[IN THE PRIVY COUNCIL]

1954 *Present :* **Lord Porter, Lord Asquith of Bishopstone, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

A. M. M. FUARD, Appellant, *and* A. R. WEERASURIYA, Respondent

Privy Council Appeal No. 41 of 1953

S. C. 387—D. C. Colombo, 18,596

Proctor and client—Fiduciary relationship—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages—Applicability of Prescription Ordinance, s. 10.

A Proctor's fiduciary relationship to his client renders him liable to indemnify the client in respect of damages incurred by the client in a transaction whereby the Proctor, in breach of his fiduciary duty, gains an advantage and his client suffers loss as the result of advice given by him and taken by the client.

The Prescription Ordinance of Ceylon, unlike the English Statute of Limitations, "governs the whole of a jurisdiction which is general, including law and equity in one system". It is therefore applicable to an action for damages for breach of a fiduciary duty. None of its sections dealing with special causes of action is applicable to a breach of a fiduciary duty and, therefore, such a

[1] *(1950) 34 Criminal Appeal Reports 60.*

breach falls under section 10. Under that section an action is not maintainable " unless the same shall be commenced within three years from the time when such cause of action shall have accrued ".

The defendant-appellant, a Proctor, was employed by the plaintiff-respondent as legal adviser for the purpose of making an investment of a sum of Rs. 15,000. The money was thereafter lent by the respondent to one S. on mortgage bond No. 2308 of the 3rd December, 1942, attested by the appellant. The security afforded by bond No. 2308 was the primary mortgage of certain lands at Panwila and the secondary mortgage of a land known as Fincham's land. The primary mortgage in favour of one M. of the latter property was for a sum of Rs. 35,000. It was sold on an order of Court on a decree on the primary mortgage obtained by M. and realised a sum of Rs. 16,000 which left no surplus towards the payment of the loan made by the respondent on the secondary mortgage. On a sale on a decree obtained by the respondent on the primary mortgage of the Panwila lands a sum of Rs. 2,250 was realised. The respondent thus lost the greater part of his principal and all interest. He then instituted the present action to recover from the appellant a sum of Rs. 20,000 by way of damages on the ground that the appellant had, while acting as his legal adviser in connection with the investment of the sum of Rs. 15,000, furthered " the interests of others whose interests were adverse to those of the respondent ".

There was evidence that out of the sum of Rs. 15,000 obtained by S. from the respondent, a sum of Rs. 4,500 was utilised to pay a debt due by S. to the appellant's cousin upon a primary mortgage of the Panwila land and a sum of Rs. 6,000 to pay another debt due to the appellant's wife and his brother upon a secondary mortgage of Fincham's land. The respondent had been told of the relationship between the parties and about the mortgages in favour of the appellant's relatives. On his own testimony, however, the appellant had had experience of certain incidents which indicated how undesirable S. was as a borrower.

Held, that in acting for the respondent in a matter in which the appellant's relatives had an interest, the duty arising from the fiduciary relationship between the appellant and the respondent placed upon the appellant the obligation of making a disclosure to the respondent of all facts in detail that might have affected a decision by the respondent to make the loan, or even merely led him to an investigation closer than he had actually made as to whether the proposed loan could prudently be made. " A man may have a duty on one side and an interest on another. A man who puts himself in that position takes upon himself a grievous responsibility ". In the present case the appellant had not discharged the heavy burden which lay upon him to establish that he made a full disclosure to the respondent of information in his possession relevant to the loan. For this failure of duty he was liable in damages, although he had honestly done all that he thought he was bound to do in dealing with the respondent.

Held further, that, for the purpose of applying section 10 of the Prescription Ordinance, a cause of action " accrued " to the respondent at the time when the Panwila lands were sold under mortgage decree, namely, on the 9th March, 1946. It was only on that day that the respondent could be said to have suffered the damage that he did in fact suffer.

APPEAL from a judgment of the Supreme Court reported in (*1952*) *54 N. L. R. 49.*

Michael Lee, for the defendant appellant.

