Privy Council Appeal No. 9 of 1968

Don Peter Mellaaratchy – – – – – – *Appellant*

v.

J. A. Naidoo – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL 1969

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD PEARSON]

The plaintiff in the action, who is the respondent in this appeal, is the executor of the will of the late Mr. Marley who died in Ceylon on 26th February 1963. Mr. Marley was a retired tea-planter and a man of substantial means. He was about 86 or 87 years of age when he died, being considerably older than Mrs. Marley, his wife, who played a prominent part in the events leading up to the action though she is not a party to it. The defendant in the action, who is the appellant in this appeal, is also a man of substantial means, owning a number of properties and having experience of managing rubber and coconut estates.

On 6th August 1960 a contract in writing was made between a Company called Borakande Estate Company Limited (who will be called "the Vendor Company") and Mrs. Marley and the appellant for them to purchase as joint purchasers from the Vendor Company a rubber and coconut estate of about 400 acres called the Borakande Estate at the price of Rs.425,000/-. Completion of the contract took place on 29th November 1960. The appellant had hardly any available ready money at that time. The sum of Rs.425,000/- required for the purchase of the estate was provided as follows:

(*a*) A sum of Rs.125,000/- was borrowed by the purchasers from the Vendor Company and it was agreed that it should be secured by a mortgage of the estate.

(*b*) A sum of Rs.125,000/- was lent to the purchasers by the Mercantile Bank on Mr. Marley giving a guarantee for this sum and interest thereon and agreeing that a fixed deposit of Rs.150,000/- which he had at the Bank should be appropriated for the purposes of the guarantee.

(*c*) A sum of Rs.50,000/- was lent by Mr. Marley to the appellant and used by the appellant in paying the deposit of Rs.42,500/- and making a further payment of Rs.7,500/- in respect of the purchase price.

(*d*) A sum of Rs.25,000/- was borrowed by the appellant from a Bank on a guarantee given by Mrs. Marley.

(*e*) Further sums amounting to Rs.100,000/- were provided by Mr. and Mrs. Marley.

In addition Mr. Marley paid legal expenses amounting to Rs.17,004/- and the purchasers—Mrs. Marley and the appellant—were liable to reimburse him. The appellant's share of this liability was one-half, *i.e.*, Rs.8,502/-. Mrs. Marley and the appellant became owners of the estate in equal shares.

Arrangements were made for the appellant to have the management of the estate and out of the nett proceeds to pay Rs.6,000/- per month to the Mercantile Bank towards repayment of the loan of Rs.125,000/- and accruing interest. It is important in relation to one of the issues in this appeal to ascertain the nature of these arrangements. There is contemporary documentary evidence that the arrangement for the payment of the Rs.6,000/- per month was imposed by the Mercantile Bank as a condition of granting the loan of Rs.125,000/-. On 8th September 1960 the appellant, in a letter to which Mrs. Marley added her written consent and signature, wrote to the Bank, saying:

> " After the interview the undersigned had with your goodself the proposals were discussed with Mr. and Mrs Marley and now we have decided to send the details.
>
> . . . . . .
>
> We really need a Rs.125,000/- to complete the purchase and if you are prepared to accommodate us Mrs. Marley and I are prepared to give you a mortgage of the property as we would be owning the property in equal shares. We are also prepared to send all our produce to Mr. Armitage of Messrs. John Keel, Thompson White Limited and from the proceeds of sales for us to draw the minimum as working expenses and the balance to be sent into your Bank or as an alternative for them to send all proceeds of sales to the Bank and for us to draw from the Bank an amount fixed upon monthly for the working expenses. As we are anxious to complete the purchase without delay we would very much appreciate an early reply.
>
> Thanking you,
> Yours faithfully,
> (Sgd.) D. P. Mellaaratchy.
>
> I consent
> (Sgd.) Eileen Marley "

On 30th September 1960 the Bank wrote to the appellant, sending a copy to Mrs. Marley. They said:

> " . . . we are pleased to advise that your application for a loan of Rs.125,000/- has been sanctioned by our Head Office. The terms of the Limit are as follows:
>
> > '*A limit of Rs.125,000/-* for advances on a separate loan account repayable on demand, secured by a first legal mortgage of freehold land beneficially owned in equal shares by Mrs. E. Marley and Mr. D. P. Mellaaratchy, comprising of

Maha Borakande Estate being a rubber estate of 399 acres, with various estate buildings, situated near Ambalangoda in Galle District, to be shortly occupied by the borrowers and valued by Mr. A. A. Jayasinha, Court Valuer & Auctioneer, at Rs.480,400/-.

