IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. Case No. 1269/2000 (F)

D.C. Galle No. 2750/SPL/97

1. **Danthika Lakshamani Abeywardena Wickramasinghe,**
   No. 154, Old Galle Road,
   Weligama.
2. **Chinthanika Abeywardena Wickramasinghe,**
   Batadolawatte, Kirinda,
   Puhuwella.

PLAINTIFF - APPELLANTS

-Vs-

Hettiarachchige Sunny de Alwis

1st DEFENDANT-RESPONDENT

1a. **Hettiarachchige Uditha Kumara Alwis,**
No. 221/2, 2nd Lane,
Soma Thalagala Mawatha, Gangodawila,
Nugegoda.

1b. **Hettiarachchige Bandula Kumara Alwis,**
Weweldegiliya, Mihintala Road,
Galkulama.

1c. **Kumarasinghe Mohottalalage Anulawathie,**
Weweldegiliya, Mihintala Road,
Galkulama.

SUBSTITUTED 1st DEFENDANT - RESPONDENTS

2. National Savings Bank,
No.255, Galle Road,
Colombo 3.
3. Manager,
National Savings Bank,
Galle Branch, Kaluwella,
Galle.

DEFENDANT - RESPONDENTS - RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	D.P. Mendis, PC with J.K. Siriwardena for Plaintiff-Appellants Champika Ladduwahetty for 1st Defendant-Respondent and substituted 1st Defendant-Respondent
Written Submissions on:		15.07.2015 (Plaintiff-Appellants) 24.07.2015 (Substituted 1(a) to 1(c) Defendant Respondents)
Decided on	:	02.09.2016

A.H.M.D. Nawaz, J.

When one of the joint holders to a bank account dies the question that inevitably arises is who is entitled to the balance held to the credit of the account. This appeal from the District Court of Galle raises just that issue. Here is a case where the maternal aunt of the two Plaintiff-Appellants (hereinafter sometimes referred to as "the Plaintiffs") one **Irene Somawathie Pandithasekera** and her husband **Don Charles Pandithasekera)** (hereinafter sometimes referred to as

"Pandithasekera") made a mutual last will bearing No.5214 and dated 15.01.1992 and in respect of the will the probate was eventually issued in Case No.20, after the aunt (the first to die of the testators) had passed away on 09.12.1994. As the two Plaintiffs averred in their plaint, the surviving uncle Don Charles Pandithasekera himself crossed the great divide on 26.01.1997 but the fact remains prior to his death he had disposed of a portion of the land described in paragraph 3 of the plaint and deposited the proceeds of sale namely a sum of Rs. 1 million in a joint "fixed deposit" at National Savings Bank, Galle.

The Plaintiffs further stated that since the 1st Defendant-one Hettiarachchige Sunny de Alwis had been staying with an otherwise feeble uncle Pandithasekera, Pandithasekera opened this joint account along with the 1st Defendant for transactional convenience. It was the case of the Plaintiffs that upon the death of uncle Pandithasekera on 26.01.1997, the funds in the joint account did not vest in the surviving account holder-the 1st Defendant but rather the moneys became the undisposed property of Pandithasekera. As the mutual will referred to above provides for the undisposed properties of Pandithasekera at the time of his death to be vested in the Plaintiffs (the nieces of the testators of the mutual will), the Plaintiffs averred in their plaint that the funds in the joint account belonged to them. Thus there is a declaration prayed for to the effect that the funds in the joint account belong to them.

In a nutshell the mutual will bearing No.5214 provided for absolute ownership of the wife's properties to be vested in Pandithasekera upon her death and he enjoyed absolute discretion to deal with her properties as he pleased. The mutual will also provided that all those properties undisposed of by Pandithasekera at the time of his death would vest in the Plaintiffs.

The joint last will contains among other things the following covenants:-

> *"We give and bequeath to the survivor of us all property movable and immovable that we may own and die possessed of wheresoever situate, absolutely and without exception whatsoever.*

The above bequests shall specifically mean and include all moneys in banks, furniture and other movables lying in our residence at No.300, Wakwella Road, Galle.