Dingle M. Foot, Q.C., with *T. O. Kellock*, for the plaintiff respondent.

Cur. adv. vult.

July 27, 1954. [*Delivered by* MR. L. M. D. DE SILVA]—

The respondent instituted this action in the District Court of Colombo to recover from the appellant a sum of Rs. 20,000 by way of damages on the ground that the appellant had in November, 1942, while acting as the respondent's legal adviser in connection with the investment of a sum of Rs. 15,000 by the respondent furthered " the interests of others whose interests were adverse to those of the respondent ". He alleged that the appellant had recommended one Samaratunge as a borrower and recommended also the security offered by Samaratunge, fraudulently concealing from the respondent the existence of the adverse interests mentioned. He alleged that the appellant was " fully aware of the facts and circumstances " which rendered the security offered " inadequate and doubtful " but nevertheless in " breach of his duty " to the appellant failed to declare them. He alleged against the appellant " an intentional and deliberate dereliction of his professional duty and a breach of his contract of employment as legal adviser ".

The learned District Judge held that the appellant had not recommended Samaratunge as a borrower or the security offered by Samaratunge. He held that the appellant had not done anything " with a view to furthering the interests of others whose interests were adverse to that of the plaintiff " (respondent). He found that the appellant's conduct had not been fraudulent and dismissed the action.

The Supreme Court on appeal felt bound not to disturb the finding on the facts on the question of fraud. It however awarded to the respondent the sum claimed by him as damages on the ground that there had been a breach by the appellant of his duty to the respondent. In doing so it has taken a view of the facts less favourable to the appellant than the view taken by the learned District Judge.

The learned District Judge who saw and heard the witnesses, although he does not say so in terms, regarded the appellant as a witness of truth. He accepted the evidence of the appellant whenever it was in conflict with other evidence. The judgment of the Supreme Court does not proceed on the basis that there is sufficient reason to disturb the views taken by the learned District Judge on the credibility of witnesses and on the facts generally. In these circumstances their Lordships think that the view of the learned trial judge that the appellant was a truthful witness must be accepted without qualification. When his evidence is accepted it appears that the appellant honestly did all that he thought he was bound to do in dealing with the respondent, his client.

Their Lordships are however in agreement with the Supreme Court that the appellant has failed to perform his duty towards the respondent. They have arrived at this conclusion on the evidence of the appellant himself. It appears to their Lordships that the appellant failed to realise how extensive in law the duty was.

The respondent is a retired government servant. At the time of his retirement in 1941 he had a sum of Rs. 15,000 which he desired to invest. He lent this sum to one Wiswasam on a mortgage bond attested by the appellant. Wiswasam had desired to return the money by raising a loan

at a lower rate of interest but had been dissuaded at the instance of the appellant by a broker for a time from returning the money. Wiswasam eventually returned the money in 1942 which was then lent by the respondent to one Samaratunge on Mortgage Bond No. 2308 of the 3rd December, 1942, attested by the appellant. It will be seen that in the dealings with Wiswasam the appellant had given the respondent assistance which in character was not purely legal.

It is with regard to the loan to Samaratunge on Bond No. 2308 that a failure of duty on the part of the appellant is suggested. It is clear from the appellant's evidence that a lender could not have regarded Samaratunge as a satisfactory borrower. The appellant says his brother Shamsudeen was instrumental in the negotiations for the loan and that he came to know about it only on 27th November, 1942, six days before the bond was signed. The appellant said :—

> " It is not true that thereafter I negotiated the loan on bond P1 (No. 2308) I deny I did so. It is not true that I recommended to plaintiff the security as being sufficient. I deny I recommended the borrower Samaratunge as being reliable. I attested that bond in the usual course of my business."

