

Achi Thayar Ammal, since deceased, and others - - - *Appellants*

*v.*

Balkis Nachial - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS  
(SETTLEMENT OF SINGAPORE).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 16TH OCTOBER, 1930.

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*Present at the Hearing :*

VISCOUNT DUNEDIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD THANKERTON.]

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This is an appeal from a decision of the Court of Appeal of the Supreme Court of the Straits Settlement at Singapore, dated the 27th June, 1928, dismissing an appeal by the appellants from a decision of Deane J., as judge of first instance, dated the 4th February, 1928.

The subject matter of the suit arises out of the administration of the estate of Ahna Mohammed Hussein, who died on the 24th January, 1904, and under whose will the plaintiff-respondent, a daughter of the testator, was specific legatee of an undivided one-third share in six houses in Singapore. The executor of the will was a brother of the testator, Ahna Mohamed Tamby, who died in 1912. The first-named appellant was the widow of the executor and was the person to whom, as the result of a sale by public auction, the six houses were assigned by the executor in the year 1908, and the remaining appellants are assignees from her of three of the houses. Since the present appeal was taken the first-named appellant has died and no one has been substituted in her place as appellant.

The provisions of the will in favour of the respondent are contained in the codicil and are as follows :—

“ From the title deeds I have in my possession my said executors shall execute a transfer of the title deeds of six houses, viz., three houses, Nos. 237, 238 and 239, Victoria Street, and three houses, Nos. 62, 63 and 64, Sultan Road, to my three daughters, viz. : (1) Neina Mohamed Nachial ; (2) Jainab Gany, and (3) Balkis Nachial. . . . My executor shall after executing the transfer keep the title deeds with him for twenty (20) years and collect the rent of the said houses and add the same to the general fund. As described in my last will, my executor shall pay each of my heirs his or her expenses and after the lapse of twenty years he shall give the title deeds to the respective heirs.”

Accordingly, the respondent was not entitled in possession to her specific legacy of a one-third share in the six houses until 24th January, 1924, being twenty years after the testator's death.

The six houses which were the subject of the specific legacy were sold by the executor on the 19th May, 1908, by public auction and were bought by Abdul Kader Marican, admittedly now on behalf of the first appellant. The six conveyances of the houses, all dated the 22nd June, 1908, by the executor in her favour, proceeded on the narrative of a sub-purchase by her from Abdul Kader Marican, and omitted to design her as the wife of the assignor. Prior to the present suit the first appellant had assigned without consideration the three houses in Sultan Road—now Bussorah Street—on 3rd April, 1923, one to each of the remaining three appellants, and it is now admitted that subsequently to the institution of the suit—on the 24th January, 1927—the first appellant assigned without consideration the three houses in Victoria Street to her daughter, Hassan Oosain Bewi, who is not a party to the suit.

The main questions in the case are, firstly, whether the assignment as on sale by the executor to the first appellant of leasehold subjects specifically bequeathed and the subsequent assignments by the latter without consideration can be upheld against the specific legatee on the ground that the sale was in due course of administration, in respect that the executor was entitled to be indemnified against liabilities properly incurred on behalf of the estate, and, secondly, if the sale was invalid, whether the appellants were entitled to repayment of the purchase price, as a condition of the sale being set aside. The circumstances which led to the sale and the circumstances of the sale itself are fully dealt with by the learned Judges in the Courts below. Both Courts have come to the conclusion that at the date of the sale the executor had not incurred liabilities on behalf of the estate in respect of which he was entitled to an indemnity out of the assets of the estate, but that the liabilities were incurred in carrying on a business in breach of his duty as executor, and consequently he remained personally liable for them without any right to indemnity. This question is one of fact, and their Lordships, in accordance with their practice, find no reason to disturb these concurrent findings. It follows that the assignments of the 22nd June, 1908, were not valid.

The appellants maintain, in the second place, that, although the executor had no power of sale and the assignments are invalid, the first appellant bought the property for value without notice of the breach of trust and is entitled to repayment of the purchase price on the assignments being set aside. The Trial Judge rejected this contention on three alternative grounds, viz. :— (a) that the first appellant had notice of the breach of trust ; (b) that the sale, being by a trustee to his wife, was invalid *ex debito justitiæ*, and (c) that the sale was not really a sale to the first appellant, but was in truth a sale by the executor to himself and therefore void.