We have given considerable thought to the manner in which the survivor of us should finally dispose of our assets. Whilst reiterating the bequests made earlier and not in any way interfering ***with the absolute discretion given to the survivor of us to deal with such property*** *during his/her life-time it is our wish and desire such property should devolve on:-*

1) *MRS. DANTIKA SIRIWARDENE nee DANTIKA ABEYWARDENE WIKREMASINGHE of Weligama*

and

2) *MRS. CHINTHANIKA SENEVIRATNE nee ABEYWARDENE WIKREMASINGHE of Puhuwella, our beloved nieces in equal shares, but as stated earlier this bequest will only operate at the discretion of the survivor of us and only in the event of the survivor's death taking place without any bequests being made during the life-time of the survivor of us.*

We do hereby appoint the survivor of us to be the executor/executrix of this Last Will and Testament."

As could be seen, the above will which is quite infelicitously entitled "joint last will" bears the hallmarks and features of commonality with a typical mutual will wherein two individuals, for instance a husband and wife as in this case, come together to an agreement in the will that the first to die (wife) will leave her property to the survivor (husband), with a further bequest that whatever is left at husband's death will devolve on one or more ultimate beneficiaries.

Joint Will vis-à-vis a Mutual Will

A mutual will has to be contrasted with a joint will where two or more persons execute the same document as the will of both of them. It is often said that joint wills are lawful but not usually appropriate. The joint will operates as the separate will of

each testator, and either (or any) of the testators may revoke or vary the joint will so far as it applies to them. It does not matter whether the other person is still alive or whether they consent.

According to Caroline Sawyer and Miriam Spero in their work ***Succession, Wills and Probate*** (Third Edition, 2015), joint wills are rare in practice and useful only insofar as they can effectively exercise a power given to two persons jointly to appoint by will.

In fact there is a clear distinction made between these two types of wills in *Halsbury's Laws of England* (the section entitled Wills and Intestacy [Vol 102-103] 2016). Whilst paragraph 1 of Volume 102 deals with joint wills, mutual wills are discussed in paragraph 2. The discussion therein goes as follows.

> *"A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, and disposing either of their separate properties[1] or of their joint property.[2] It is not, however, recognised in English law as a single will.[3] It is in effect two or more wills, and it operates on the death of each testator as his will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own will and on the death of the survivor, if no fresh will has been made, it is admitted to probate as the disposition of the property of the survivor.[4] Joint wills are now rarely, if ever, made."*

Paragraph 2 of Volume 102 of *Halsbury's Laws of England* discusses mutual wills.

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[1] *Re Piazzi-Smyth* [1898] P 7; *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190; *Re Hack* (1930) 169 LT Jo 285; *Re O'Connor* [1942] 1 All ER 546. In *Re Stracey* (1855) Dea & Sw 6, a joint will made by husband and wife operated as an exercise of the wife's power of appointment.

[2] *Re Raine* (1858) 1 Sw & Tr 144; *Re Lovegrove* (1862) 2 Sw & Tr 453. A dictum by Lord Mansfield in *Earl of Darlington v Pulteney* (1775) 1 Cowp 260 at 268, that there could not be a joint will, cannot be supported. A joint power of appointment by will may be exercised by a joint will and becomes effective on the death of the survivor, provided that at that time the will remains unaltered: *Re Duddell, Roundway v Roundway* [1932] 1 Ch 585.

[3] *Hobson v Blackburn and Blackburn* (1822) 1 Add 274.

[4] *Re Duddell, Roundway v Roundway* [1932] 1 Ch 585. See also *Re Stracey* (1855) Dea & Sw 6; *Re Lovegrove* (1862) 2 Sw & Tr 453; *Re Miskelly* (1869) IR 4 Eq 62; *Re Fletcher* (1883) 11 LR Ir 359 (where there was a separate will following and recognising a joint will); *Re Crofton* (1897) 13 TLR 374 (where there was a joint codicil to separate wills); *Re Piazzi-Smyth* [1898] P 7; *Re Heys, Walker v Gaskill* [1914] P 192 at 196.