. . . . . .

REPAYMENT OF ADVANCES

By monthly instalments of Rs.6,000/- to be paid direct to the Bank by Messrs. John, Keell, Thompson, White Ltd from whom a letter will be obtained undertaking to pay to the Bank the proceeds of all produce sold by them on account of the estate. Interest at 3% over Central Bank rate, minimum 7%.'

We shall be grateful if you will now write to Messrs. John, Keell, Thompson, White Limited instructing them to pay the proceeds of all produce sold by them on your behalf to this Bank for credit of your account. Such payments will be credited to a general account to be opened in the name of the Estate and the sum of Rs.6,000/- will be transferred monthly from the general account to the loan account.

. . . . . ."

For a very short time the joint venture seemed to be proceeding smoothly and successfully. On 8th December 1960 Mr. Marley wrote a friendly letter to the appellant and on 12th January 1961 the appellant wrote a friendly letter to Mr. Marley. Also on 12th January 1961 Messrs. John Keel, Thompson, White Limited paid into the Bank a sum of Rs.8,811/85 of which Rs.2,811/85 was credited to the joint current account of the appellant and Mrs. Marley for the Borakande Estate and Rs.6,000/- was credited to the joint loan account.

But after that there was no further payment into the joint loan account and the only further payment into the joint current account in the year 1961 was of a sum of Rs.1181/40 on 17th February. There was antagonism developing between Mrs. Marley and the appellant. Early in February 1961 Mr. Martensz, Mr. Marley's legal adviser and then a partner in the firm of F. J. and G. de Saram, was trying to bring about either a sale of the estate by the appellant and Mrs. Marley or a sale by Mrs. Marley of her half share to the appellant. Mr. Martensz also requested that Messrs. Mackwoods be appointed to manage the estate, but the appellant would not agree. Also in February and March 1961 Mr. Martensz and Mr. Marley were asking the appellant to give a mortgage of his half share of the property as security for the loan of Rs.50,000/- and the half of the Rs.17,004/- paid by Mr. Marley in respect of legal expenses and the half of Mr. Marley's liability under the guarantee, but no mortgage was given. On 8th August 1961 Messrs. F. J. and G. de Saram wrote to the appellant asking for a working account of Borakande Estate showing Mrs. Marley's half share of the profit or loss for the period 1st April 1960 to 31st March 1961. On 12th October 1961 another lawyer, Mr. Clarence L. de Silva, wrote on behalf of Mrs. Marley to the appellant requesting him to hand over the management of the estate and also asking for an account. On 12th November 1961 the appellant replied, refusing to hand over the management of the estate on the ground that Mr. Marley had made it an express condition before the purchase that the appellant should devote his entire time and energy to the management of the estate, and also refusing to send an account on the ground that as Mr. Jaleel was Mrs. Marley's agent and attorney in

respect of her half share in the estate the appellant was not accountable to anybody else. On 22nd November 1961 Mr. Clarence L. de Silva wrote a letter protesting against the appellant's attitude and proposing that the appellant should either sell his interest in the estate to Mrs. Marley or purchase her interest. In the meantime Messrs. F. J. and G. de Saram wrote to the appellant on behalf of Mr. Marley demanding repayment of the Rs.50,000/- and the Rs.8,502/- (half the sum of Rs.17,004/-) and requiring him to pay to the Bank the arrears of the monthly instalments of Rs.6,000/-. Mr. Martensz (partner in F. J. and G. de Saram) was still trying to bring about a sale by Mrs. Marley of her interest in the estate to the appellant.

