trial Judge.
12. BECAUSE the period of 18 months provided by Agreement was not regarded as the essence of the contract (58 New Law Reports page 505 at pages 532, 534 and 536)
- 20 13. BECAUSE abandonment and repudiation (if any) were an afterthought. (48 New Law Reports page 548)
14. BECAUSE the Appellant Company could not in law rescind waive, abandon and/or repudiate its right under Agreement 'A' in the manner the Supreme Court found in the Appeal.
- 30 15. BECAUSE the Agreement Pl to sell which was required by law to be in writing as specified by section 2 of the Prevention of Frauds Ordinance, could not be rescinded and/or waived and/or abandoned and/or repudiated in the manner the Supreme Court held (vide section 92 of the Evidence Ordinance)

B. J. FERNANDO.

42 OF 1970

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D.C. Colombo Case
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IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

B E T W E E N

THE SINHALESE FILM INDUSTRIAL
CORPORATION LIMITED

(Plaintiff-Respondent)
Appellant

AND

1. HERATHMUDIYANSELAGE CHANDRAWATHIR
MADANAYAKE
2. SIRINETHA KUMARADASA MADANAYAKE
3. DHARMAWANSA SIRIPALA MADANAYAKE
4. IRANGANI HEMAMALI WIJewardena
5. UPALI GOTABHAYA MADANAYAKE
6. MALINI SOMAKUMARI KOTAGAMA

(Defendant-Appellants)
Respondents

CASE FOR THE APPELLANT

HATCHETT JONES & CO.
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