"Wills are mutual when the testators confer on each other reciprocal benefits, which may be absolute benefits in each other's property[5]*, or life interests with the same ultimate disposition of each estate on the death of the survivor*[6]*. Apparently, a mutual will in the strict sense of the term is a joint will, but, where by agreement or arrangement similar provisions are made by separate wills, these are also conveniently known as mutual wills. Wills which by agreement confer benefit on persons other than the testators, without the testators conferring benefits on each other, can also be mutual wills*[7]*. Where there is an agreement not to revoke mutual wills and one party dies having stood by the agreement, a survivor is bound by it.*[8]"

The above discussion was necessitated because there was a misdescription by the draftsman of the will made by Irene Somawathie Pandithasekera and Don Charles Pandithasekera as their joint will and from the foregoing it is clear that such misdescription does not detract from the fact that it was in fact a mutual will which conferred reciprocal benefits on each other. One of the benefits was the passage of dominium of Irene's property to her husband Don Charles Pandithasekera upon her death and he could deal with it as his own. He did exercise the benefit by selling one such property *qua* owner and made a deposit of the proceeds of sale in a joint account but named the 1st Defendant as the other joint account holder. In fact both of them opened the fixed deposit account on 06.03.1996.

The doctrine of mutual wills is an equitable doctrine and the creation of the Court of Chancery. So in a nutshell, in a mutual will, the testators-as is often the case, the wife

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[5]*Stone v Hoskins* [1905] P 194. There may, however, be alternative provisions in case of lapse: *Re Oldham, Hadwen v Myles* [1925] Ch 75. See also *Re Heys, Walker v Gaskill* [1914] P 192.

[6]*Gray v Perpetual Trustee Co Ltd* [1928] AC 391, PC; *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190; *Re Green, Lindner v Green* [1951] Ch 148, [1950] 2 All ER 913.

[7]*Re Dale, Proctor v Dale* [1994] Ch 31, [1993] 4 All ER 129. See also *Olins v Walters* [2007] EWHC 3060 (Ch), [2008] WTLR 339, [2007] All ER (D) 291 (Dec); affd [2008] EWCA Civ 782, [2008] Ch 212, [2008] All ER (D) 58 (Jul).

[8]See *Olins v Walters* [2007] EWHC 3060, (Ch), [2008] WTLR 339, [2007] All ER (D) 291 (Dec), affd [2008] EWCA Civ 782, [2008] Ch 212, [2008] All ER (D) 58 (Jul). See also *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch), [2008] Ch 395, [2007] 4 All ER 81 (where the survivor of two people who made mutual wills, and his personal representative, were 'trustees' for the purposes of Judicial Trustees Act 1896 s 1, and a person entitled to enforce the trust arising under the will of the first to die was a 'beneficiary', for those purposes); and *Fry v Densham-Smith* [2010] EWCA Civ 1410, [2011] WTLR 387, [2010] All ER (D) 136 (Dec) (finding of existence of mutual wills agreement upheld on appeal).

and husband, each leave their property, usually, to the other, on the condition that the second to die will necessarily then leave all their estate-including that of the first to die-to an agreed third party, for example, their child.[9] In the instant appeal it would appear that the mutual testators were issueless and left the remainder of their undisposed property, upon the death of the second to die, to their nieces namely the Plaintiffs.

As I have made the observation, the above mutual will executed by Pandithasekera admits of the following conclusions deducible from its covenants. Since it was the wife who was the first to die, she agreed with her surviving husband that he would inherit her movable and immovable property upon her death. He was conferred with the absolute discretion to deal with her property as he pleased -see the 3rd covenant in the will set out above. It is this covenant that empowered Pandithasekera to dispose of her property as his property and open a joint account with the proceeds of sale. Pandithasekera became the owner of the properties of his wife upon her demise, disposed of one such property and deposited the proceeds of sale in a joint account with the 1st Defendant-Respondent.