The antagonism came to a climax in February 1962. On 6th February Mr. Clarence L. de Silva as proctor for Mrs. Marley filed a plaint on her behalf against the appellant in the District Court of Balapitiya. The plaint alleged mismanagement of the estate by the appellant in several ways, especially by failing to send the produce to the brokers John Keel, Thompson, White Limited so that they could pay the proceeds to the Mercantile Bank for the credit of the joint estate account, and by failing to render to Mrs. Marley any account of the income and expenditure. She claimed an account, certain sums of money and the appointment of a receiver. On 20th February 1962 strange things happened. Mrs. Marley granted or purported to grant to Mr. Jayatilleke and Mr. Gunasekara a lease of the estate for five years at a rent of Rs.500/- per month or one quarter of the nett income whichever should be the less. On the same day there was an invasion of the estate by Mr. and Mrs. Marley and Mr. Jayatilleke accompanied by a number of men some of whom were armed, and they took possession of the estate and forced the superintendent to leave the estate. The comment of the District Court on this behaviour was " It is rather shocking that people from whom one could have expected a better standard of conduct should have descended to that low level reminding one of Chicago gangsterism ". Complaints to the police were made by the superintendent on 20th February and by the appellant two days later.

Then there were negotiations, and on 2nd March 1962 an agreement in writing was made, which is important in its bearing on the issues in this appeal. The parties to it were the appellant as vendor and Mrs. Marley as purchaser. The appellant agreed to sell and Mrs. Marley agreed to purchase the appellant's half share in the estate (subject to authority being obtained from the Tea and Rubber Estate (Control of Fragmentation) Board) at the price of Rs.100,000/- and completion was to take place within two weeks of such authority being obtained. There were additional terms including the following:

> " 7. That all outstanding debts and liabilities accruing in respect of moneys advanced by Herbert Goddard Marley for the purchase of the said premises shall be borne by the purchaser, who shall also be solely liable for the payment of the sum of Rs.125,000/- which may become due upon an Agreement to Mortgage executed by the vendor and the purchaser and the said mortgage in respect of the said sum of Rs.125,000/- shall be executed in favour of the Borakanda Estate Company Limited by the vendor and the purchaser before the execution of the transfer herein mentioned.
>
> . . . . . .
>
> 10. The purchaser shall withdraw all proceedings and suits filed against the vendor in the District Court of Balapitiya in respect of the said premises.
>
> . . . . . .

12. If the purchaser shall fail to complete the purchase as provided in Clause 4 hereof, then in that event this Agreement shall forthwith be deemed to be cancelled and of no effect and thereupon the purchaser shall become liable to pay forthwith to the vendor a sum of Rs.100,000/- as liquidated damages and not by way of penalty, subject however to the conditions that the Tea and Rubber Estates (Control of Fragmentation) Board has granted its authority for a sale of the said premises in terms of paragraph 3 hereof."

The appellant had legal advice with regard to this agreement of 2nd March 1962. He said in his evidence that when Mr. Marley had asked him to meet Mr. Marley's proctor, Mr. Welikala, "I could not make up my mind because the matter was in the hands of my lawyers Mr. Adv. Thurairatnam and Mr. David Perera. . . . On Mr. Thurairatnam's advice, I was agreeable to get rid of the bother on receipt of Rs.125,000/-. Mr. Marley agreed and asked me to go and see Mr. Welikala and he wanted me to discuss the details with him. I went and saw Mr. Welikala a day or two after. Then I met him and he gave me a draft and with Proctor De Silva I went and saw Mr. Adv. Neville Samarakoon and after some corrections were made, I brought and gave it to Mr. Welikala."

When they had entered into this agreement both the appellant and Mrs. Marley went to the police and made statements informing them of the settlement that had been effected.

The Board granted its authority for the sale to be made.