Of Shamsudeen the appellant said " He calls himself a land agent. In fact he is an unlicensed broker ". Shamsudeen admittedly transacted business in the appellant's office and used the appellant's stationery with his name typed above the printed name of the appellant. In the course of negotiations he wrote three letters on the 17th, 22nd, and 26th November, 1942, in which amongst other things he said that Samaratunge was a " long standing client of ours " (meaning thereby of the appellant and of Shamsudeen), that Samaratunge would be " very regular " in paying interest and that " the borrower (Samaratunge) is absolutely good ". He gave details of the security offered, he made out that the appellant was in close touch with the negotiations, that the appellant had suggested a secondary mortgage over a land known as Fincham's land and said in terms " Mr. Fuard (the appellant) highly recommends this loan ".

According to the appellant " . . . . it is false what Shamsudeen has stated in his letter that the suggestion to give a secondary mortgage of Fincham's land first came from me ".

The appellant also said :—

> " He has stated in this letter that he consulted me, that is wrong. I never knew anything about these letters he has written, he has been acting behind my back."

and by this he certainly meant that he had not seen them before the day on which the bond was signed. Shamsudeen admitted in evidence that he had made false statements in the letters. The learned trial Judge has accepted the appellant's evidence that he did not see these

letters and, for the reasons they have already given, their Lordships think the learned trial Judge's view must be accepted. The Supreme Court held that it appeared from the evidence the appellant had failed to correct the false impressions created by the letters, and in so holding the Supreme Court appears to have taken the view that the appellant had seen the letters before the bond was signed. The facilities to transact business afforded to Shamsudeen in the appellant's office and the constant contacts between Shamsudeen and the appellant disclosed by the evidence would give some measure of probability to the view taken by the Supreme Court. It is in their Lordships' view important that the work of a proctor should be free from all contamination or suspicion of contamination and it is undesirable that a person such as Shamsudeen who on his own showing makes deliberately false statements should be allowed to be active in a proctor's office. The letters written in this case tended to compromise the proctor himself. There is however nothing to show that the learned trial Judge did not give full weight to the implications that arose from Shamsudeen's activities in the appellant's office and his view that the appellant had not seen the letters is entitled to prevail.

The security afforded by Bond No. 2308 was the primary mortgage of certain lands at Panwila and the secondary mortgage of a land near Kandy known as Fincham's land. The primary mortgage in favour of one Moolchand of the latter property was for a sum of Rs. 35,000. It was sold on an Order of Court on a decree on the primary mortgage obtained by Moolchand and realised a sum of Rs. 16,000 which left no surplus towards the payment of the loan made by the respondent on the secondary mortgage. On a sale on a decree obtained by the respondent on the primary mortgage of the Panwila lands a sum of Rs. 2,250 was realised. The respondent thus lost the greater part of his principal and all interest.

There is no evidence from either side which seeks to explain how or why Fincham's land mortgaged for Rs. 35,000 realised only Rs. 16,000 on the sale under the decree. There were statements by witnesses in the case to the effect that the value of the property was considerably more than Rs. 35,000 but there is no evidence which reconciles these statements with the price of Rs. 16,000 realised at the sale. The reason why the property fetched Rs. 16,000 has not been established or even sought to be established by evidence.

On the date of the execution of Bond No. 2308 by Samaratunge in favour of the respondent, Samaratunge owed Rs. 4,990 and interest on a decree on a primary mortgage of the Panwila lands to one Naina Marikar, a cousin of the appellant. He also owed a sum of Rs. 6,000 on a secondary mortgage of Fincham's land to Shamsudeen and to the wife of the appellant. Of the sum of Rs. 15,000 obtained by Samaratunge from the respondent, a sum of Rs. 4,500 was utilised to pay the debt due to Naina Marikar and a sum of Rs. 6,000 to pay the debt due to Shamsudeen and the appellant's wife. In these circumstances it must be held that the defendant's wife, brother and cousin, creditors of Samaratunge, were interested in the loan that was being made by the respondent to Samaratunge and it has been rightly conceded by counsel

for the appellant that it makes no difference in law to the position of the appellant whether the interest shown to exist is that of his relatives or of himself.