In fact parties seem to have been cognizant of these primary facts when they made a formal admission at the trial that Don Charles Pandithasekera became the sole owner of all properties belonging to his wife Irene Somawathie Pandithasekera-see admission 5 recorded on 21.04.1998. This admission is in accord with the terms of the mutual will and as I turn to the trial, I have to point out that the respective parties in the case did not adduce any evidence in the court *a quo* about the factual matrix of the case, with the exception of a bank officer who was led by the Plaintiffs to establish the opening of the joint account and other relevant terms of the banker customer relationship.

[9] See this explanation in *Succession, Wills and Probate* by Caroline Sawyer and Miriam Spero, 3rd Edition, 2015 at page 106.

The Issue before Court

The terse and sparse issues on either side quite rightly captured the question for resolution-who is entitled to the money in the joint account upon the demise of one of the joint account holders? The Plaintiffs claimed that the money in the joint account must inure to their benefit by virtue of the covenants in the mutual will but the 1st Defendant asserted that as a joint account holder the balance in the account should accrue to him. The source of the claim of the Plaintiffs is traceable to the last will. They assert that the deposit of Rs.1,000,000/- (a sum of Rs. 1 million) which flowed from the proceeds of sale of a land left to the uncle by the aunt should form part of the estate of Mr. Pandithasekera when he passed away. If the sum of Rs.1 million lying to the credit of the joint account results to the estate of Pandithasekera, then the money must accrue to them by virtue of the mutual last will. The mutual will undoubtedly made the Plaintiffs the owners of the remainder of the property of their uncle and aunt. That remainder, according to the Plaintiffs, included the money in the joint fixed deposit. The title to the money did not pass to the 1st Defendant at all though he was one of the joint account holders. This was the case of the Plaintiffs.

On the other hand, the 1st Defendant relied on a condition attached to the account namely condition No.5 which clearly stated that in the event of death of any joint holder the survivor/survivors will be entitled to all rights of the deceased in the joint deposit. It is on account of this condition (**the survivorship clause** as it would be called) the 1st Defendant made out his claim for the money.

The only witness called by the Plaintiffs-one Hema Ranaweera who was serving as a bank officer of the National Savings Bank in Galle was examined by both counsel for the parties on their respective cases. The Counsel for the Plaintiffs raised an issue - Issue No.9 which engaged the question of nomination which is provided for in the specific Act-the National Savings Bank Act, No.30 of 1971 (**NSB Act**). Both the Civil Procedure Code (CPC) and the National Savings Bank Act, No.30 of 1971 provide for *nominations* of beneficiaries to balances lying in Bank accounts among other things.

It is relevant to note that there was no *nomination* made by Pandithasekera as to whom the money should go upon his death. Accordingly the Issue No.9 raised on behalf of the Plaintiffs was to the effect that since Pandithasekera had not nominated the 1st Defendant to succeed to the money in the joint account, the 1st Defendant could not become the owner of the money in the joint account and therefore upon the death of Pandithasekera money in the joint account must pass to the estate of Pandithasekera. If this issue is answered in favor of the Plaintiffs, it goes without saying that whatever forms the estate would belong to the Plaintiffs by virtue of the last will which contains the covenant eventuating in that result. The relevant covenant goes as follows:

> *"Whilst reiterating the bequests made earlier and not in any way interfering* ***with the absolute discretion given to the survivor of us to deal with such property*** *during his/her life-time it is our wish and desire such property should devolve on:-*
>
> *1) MRS. DANTIKA SIRIWARDENE nee DANTIKA ABEYWARDENE WICKREMASINGHE of Weligama*
>
> *and*
>
> *2) MRS. CHINTHANIKA SENEVIRATNE nee ABEYWARDENE WIKREMASINGHE of Puhuwella, our beloved nieces in equal shares, but as stated earlier this bequest will only operate at the discretion of the survivor of us and only in the event of the survivor's death taking place without any bequests being made during the life-time of the survivor of us."*

Nomination of a Beneficiary to Bank Accounts

The absence of any nomination to this particular joint account figured both before the District Court and this Court, because it was placed as an issue before the Trial Judge.

