

[IN THE PRIVY COUNCIL]

1963 Present: Viscount Radcliffe, Lord Morris of Borth-y-Gest,
Lord Guest, Lord Pearce, and Sir Kenneth Gresson

MRS. HILDA VANDER POORTEN, Appellant, and
J. VANDER POORTEN, Respondent

PRIVY COUNCIL APPEAL NO. 31 OF 1962

S. C. 376 of 1958—D. C. Colombo, 34367/M

Claim for account of rents and profits—Items involving questions of fact—Not a proper subject-matter of appeal to Privy Council.

An investigation of items in the taking of an account where questions of fact rather than principles of law are involved is unsuited to the jurisdiction of the Privy Council.

APPEAL from a judgment of the Supreme Court dated 14th December, 1960.

E. F. N. Gratiaen, Q.C., with *Martin Jacomb*, for the appellant.

Ralph Millner, for the respondent.

Cur. adv. vult.

July 11, 1963. [Delivered by LORD PEARCE]—

The appellant (hereinafter referred to as the wife) claimed from the respondent (hereinafter referred to as the husband) in the District Court of Colombo an account of rents and profits received by him from her share in certain estates during the period from 1st December 1940 down to the commencement of proceedings on 25th January 1955 and payment of the amount found due, or in the alternative the sum of Rs. 50,000. Judgment was given in the wife's favour for Rs. 31,622 and costs. On appeal the Supreme Court of Ceylon set aside the judgment and dismissed the wife's claim on the ground that the husband had disbursed on account of the wife a sum far in excess of the sum of Rs. 50,000 claimed by her.

The husband and wife are persons of substance. From November 1940 they were co-owners of certain estates in Ceylon, the wife owning 1/9th and the husband 8/9th. In certain other estates the wife owned 1/20th and the husband 8/20th. The husband managed the estates and paid the profits into a joint banking account on which both husband and wife could draw. The expenses of the household were paid out of this account and it does not appear that the husband had any other banking account. At first the parties were living together in amity and there is no reason to suppose that they had any financial disagree-

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ments. In 1950, however, they quarrelled and ceased to live together. In January 1951 the husband ceased to manage the estates and professional agents, Aitken Spence & Co., took over the management. The wife obtained a divorce and took proceedings for maintenance. When the present case came on for trial neither the wife nor the husband gave evidence. On the husband's side there were called his chartered accountant, the clerk of the bank which held the joint account, a sub-assistant and book-keeper of the agents Aitken Spence & Co., the chief clerk of the Estates prior to 1950 and a clerk employed by the husband. From their evidence and the documents which they produced it was possible to obtain a great number of detailed figures relating to financial transactions, but little light was thrown on the relations of the parties to one another or their mutual arrangements.

It was agreed at the trial that the wife's share of the total distributed income from the estates during the whole of the relevant period of fourteen years was Rs. 161,488. It was further agreed that after Aitken Spence & Co. took over the management of the estates she received from them a total of Rs. 129,866. There was thus a balance of Rs. 31,622 unaccounted for during the whole period of fourteen years. If, therefore, the wife is to be taken as having received nothing during the ten years in which the husband managed the business and the parties lived together, she was entitled to that sum. For the husband it was contended in general that during those ten years his payments of her share of the profits into the joint account constituted payment to the wife and in particular that there had been paid out of the joint account many specified items on her account or at her request, amounting in all to Rs. 371,984, for which he was entitled to credit in any account with her. The learned district judge held that payment into the joint account did not discharge the husband and that none of the items could be taken into account as being a debit against the wife which *pro tanto* discharged the husband. Accordingly he entered judgment for Rs. 31,622.

Their Lordships find it unnecessary to refer to all the items in detail, but there are two items on which the Supreme Court particularly relied as showing that the husband had no remaining indebtedness to the wife. Between 1944 and 1948 the husband bought in his own and the wife's name for the price of Rs. 70,000 paid out of monies from the joint account, a house in Colombo called Preston at which the parties lived. It is agreed that she is thus the beneficial owner of half the house. Again, in 1947 the husband paid out of the joint account Rs. 28,436 as the purchase price of shares in the wife's name of which she is admittedly the beneficial owner.

A judgment delivered by Lord Romer (Practice Note 69 Indian Appeals p. 172) and a judgment delivered by Lord Thankerton (*N. R. Kapur v. Murlidhar Kapur* 71 Indian Appeals p. 149) have pointed out the undesirability of appeals concerned with items in the taking of an account where questions of fact rather than principles of law are involved. Their Lordships are in entire agreement with those observations. In the present case any allowance or dis-allowance of items involved in the account

depends on questions of fact and inferences of fact. It is difficult to trace in the record the intricate details of the various transactions and to say whether this item or that should be allowed in any account between the parties. Such an investigation is unsuited to their Lordships' jurisdiction. More particularly is this so in a matrimonial dispute such as the present in which neither party chose to give evidence, in which the amount involved is small compared to the sums at stake in concurrent maintenance proceedings and in which the parties seem to their Lordships to be largely guided by tactical and emotional considerations. The Supreme Court were in a better position than their Lordships' Board for such an investigation but although the case was argued in detail before them, they were not unreasonably content to take a broad and summary view of the case. Their Lordships are of opinion that the Supreme Court were right in dismissing the wife's claim.

It was contended for the wife that the Supreme Court erred in principle in that they failed to apply the presumption of advancement. But such a presumption has little or no relevance to the facts of the present case. It is agreed that the wife is beneficial owner of half the house and all the shares. There is no reason here to presume that when the husband paid for these benefits to the wife out of a joint account containing her monies and his, he used only his own money in the purchase, and cannot attribute her share of the funds in the joint account to any part of the purchase price.

Since neither party gave evidence of their mutual financial arrangements, their Lordships must be guided by reasonable inference. The facts relating to the joint account and the parties' course of dealing over the ten years when they lived together in amity seem to indicate that there was between them an informal arrangement by which the husband was to pay into the joint account both the wife's income and his own (which was approximately eight times as large as hers) and that there should be drawn from the account sums to pay for the various purposes of the matrimonial life. He was managing the estates and it was mainly he who was operating the account. By paying the profits into the joint account he was putting their respective incomes at their disposal in a way which was presumably satisfactory to both since both accepted this position for ten years.

If the wife had desired a strict accounting she could have asked for it at the time. But there is no indication that she ever did so and presumably she did not wish for it. So far as can be seen the informal arrangement was greatly to her advantage and it seems likely that she considered the benefits which she received to be an adequate satisfaction of her rights.

It would be quite unreal to import *ex post facto* into such an informal arrangement the contractual precision which Mr. Gratiaen for the wife now urges upon their Lordships. Whatever might have been the rights of the wife if she had received less than her fair share of benefits from the

joint account it seems clear to their Lordships as it did to the Supreme Court that she has in this case received from it personal benefits and value (exclusive of mere normal matrimonial benefits) far in excess of the amount of her share of the payments into it, and far in excess of any sums which she would have received on any strict accounting.

Under those circumstances their Lordships cannot hold that the husband now owes a duty to account or to pay the wife any further monies.

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

Appeal dismissed.