Their Lordships are of opinion that in acting for the respondent in a matter in which the appellant's relatives had an interest the duty arising from the fiduciary relationship between the appellant and the respondent placed upon the appellant the obligation of making a disclosure to respondent of all facts in detail that might have affected a decision by the respondent to make the loan, or even merely led him to an investigation closer than any he had actually made as to whether the proposed loan could prudently be made. In a matter where a solicitor who (as a trustee for certain beneficiaries) was selling property, acted also for the purchaser, Lord Cozens Hardy observed " A man may have a duty on one side and an interest on another. A man who puts himself in that position takes upon himself a grievous responsibility " (*Moody v. Cox*[1]). Their Lordships share that view. The appellant in acting for the respondent took upon himself a grievous responsibility. The burden of proving that he discharged that responsibility is upon the appellant. One of the incidents of that responsibility is, as already stated, the duty of making a full disclosure to the respondent. Their Lordships need only refer to certain events, spoken to by the appellant himself, which suffice to satisfy them that the appellant has not discharged the burden resting on him.

It was curious that the sum lent by Moolchand on the primary mortgage was the same as the amount that Samaratunge the borrower had paid for the property mortgaged. According to the appellant Moolchand had originally agreed to lend Rs. 40,000. The appellant said that this fact " surprised " him and that he spoke to Moolchand about it. In examination in chief the appellant said :—

" I was surprised and asked Moolchand what was the meaning of this. He said that the property belonged to Samaratunge's uncle and Samaratunge had spent about Rs. 10,000 to Rs. 15,000 to bring the property to a proper condition and that Samaratunge feels that the property is now worth about one lac of rupees. Then I told him that if that is so he had better take a valuer. They did not agree to a valuer being sent. Moolchand was satisfied with the property and after inspection he was prepared to lend the Rs. 40,000 with 8 cents rebate on the coupons. About two months after the inspection Moolchand said he could not lend more than Rs. 35,000 and wanted 20 cents rebate on each pound. According to that on every pound of tea coupon Moolchand was to get 20 cents and the balance was to be credited against the principal due on the bond. The interest that Moolchand was getting was 20 cents on each pound of tea coupons."

In cross-examination he said :—

" Moolchand told me that Samaratunge was going to buy this property from his uncle for Rs. 35,000 and that Samaratunge wanted Moolchand to give him Rs. 40,000. Then I asked Moolchand " How

[1] *(1917) 2 Ch. 71.*

could you lend Rs. 40,000 on a property purchased for Rs. 35,000 ? ". Then Moolchand said that this property was purchased by Samaratunge's uncle and that Samaratunge has spent nearly Rs. 10,000 to Rs. 15,000 over it with an understanding that Samaratunge's uncle would sell it to him for Rs. 35,000, and that Rs. 35,000 was not the true value. At the time Moolchand entered into this bond he knew all these facts fully."

If the appellant had believed what Moolchand said it would have appeared to the appellant that, making allowance for the " Rs. 10,000 to Rs. 15,000 " owed by the uncle to Samaratunge, the real price at which the property passed from the uncle to Samaratunge was Rs. 45,000 to Rs. 50,000. This may or may not have been the actual value of the land but it was a piece of information of importance to a lender in weighing up a proposal for a loan.

The appellant said further :—

" Moolchand, Samaratunge and I had a talk. Then Moolchand fixed an appointment with me to inspect the land because I told him it was absurd to lend Rs. 40,000 on a property purchased for Rs. 35,000. I suggested to Moolchand that we should take a valuer. He did not want to take a valuer. I was asked to find out the exact position of the land and get a valuer's opinion. Mr. McHeyzer valued the land. He told me that if the estate was in excellent condition with a factory he would value an acre at Rs. 2,000. If it was without a factory he would value it at Rs. 1,000 to Rs. 1,500 an acre. Fincham's land is situated at an elevation of 4,500 feet. It was high grown tea. I did not ask Moolchand not to embark on this venture. Moolchand told me that Samaratunge's valuation of the estate was over Rs. 100,000. I suggested to Moolchand that we take a valuer. Mr. McHeyzer was never taken to the estate. I did not pay Mr. McHeyzer a fee. I took the plan and the report of the estate to Mr. McHeyzer and showed him the plan and report. Then I told him the exact position of the land and its present condition. His was a hypothetical valuation. I told him that my client was going to lend about Rs. 35,000 or Rs. 40,000 and asked him whether it was a safe investment. Mr. McHeyzer recommended and said that it was a safe investment. The estate was in very good condition at the time of my inspection. After consulting Mr. McHeyzer I thought the estate was worth more than Rs. 100,000."