Nomination of a beneficiary has become a norm today in the case of balances lying to the credit of an account holder and in fact it is often described as an alternative mode of inheritance. This concept found its way into Chapter XXXVIII of the Civil Procedure Code (CPC), which deals with testamentary actions and the pertinent

Section 544 was amended by Acts, No.34 of 2000, No.20 of 2002 and No.4 of 2005. The pith and substance of the amendments is to facilitate the nomination of a person by a deceased nominator, to become entitled to the monies, shares, movables and insurance policies of the nominator upon the death of the nominator. An interesting provision is Section 544(2) of the CPC which declares that a nomination under Section 544(1) of the CPC supersedes the terms of a last will executed by the nominator. However, as for this joint account at the National Savings Bank, the relevant provision for making a nomination is Section 44 of the National Savings Bank Act, No.30 of 1971.

An argument was thus mounted by the learned President's Counsel for the Plaintiff-Appellants, as was done by their Senior Counsel in the District Court of Galle, that since Don Charles Pandithasekera had not nominated his joint account holder-the 1st Defendant as the nominee to receive the funds in the joint account upon his demise, the terms of the last will would prevail and the money should revert to the estate of Pandithasekera and so the bank must disburse the money to the Plaintiffs who are the ultimate owners of the remainder of the joint estate of Pandithasekera.

Condition on the reverse of the application to open the Joint Account

What was pivotal to the decision of the learned District Judge in this case is Condition No.5 attached to the joint account namely *in the event of death of any joint holder the survivor/survivors will be entitled to all rights of the deceased in the joint deposit.* Because of this condition, money would belong to the 1st Defendant. Having thus concluded, the learned District Judge dismissed the case of the Plaintiffs.

As I said before, both in the District Court and before this Court, an argument, attractive as it was, was mounted on behalf of the Plaintiffs that failure to nominate Sunny de Alwis-the 1st Defendant on the part of Pandithasekera in terms of Section 44 of the NSB Act would render the deposit (Rs. 1 million) chargeable with the estate of Pandithasekera and the 1st Defendant would thus have no *seisin* of the money in the joint account. This has been quite strongly urged before me.

Implicit in this argument is that nomination in terms of Section 44 of the NSB Act would alone confer title to the money on the 1st Defendant. Absent nomination, in terms of this provision, the money in the joint account will return to the estate and the mutual will would vest the Plaintiffs with title to the money. The statute alone would govern the relationship between National Savings Bank and the joint account holders and there is no scope for conditions on the reverse of the application to open the joint account to apply. In other words six conditions that appear on the reverse of the application signed by both Pandithasekera and Sunny de Alwis are internal rules imposed by banks and they have no application. This was the contention raised on behalf of the Plaintiffs-Appellants, whilst on the contrary Mr. Champika Ladduwahetty quite strenuously contended that Condition No.5 to the account which I have already alluded to above must prevail. He argued that the money in the joint account, after the death of Pandithasekera, was the sole property of the 1st Defendant because of Condition No.5.

Let me set out *in extenso* Section 44 of the National Savings Bank Act (hereinafter known as "the NSB Act") which deals with nominations.

> *"Any person over sixteen years of age who has a deposit or savings account* ***may nominate a person,*** *(hereinafter called a "nominee"), to whom the moneys lying to the credit of such first-mentioned person (hereinafter called "nominator") shall be paid upon his death and, if his death should occur while the account exists, the moneys shall be so paid subject to the provisions of this Act*.....**Section 44 (1)**
>
> *A nomination made under subsection (1) shall have effect upon the death of the nominator notwithstanding anything in his last will to the contrary* .....**Section 44 (2)**
>
> *Any nomination made under subsection (1) shall be deemed to be revoked by the death of the nominee in the lifetime of the nominator o by written notice of revocation signed by the nominator in the presence of a witness (who shall attest the signature of the nominator) or by any subsequent nomination made by the nominator*.....**Section 44 (3)**

The moneys lying in his deposit or savings account to the credit of the person who has made a nomination under subsection (1) shall, in the event of his death, ***be deemed not to form part of the estate or property of that person for the purpose of probate or administration proceedings*** *under the Civil Procedure Code, and the transfer of such property shall not be an offence under Section 547 of that Code*.....**Section 44 (4)**

No payment shall be made by the Bank to any nominee unless the nominee makes an application supported by evidence acceptable to the Bank, in respect of his identity.....**Section 44 (5)**

A payment made to a nominee of a deceased nominator shall be a complete discharge of the obligations of the Bank in respect of the moneys lying to the credit of such nominator.....**Section 44 (6)"**

In fact the aforesaid provisions are substantially mirrored in Section 544 of the Civil Procedure Code-the general enactment with its subsequent amendments passed from time to time to Section 544, which add to the range of choses in action over which nomination could be made.