But Mrs. Marley did not proceed with the purchase. In breach of clause 10 of the agreement of 2nd March 1962 she did not withdraw the action which she had commenced against the appellant in the District Court of Balapitiya. Indeed she signed judgment against the appellant in that action but the appellant had the judgment set aside. From about April 1962 onwards Messrs. Julius and Creasy were acting for Mrs. Marley. On 15th June 1962 Messrs. Julius and Creasy wrote on her behalf a letter to the appellant referring to the lease of 20th February 1962 in favour of Mr. Jayatilleke and Mr. Gunasekera and to the agreement of 2nd March 1962, and saying that they proposed taking steps to secure to their client her interest in the property free from any encumbrances effected by these documents, and calling upon the appellant to have the agreement of 2nd March 1962 cancelled and discharged.

On 12th July 1962 Mrs. Marley through her proctors Messrs. Julius and Creasy commenced an action against Mr. Jayatilleke and three other defendants, alleging that Mrs. Marley's execution of the lease of 20th February 1962 had been obtained by fraudulent misrepresentation as to the nature and contents of the lease or by undue influence, and claiming that the lease should be declared void *ab initio* or rescinded or set aside and that possession of Mrs. Marley's one half share of the estate should be restored to her and also claiming damages. Mrs. Marley did not bring an action to have the agreement of 2nd March 1962 declared void or rescinded or set aside.

Mr. Marley died on 26th February 1963, and his will was proved by the plaintiff (respondent) who is a senior partner in the firm of Julius and Creasy. The will contained a proviso: "I do hereby . . . direct my executors out of my estate to pay to the said Mercantile Bank Limited the sum which at the time of such payment shall be found to be owing to the said Bank for principal and interest upon the joint loan account in the name of my said wife and the said Peter Mellaaratchy and on such payment I direct my executors at the expense of my estate to obtain

from the Bank an assignment cession or other appropriate document in consequence of such payment having been made under or in respect of my hereinbefore recited guarantee." Mr. Marley by his will released his wife from certain debts which she owed to him in connection with the purchase of the estate in 1960 and also from any liability which would arise out of the repayment of the Bank loan. On the other hand he directed his executors to demand payment of all monies owing to him by the appellant, and to take all such steps as might be necessary for the recovery of such monies. The will had been made on 9th October 1961, and there was a codicil made on 17th May 1962.

The directions in the will were carried out. On 12th June 1963 the fixed deposit of Rs.150,000/-, which Mr. Marley had in 1960 appropriated to his guarantee of the loan of Rs.125,000/- made by the Bank to the appellant and Mrs. Marley on joint account and interest thereon, was applied to this purpose by the Bank at the request of the respondent who was the executor. The amount owing including interest was Rs.136,343/69, and the deposit receipt was used to pay off this debt and the balance of Rs.16,183/71 was paid to the respondent. Then on 21st November 1963 the respondent brought the action against the appellant, claiming repayment or reimbursement of:

(*a*) Rs.68,171/84, being one half of the sum of Rs.136,343/69.

(*b*) Rs.8,502/- being one half of the sum of Rs.17,004/- which Mr. Marley had paid in respect of the legal expenses of the purchasers of the estate in 1960.

(*c*) Rs.52,812/50, being the sum of Rs.50,000/- lent by Mr. Marley to the appellant in 1960 and interest thereon.

There was an Answer from the appellant as defendant, and it was dated 29th May 1964. As there were afterwards " issues framed " covering most of the material allegations in the Answer, it will be necessary to set out only the main contents of paragraph 13:

> " 13. Thereupon Eileen Florence Marley with the concurrence, approval and knowledge of and together with H. J. G. Marley acting by their Proctor, Mr. Welikala, and others, entered into negotiations with the Defendant as a result whereof the Defendant was discharged from all obligations to pay any moneys to H. J. G. Marley or Eileen Florence Marley and the Agreement No. 227 dated 2nd March 1962 . . . was entered into between Eileen Florence Marley and the Defendant. . . . The Defendant thereafter and in consequence thereof abandoned all steps taken by him and referred to above, and gave up all claims against Eileen Florence Marley and H. J. G. Marley and was thus and otherwise absolved and released by H. J. G. Marley and Eileen Florence Marley from all or any liability to pay any sum of money to H. J. G. Marley or to Eileen Florence Marley. In the circumstances aforesaid, H. J. G. Marley was estopped and barred from making any claim and the Plaintiff has no cause of action against the Defendant."