The surprise experienced by the appellant and the way in which it was allayed were important items of information.

The respondent was in their Lordships' opinion entitled to have had disclosed to him the whole history in detail of the Moolchand loan. The appellant does not say, and there is nothing to show, that it was communicated to the respondent. The appellant says that he told the respondent to satisfy himself about the value of the land. He also says

that as the result of his own valuation, after leaving a comfortable margin, he told the respondent not to accept the proposed security unless Fincham's land was worth at least Rs. 50,000. But these or similar expedients could not in their Lordships' view discharge the obligation of full disclosure with regard to Fincham's land. The appellant had no right to act until he was satisfied that the respondent was informed in detail of the facts referred to above and that the respondent had been placed in a position to decide for himself whether in the light of the information received he should investigate further the soundness of the loan he was about to make, and in particular the soundness as a secondary mortgage of a security which for a reason unestablished in the case has realised a price which is less than half the amount of the principal of the loan made on it on the primary mortgage. The possibility, for one reason or another, of such a price being realised may have occurred to the respondent if he had been placed upon the road to an investigation.

As already stated the appellant in terms disavowed the statement made in a letter from Shamsudeen to the respondent that Samaratunge was a desirable borrower from the point of view of a lender. On his own testimony the appellant had had experience of certain incidents which indicated how undesirable Samaratunge was as a borrower. At the time the negotiations for the loan were proceeding a decree was outstanding on the mortgage bond given by Samaratunge to Naina Marikar (the appellant's cousin referred to earlier) in respect of the Panwila lands. The appellant had acted for Naina Marikar in the action and experienced difficulty in serving summons on Samaratunge. Further according to the appellant Samaratunge had " played a trick ", the definite details of which do not appear in evidence, on him in respect of certain tea coupons. The appellant does not say nor does it appear otherwise, that the facts with regard to the service of summons and the " trick " were disclosed to the respondent. The appellant does say that he told the respondent that " Samaratunge was a difficult customer and would not keep to his words ". But in their Lordships' view a bare statement such as that without the details which gave rise to it would not be a sufficient discharge by the appellant of his duty however much he may have thought he had performed it. Their Lordships think it was not a sufficent discharge even though (as the appellant stated) the respondent said that he was " not lending the money to Samaratunge on his personal security and that he was lending the money on a mortgage of lands ". In the circumstances in which the appellant had placed himself the duty to make a full disclosure of the details with regard to the service of summons and the " trick ", was not brought to an end by the statement made by the respondent. The duty persisted all the more for the reason that the respondent had not been acquainted with the history of the loan by Moolchand on the security of Fincham's land. It is relevant here to mention that the appellant says he told the respondent " that he should not take into consideration the value of the small lands in Panwila as they consisted of several small lots and that he should be fully satisfied with the security of the secondary mortgages of Fincham's land to cover the amount he lent ". This advice appears to have been sound and to have been accepted by the respondent.

The appellant has stated that at the time when negotiations for the loan were going on the respondent knew that there was a mortgage decree in favour of Naina Marikar in respect of the Panwila land and a secondary mortgage (No. 2205 of the 2nd June, 1941), in respect of Fincham's land in favour of the appellant's wife and Shamsudeen. He says that the respondent knew also of the relationship between the parties. For reasons already stated his evidence must be accepted. There is a matter however which calls for consideration. Bond No. 2205 carried no interest, and accordingly it was to the advantage of the lenders to have it repaid as early as possible. This fact might strike a lender with whose money the mortgage was to be paid as giving rise to an added interest on the part of the mortgagees to have their money back. The fact that Bond No. 2205 carried no interest therefore called for disclosure.