It has to be recalled that Issue No.9 engaged Section 44(4) of the NSB Act namely if there is no nomination, the deposit of Rs.1 million will form part of the remainder of the estate of Pandithasekera. This issue has been answered against the Plaintiffs giving rise to the conclusion that the money in the joint account belongs to the 1st Defendant-joint account holder. The learned District Judge has relied exclusively on Condition No.5 attached to the joint account.

An argument has been taken before me that whilst Section 44(2) of the NSB Act enables a testator to alter his last will by making a nomination, this is the only procedure that should have been employed by Pandithasekera to bequeath his deposit to the 1st Defendant. A mere condition in the mandate namely condition No.5 *-in the event of death of any joint holder the survivor/survivors will be entitled to all rights of the deceased in*

the joint deposit- cannot transfer title of the chose in action to the 1st Defendant. The resolution of this argument would dispose of the issue before me.

Issue of Banking Law

I would look upon the issue before me as a question engaging banking law and once Pandithasekera disposed of ***his property*** *(sic)* and deposited a sum of Rs.1,000,000 (Rs.1 million) in a fixed deposit with the 1st Defendant as a joint account holder, banking law would begin to take over the relationship between the parties.

It is worth bearing in mind Section 3 of the Civil Law Ordinance No.5 of 1852 which enacts:

> *"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of banks and banking, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted."*

So if a question of banking law in respect of banks and banking arises before this Court at the present time, one has to look to the English law which is administered at the corresponding period in a like case, unless of course provision has been made in a domestic enactment on the same issue. The issue in this case is who succeeds to the money in the joint account when one of the joint account holders who is the sole contributor to the deposit has passed away. No doubt there is a domestic enactment - Section 44 of the National Savings Bank Act that provides for a procedure to nominate a beneficiary but I hasten to point out that this is not the only and exclusive method for choosing a beneficiary to one's joint account, particularly in a situation where the sole contributor to the deposit is just one joint account holder like Pandithasekera. Pandithasekera's right to nominate a beneficiary in terms of Section 44 of the NSB Act is only discretionary as Section 44(1) of the NSB Act quite clearly declares-"*Any person over sixteen years of age who has a deposit or savings account* ***may nominate a person*****.....**".

It is not mandatory that Pandithasekera should have exercised his right under Section 44 of the NSB Act to constitute the 1st Defendant as a beneficiary to receive the sum of Rs.1 million which he alone paid in. If banking law permits him to make a devolution or provides for an alternative mode of transfer of title to the money in the joint account, it is not inconsistent with the domestic legislation to recognize such alternative modes of devolution of the joint account balance as **the principle of survivorship** which figures in this case. It has to be recognized that statutory law is not the only source of banking law in this country.

As Ungoed-Thomas J. stated quite pertinently in ***Selangor United Rubber Estates v. Cradock (No 3)*** [1968] 1 WLR 1555 at 1607:

> *"Banking law is not a separate body of law, though, like innumerable other activities, it has statutory provisions dealing exclusively with it, and, being a distinctive and important activity, textbooks dealing separately with it. Those aspects of law with which we are at present concerned are aspects of the general law of contract applicable to banking. The principles of that law of contract applicable to banking are the principles of the general law of contract."*[10]

Apart from many other sources which feed into a banker-customer relationship such as tort, equity and trust and personal laws, having regard to the facts and circumstances of the particular banker-customer relationship, the law of contracts also plays a significant role in the relationship between a customer and his bank and when Pandithasekera and Sunny de Alwis opened the joint account on 06.03.1993 at the National Savings Bank, a contractual nexus of creditor and debtor was established between them and the bank and the Privy Council explained the relationship in the well known Hong Kong appeal case of ***Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd*** (1986) AC 80:

[10] See an interesting article by Ross Cranston "Understanding Banking Law" (1988) LMCLQ 360.