The appellant's primary contention at the trial in the District Court, and the version of the agreement of 1960 given by him in his evidence, were that he did not in 1960 acquire any half interest in the estate and he did not have any liability to repay the loans out of his own pocket, but the agreement was that he should manage the estate and out of the profits pay off the monies which had been borrowed for effecting the purchase of the estate, and when all these monies had been paid off then and only then he would acquire his half interest in the estate. This contention of the appellant and his version of the 1960 agreement were rejected by the District Court because they were extensively contradicted by the

documents as well as by the evidence of the respondent's witnesses which was accepted by the District Court. The decision of the District Court on this aspect of the case was not challenged in this appeal (nor, so far as appears, in the Supreme Court). Therefore it is unnecessary to set out the issues and findings relating to these matters.

The plea of estoppel raised in paragraph 13 of the Answer was relied upon in argument in the Courts below, but there seems to be in the facts of this case no matters from which any estoppel, in any ordinary sense of the word, could possibly be derived or inferred. At any rate no argument based on estoppel was put forward in this appeal.

Learned counsel for the appellant put forward two contentions in this appeal.

(A) It was contended that before the written agreement of 2nd March 1962 was entered into there was an oral agreement made between the appellant and Mr. Marley by which Mr. Marley would release the appellant from his liability to Mr. Marley if the appellant would enter into the written agreement with Mrs. Marley. In regard to this contention it will be convenient to set out the relevant issues framed and the District Court's answers to them:

> "(18) Did the deceased H. J. G. Marley thereupon agree with the defendant whereunder:
>
> | | *Answer* |
> |---|---|
> | (*a*) the defendant was discharged of all obligations to pay any monies to H. J. G. Marley, deceased, or Eileen Florence Marley, his widow? | No |
> | (*b*) Agreement No. 227 of 2.3.62 attested by R. M. S. Karunaratne, Notary Public, was entered into between the defendant and Eileen Florence Marley? | Yes |
> | (*c*) the defendant abandoned all steps taken against Eileen Florence Marley and H. J. G. Marley, deceased? | Yes |
> | (19) (*a*) Has the defendant been released and absolved from liability to pay any sum of money to H. J. G. Marley, deceased, or to Eileen Florence Marley? | No |
> | (*b*) Is the Estate of H. J. G. Marley, deceased, estopped and barred from making any claim against the defendant? | No" |

The District Court's negative answer to issue No. 18 (*a*) was expressly approved by the Supreme Court. Therefore the appellant is faced with concurrent findings of fact against him. There is a well-established rule that, unless there are special circumstances, their Lordships' Board treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established. *Vatcher v. Paull* [1915] A.C.372, 383 J.C. per Lord Parker of Waddington. *St. Francis Hydro Electric Company Limited v. The King* [1937] 2 All E.R. 541 J.C. per Lord Maugham. *Yachuk v. Oliver Blais Company Limited* [1949] A.C.386, 397 J.C. per Lord du Parcq.

Counsel for the appellant, however, has argued that there are special circumstances in this case, in that the judges of both the Courts below misdirected themselves as to the effect of the evidence relating to issue 18 (*a*) in that the distinction between the notarial agreement D.5 (*i.e.*, the written agreement of 2nd March 1962) and the alleged oral agreement between Mr. Marley and the appellant which preceded D.5 was not sufficiently appreciated.

There is in the judgment of the District Court some foundation for this argument, in that the judgment after reviewing the evidence at length and dealing very carefully and lucidly with the main question at issue (the question as to the nature of the original transaction) dealt rather cryptically with the question whether Mr. Marley had before the conclusion of the written agreement of 2nd March 1962 agreed to release the appellant from his liabilities to Mr. Marley. The learned District Judge must have had in mind what the question was. The note of the address of defendant's (the appellant's) counsel in reply ended with the words "Mr. Adv. Thiagalingam in reply says that Mr. Marley agreed to release the defendant from all obligation and that the defendant was absolved from all liability." In the judgment the description of the defendant's evidence includes this passage: "He agreed with Mr. Marley that he was to be discharged of all obligations in respect of the Borakanda Estate. If that was not agreed he would not have signed the agreement". Also issue No. 18 (*a*), which has been set out above, was quite clearly phrased and received the definite answer "No". The passage in the judgment giving reasons for the decision is as follows:

> "The defendant has taken up the position that the Plaintiff is estopped from making any claims against him as by D.5 the defendant was discharged from all obligations to pay any monies to Mr. Marley or Eileen Florence Marley and further the defendant abandoned all steps taken by him and gave up all claims against Eileen Florence Marley and H. J. G. Marley. Now it would appear that D.5 is an agreement between Mrs. Marley and the defendant only. There is no doubt credible evidence that Mr. Marley was also present at the time of execution of D.5. Mr. Karunaratne states that Mr. Marley was present at the time. The defendant states that he would not have signed the agreement if Mr. Marley was not a party to it and he was not absolved from all claims by Mr. Marley. It is difficult to understand why it was not thought fit to make Mr. Marley also a signatory to D.5. By D.5 Mrs. Marley has undertaken to pay all monies advanced by Mr. Marley. One cannot, however, say that Mr. Marley did not acquiesce in the transaction, but why was he not made a party to it? However, the agreement is a conditional one as can be seen by paragraph 12 and also paragraphs 3 and 4. There is proof that Mrs. Marley did not abide by the agreement, because, despite paragraph 10 of D.5 she proceeded with the case filed against the defendant in the Balapitiya Courts. . . . In the circumstances I am of opinion that the plea of estoppel must fail."

In this passage, although the explanation of the ground of decision is lacking in clarity the reasoning is sound. The fact that Mr. Marley was not made a party to D.5 (the written agreement of 2nd March 1962) is a vital point. It is to be remembered that the appellant had ample legal advice with regard to this agreement, as appears from a passage in his evidence quoted above. Mrs. Marley if she took over the appellant's half share in the ownership of the estate would naturally take over all or most of the appellant's obligations arising out of their purchase of the estate. But her promise to perform his obligations would not extinguish the obligations nor relieve him of his liabilities to Mr. Marley as creditor. If the intention had been to release the appellant from his liability to Mr. Marley, Mr. Marley should have been joined as a party to the written agreement, so that there would have been a novation with Mr. Marley agreeing to accept Mrs. Marley as his debtor in lieu of the appellant—in other words agreeing to release the appellant from the obligation in consideration of Mrs. Marley assuming it. As the appellant was acting under legal advice, the fact that Mr. Marley was not joined as a party, so that the written agreement could not operate as a novation, is strong evidence against the alleged existence of an oral agreement to

relieve the appellant of his obligation to Mr. Marley. Moreover Clause 12 of the written agreement, to which the District Court referred, also tends to show that the alleged oral agreement was not made. The scheme of Clause 12 is that if Mrs. Marley does not complete her purchase of the appellant's half share the agreement will be cancelled and of no effect and Mrs. Marley will be liable to pay to the appellant Rs.100,000/- as liquidated damages. That is reasonable if the appellant keeps his half share of the ownership of the estate and also remains under his obligations arising out of the purchase of the estate in 1960: he is deprived of the purchase price of Rs.100,000/- but he will receive the same sum as liquidated damages. On the other hand, if the appellant were relieved of his obligations to Mr. Marley, the Scheme of Clause 12 would go wrong and the appellant would get too much: he would keep his half share of the ownership of the Estate, and be relieved of his obligations to Mr. Marley and in addition receive Rs.100,000/- as liquidated damages: that would be an excessively favourable position for the appellant and is not likely to have been intended.

The judgment of the Supreme Court on this issue, affirming the decision of the District Court, shows beyond all doubt a full understanding of the appellant's allegation of an oral agreement and gives clear and cogent reasons for rejecting it.

There are in this case no special circumstances such as would justify setting aside the concurrent findings of fact by the Courts below that the alleged oral agreement was not made. Accordingly the first contention put forward on behalf of the appellant in this appeal fails.