Samaratunge says that it was from the Rs. 6,000 borrowed on Bond No. 2205 in favour of Shamsudeen and the appellant's wife that he paid commission to Shamsudeen and " notarial expenses " to the appellant in respect of his loan transaction (on the primary bond of the same property) with Moolchand. This evidence has not been contradicted or qualified by the appellant or anyone else. This Rs. 6,000 as already stated was paid off by Samaratunge from moneys received on the loan from the respondent. In effect this means amongst other things that the appellant was paid " notarial expenses " (it is not clear what the term includes) with money borrowed by Samaratunge from the appellant's wife and Shamsudeen, and that the appellant's wife and Shamsudeen received the money back from Samaratunge through the loan raised by Samaratunge from the respondent. If the respondent had been told that Bond No. 2205 carried no interest he might have made enquiries which would have led him to the facts just mentioned. These facts may in turn have led him to an investigation closer than the one he had made of the soundness of the security which he had been offered.

For the reasons which they have given their Lordships are satisfied that the appellant has not discharged the heavy burden which lay upon him to establish that he made a full disclosure to the respondent of information in his possession relevant to the loan. For this failure of duty he is liable in damages unless the provisions of the Prescription Ordinance (Cap. 55, vol. 2, Legislative Enactments of Ceylon, p. 86), bar the claim.

In the case of *Nocton v. Ashburton*[1], a solicitor was held to have been guilty of a breach of a fiduciary duty though not of fraud in respect of a transaction whereby he had gained an advantage and his client had suffered loss as the result of advice given by him and taken by the client. It was held in that case that the English Statute of Limitations did not apply to an action against the solicitor. It was argued that equally the Prescription Ordinance of Ceylon did not apply to an action for damages for breach of a fiduciary duty. Their Lordships do not agree. It was held in *Nocton v. Ashburton* that the English Statute of Limitations did not apply to an action in respect of a breach of a fiduciary duty because such an action before the passing of the Judicature Act would have

[1] *House of Lords, 1914, A. C., 932.*

fallen within the " exclusive jurisdiction " of the Court of Chancery. It was held that although " since the passing of the Judicature Act any branch of the Court may give both kinds of relief " nevertheless the Statute of Limitations would not apply even after the passing of the Act. The course by which rules of limitation became applicable in England to certain causes of action in equity and not to others has had no counterpart in Ceylon. No Court in Ceylon had at any time jurisdiction corresponding to the " exclusive jurisdiction " of the Court of Chancery in England. Their Lordships do not propose to refer to principles of the English law of limitation which led to the decision mentioned above in *Nocton v. Ashburton* as they are of the opinion that those principles are not relevant to the law of Ceylon. The Prescription Ordinance of Ceylon in various sections prescribes a period of limitation for special causes of action and section 10 prescribes a period for " any cause of action " not caught up by the others. The Ordinance is clearly applicable to all causes of action and no basis can be found in the law of Ceylon for excluding its application to all or any causes of action in equity. This view was expressed by the Board in *John v. Dodwell*[1]. In the words of Lord Haldane :—

> " The Prescription Ordinance of Ceylon governs the whole of a jurisdiction which is general, including law and equity in one system."

Their Lordships are of the view that none of the sections of the Prescription Ordinance dealing with special causes of action is applicable to a breach of a fiduciary duty and that therefore such a breach falls under section 10. Under that section an action is not maintainable " unless the same shall be commenced within three years from the time when such cause of action shall have accrued ". By a breach of duty the appellant created a situation which rendered him responsible if damage occurred. In the case before their Lordships it was impossible for the respondent at the time the breach was committed to have assessed the loss which he subsequently suffered. Their Lordships are of opinion that a cause of action " accrued " to the respondent at the time when the Panwila lands were sold under mortgage decree, namely, on the 9th March, 1946. It was only on that day that the respondent can be said to have suffered the damage that he did in fact suffer. The action was instituted on the 23rd October, 1947, and is consequently not barred by the Prescription Ordinance.

The amount of damages claimed by the respondent has not been contested.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent his costs of this appeal.

Appeal dismissed.

[1] *1918 A. C. 503.*