There is a debt (a chose in action) which is created when a bank account is opened and the deposit by the customer is owed to the customer by the bank, payable on demand-for comparable dicta on the nature of the customary banker-customer relationship see seminal cases such as ***Foley v. Hill*** (1848) 2 HLC 28 (HL) and ***Joachimson v. Swiss Bank Corporation*** (1921) 3 KB 110 (CA). Then the question arises what happens when a joint account is opened?

There is considerable authority for the view that Pandithasekera and Sunny de Alwis jointly held the legal title to the chose in action-see the Australian case of ***Russell v. Scott*** (1936) 55 C.L.R 440; ***Fadden v. Deputy Federal Commissioner of Taxation*** (1943) 68 C.L.R 76; ***Croton v. R.*** (1967) 41 A.L.J.R.289 (HCA); ***McEvoy v. The Belfast Banking Company*** (1935) A.C.24; ***Hirschorn v. Evans (Barclays Bank Ltd, Garnishee)*** (1938) 3 All E.R.491, 495; In fact in ***Hirschorn v. Evans*** *(supra)*, the English Court of Appeal held that the funds in the joint account are owned by both account holders jointly and the funds cannot be seized to satisfy a debt owed by one of them individually. This was a case where a husband and wife maintained a joint account, but the garnishee order was only against the husband. In ***Hirschorn*** the joint account was a cheque account where **either** the husband **or** wife could draw a cheque and make a demand on the chose in action.

Operating Instructions -Either/or

The appeal before me involves a fixed deposit account but withdrawals could be made **either** by Pandithasekera **or** Sunny de Alwis-the 1st Defendant. The commonality between the case of ***Hirschorn*** and the appeal before me is that both were joint accounts where the mandate under which the joint account holders operated the accounts provided for the respective banks to act on the sole signature of either account holder-vide the joint application made by both Pandithasekera and Sunny de Alwis where the operating instruction was to permit withdrawals by either party. This provides an item of evidence for me to conclude that Sunny de Alwis was not a mere volunteer to the account but had full control of the balances on his own. This is a point missed by the learned District Judge. The Courts have also posed a

question whether the funds in a joint account is held by the surviving account holder for the benefit of the estate of the deceased account holder.

This question was addressed by the High Court of Australia in ***Russell v. Scott*** (1936) 55 CLR 440. In this case an aunt opened a joint account with her nephew. She supplied all of the funds for the account and during her lifetime the account was used solely for her support.

When the account was opened, the aunt had told the nephew and others that the balance remaining in the account at her death would belong to him.

The High Court of Australia found that the aunt intended the nephew to take beneficially whatever remained in the account at the date of her death.

The High Court held that the aunt had, during her lifetime, vested the legal right to the debt in the nephew including the legal right to take by survivorship on her death. Since however, she had provided all of the funds for the account, the Court held that there arose a presumption of resulting trust in her favour. The real question was whether the presumption had been rebutted.

The High Court held that, in relation to the balance of the account at her death, the presumption of resulting trust was rebutted and that, upon the aunt's death, the principle of survivorship interest in the account passed to the nephew.

Dixon and Evatt JJ, at 451, succinctly dealt with this issue thus:-

> *"The right at law to the balance standing at the credit of the account on the death of the aunt was thus vested in the nephew. The claim that it forms part of her estate must depend upon equity. It must depend upon the existence of an equitable obligation making him a trustee for the estate. What makes him a trustee of the legal right which survives to him? It is true a presumption that he is a trustee is raised by the fact of his aunt's supplying the money that gave the legal right a value. As the relationship between them was not such as to raise a presumption of advancement, prima facie there is a resulting trust. But that is a mere question of onus of proof. The presumption of resulting trust does no more than call for proof of an*

intention to confer beneficial ownership; and in the present case satisfactory proof is forthcoming that one purpose of the transaction was to confer upon the nephew the beneficial owner ship of the sum standing at the credit of the account when the aunt died....