(B) The second contention put forward on behalf of the appellant in this appeal has been to the effect that from the findings of the District Court on certain of the issues it follows as a matter of law that the appellant has been released from his obligations to Mr. Marley or at any rate from those arising out of Mr. Marley's guarantee in respect of the sum of Rs.125,000/- lent by the Mercantile Bank to the appellant and Mrs. Marley.

This is a new contention, not put forward in the Courts below. In *Connecticut Fire Insurance Company v. Kavanagh* [1892] A.C.473, 480 J.C. Lord Watson said:

> " When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

The findings relied upon were in the answers given to issues (11), (15 (*a*)) and (16 (*a*)), and the answer to issue 17 is also relevant:

Issues	*Answers*
" (11) Prior to the Deed of Transfer No. 1419 of 29th November 1960 of Borakanda Estate to the defendant and Mrs. Marley was it agreed between H. J. G. Marley, the deceased, and the defendant:	
(*a*) that the defendant was to be in sole management of Borakanda Estate after the transfer;	Yes

Issues	*Answers*
(*b*) that the defendant was to manage the same and pay out the nett income therefrom:	
(i) the sum of Rs.125,000/- and interest thereon due to Borakanda Estate Co Ltd. on a mortgage to be entered into in favour of the said Company;	Yes
(ii) the sum of Rs.275,000/- to the said Marley, deceased, and Eileen Florence Marley by crediting the same to a separate account with the Mercantile Bank Ltd.; and	Yes
(iii) the defendant was to maintain an account under the name 'Borakanda Estate' for the purpose of running the Estate.	Yes
. . . . .	
(15) (*a*) Did H. J. G. Marley, deceased, and his widow Eileen Florence Marley on 20.2.62 along with some thugs take wrongful and forcible possession of Borakanda Estate from the defendant?	Yes
. . . . .	
(16) Was the defendant wrongfully deprived of the possession and management of:	
(*a*) Borakanda Estate	Yes
. . . . .	
(17) Did the defendant thereupon take necessary steps to regain possession of Borakanda Estate. . . .	Yes "

These findings are not enough to establish any contention on the lines put forward, however it might be formulated. Further evidence and further findings would be required. Was it a condition of the loans made by Mr. Marley, or of any agreement that there might have been relating to Mr. Marley's guarantee of the Bank loan of Rs.125,000/-, that repayment or reimbursement would be made only out of the proceeds of the estate and not otherwise? The arrangement for payment of Rs.6,000/- in reduction of the Bank loan of Rs.125,000/- was made at the instance and for the benefit of the Bank. Was there any agreement between Mr. and Mrs. Marley and the appellant that this arrangement was to operate for the benefit of the debtors? When and how was any such agreement made? Secondly, did the dispossession brought about by the high-handed invasion of the Estate on 20th February 1962 prevent the appellant from effecting repayment or reimbursement out of the proceeds of the Estate? No payment in reduction of the Bank loan had been made since 12th January 1961 and only one payment (a payment of about Rs.1,118/-) had been made into the joint current account since that date. If the appellant had remained in possession, would he in any case have made any repayment or reimbursement out of the proceeds of the Estate? If not, the dispossession did not prevent him from doing so. Also, was the dispossession permanent? The answer to issue No. 17 shows that the appellant took steps to regain possession of the Estate. If he had not decided to settle the dispute by entering into the written agreement of 2nd March 1962, perhaps he would have been able to regain possession. Thirdly, what was the position to be as between the appellant and the Bank? The Bank was the primary creditor for Rs.125,000/-. The wrongful dispossession effected by Mr. and Mrs. Marley would not deprive the Bank of any of its rights

against the appellant. These are some of the questions which would have to be decided—and decided in favour of the appellant—before this second contention put forward on behalf of the appellant could succeed. There may well be other questions on which decisions would be required.

Consequently this is not a suitable case for admitting new contentions not put forward in the Courts below. It could not succeed on the materials now available.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

39572—2 Dd. 178094 80 5/69

In the Privy Council

DON PETER MELLAARATCHY

v.

J. A. NAIDOO

DELIVERED BY

LORD PEARSON

Printed by HER MAJESTY'S STATIONERY OFFICE
1969