Doubtless a trustee [the nephew] was during her lifetime, but the resulting trust upon which he held did not extend further than the donor intended; it did not exhaust the entire legal interest in every contingency. In the contingency of his surviving the donor and of the account then containing money, his legal interest was allowed to take effect unfettered by a trust. In respect of his jus accrescendi his conscience could not be bound. For the resulting trust would be inconsistent with the true intention of that person upon whose presumed purpose it must depend."

The fact that one of the joint account holders did not contribute to, nor draw upon, the joint account does not prevent that person from having a beneficial interest. Nor does it matter that that person did not even know of the existence of the joint account: ***Standing v. Bowring*** (1885) 31 Ch. D 282; ***Russell v. Scott*** (1936) 55 CLR 440, at 453 (citing *Re Harrison* (1920) 90 L.J.Ch. 186). Nor does it matter that that person was never intended to use the account while the other account holder was alive prevent the former from succeeding to the whole account by survivorship.

In ***Russell v. Scott***, *ante*, Miss Russell, who was very wealthy, had a bank account at the Commonwealth Savings Bank. She and her nephew opened a joint account with the bank by the transfer of a large sum from her account. The joint account was kept in funds by payments from her investments, and it was used solely for her needs. The nephew withdrew money for this purpose with withdrawal slips signed by himself and his aunt. The nephew did not contribute to the account. When the account was opened Miss Russell told the nephew and others that any balance remaining in the account at her death would belong to the nephew, and it was found that she intended him to take whatever balance stood to the credit of the account at her death. The similarities between ***Russell v Scott*** and this case are striking. Whilst the aunt in ***Russell*** made a declaration that the money in the joint account upon her death would

belong to the nephew, the mandate in the joint bank account Condition No.5 declared "*in the event of death of any joint holder the survivor/survivors will be entitled to all rights of the deceased in the joint deposit*". Thus in my view that the presumption of a resulting trust in Mr. Pandithasekera's favour (and therefore of his estate) was rebutted, and that Hettiarachchige Sunny de Alwis-the 1st Defendant would become entitled to the balance on the joint account by survivorship.

The doctrine of survivorship evinced by Condition No.5 attached to the joint account rebuts the presumption of a resulting trust arising in favor of the estate of Pandithasekera. I would thus summarize my conclusions as to the right of Sunny de Alwis-the 1st Defendant to receive the funds outstanding in the joint account.

1. The claim of the plaintiffs that the balance standing at the credit of the joint account on the death of Pandithasekera forms part of his estate must depend upon equity.
2. It must depend upon the existence of an equitable obligation making the 1st defendant (the surviving joint account holder) a trustee for the estate.
3. What makes him a trustee of the balance even though the legal title is in him? It is through a presumption of trust that is raised by the fact of Pandithasekera supplying the money that gave the legal right a value (Rs.1 million).
4. As the relationship between Mr. Pandithasekera and Sunny de Alwis was not such as to raise a presumption of advancement, *prima facie* there would arise a presumption of resulting trust.
5. In the appeal before me I find that satisfactory proof has been adduced that Pandithasekera intended to confer upon Sunny de Alwis the beneficial ownership of the sum standing at the credit of the account when he passed away. Opening the account with operating instructions "*Either of us could operate the account*" is emblematic of that intention. Moreover Condition No.5 attached to the account declares that the survivor takes the balance.

As I cited Dixon and Evatt JJ in ***Russell v. Scott (supra)***, *the right at law to the balance standing at the credit of the account on the death of one joint account holder* was vested in the surviving account holder Sunny de Alwis. As a legal right exists in him to the sum of money, what equity is there defeating the intention that he should enjoy the legal right beneficially? Both upon principle and law I answer, none. Both the legal right and the beneficial interest in the money standing at the credit of the joint account have vested in Sunny de Alwis-the 1st Defendant and thus I proceed to affirm the judgment of the learned District Judge of Galle dated 23.06.2000.

Accordingly I would dismiss the appeal of the Plaintiff-Appellants.

JUDGE OF THE COURT OF APPEAL