The learned Judges of the Court of Appeal agreed with the first ground of the Trial Judge and do not appear to have dealt with the third ground, but they held that the second ground was stated too absolutely and that a sale by a trustee to his wife only raised a strong presumption against the validity of the sale, which might be rebutted by evidence of the independent action of the wife. The learned Acting Chief Justice held that the presumption had not been rebutted in this case, but Thorne J. expressed no opinion on this point.

Their Lordships agree with the statement of the law as to a sale by a trustee to his wife as laid down by the Court of Appeal in this case and also as laid down in the Scottish case of *Burrell v. Burrell*, 1915 S.C. 333, referred to in the Court of Appeal. In the latter case Lord Mackenzie says :—

“ The category under which it apparently falls is the category which is referred to by Lord Justice Cottenham in *Ferraby v. Hobson* (2 Phillips, 255, at p. 261), in terms to which every Court must subscribe : ‘ Trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust ; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove.’ Therefore I venture to remark that in all cases of this class the Court will seek to be certain, by vigilant scrutiny, of the true nature of such a transaction ; because one can readily see that the close relationship between husband and wife may, unless the nature of the transaction is explained, give rise to the not unnatural inference that the husband was truly the party intervening in the case, and that not without benefit to himself.”

The facts of that case are summarised by Lord Dundas (at p. 337) as follows :—

“ I think it is clear enough upon the proof in each case that there was no bargaining of any sort between the wife and the trustees ; that the wife made her purchase on her own initiative, and neither at the instigation, nor under the advice of her husband ; that both ladies were capable business women accustomed to manage their own ample means ; that payment was made in each case out of the wife’s separate estate ; and that the price was an adequate and even a full one. It further appears that the transfers bore *ex facie* the exclusion of the husband’s *jus mariti* and right of administration.”

These facts are in strong contrast to the facts in the present case.

The first appellant, the ostensible purchaser of the specifically bequeathed subjects, was the wife of the vendor, the executor ; she lived in India and had never been in Singapore ; she had granted a general power of attorney to Mohammed Kassim Marican to act for her on the 20th June, 1906, and on the 11th September, 1907, had granted a similar power of attorney to her husband with power to give notice to revoke the earlier power of attorney to Kassim Marican, though such intimation was not given until the 14th September, 1908, three months after the sale. The sale took place in Singapore on the 19th May, 1908, the property being knocked down to Abdul Kader Marican, who paid the deposit money. The only evidence available in the case is to the effect that Kassim Marican, Kader Marican and the executor were present at the sale, that Kader Marican acted on the instructions of Kassim Marican, and that the deposit money was handed by Kassim Marican to the executor, who handed it to Kader Marican to give to the auctioneer. Even this evidence is not regarded as reliable by the Trial Judge. The sale was made in order to provide a fund out of which to satisfy an unjustifiable claim by the husband. The circumstances all rather tend to increase the suspicion attaching to a sale by a trustee to his wife, and there is a marked absence of any evidence to rebut the legal presumption arising on such a sale by showing that the purchase was the independent action of the wife.

Their Lordships are therefore of opinion that it must be held that the executor was the true instigator of the purchase by his wife, and that knowledge of the executor's breach of trust in selling the property must be attributed to her, and equally to assignees from her without consideration.

It follows then that the respondent, as specific legatee, is entitled to be relieved against the sale of the specifically bequeathed property to the extent of her one-third share in the six houses already referred to, but the form of the relief to be granted requires reconsideration. The order of the 4th February, 1928, as varied by the order dated the 24th August, 1928, directed that the assignments should be set aside and cancelled so far as they purported to affect the share and interest of the respondent, and ordered an account of the rents and profits received by the defendants in respect of the houses without limit of date. In their Lordships' opinion, the order to set aside the assignments is inappropriate in the circumstances, and in its place there should be a declaration that the assignees respectively hold the subjects of the assignments as to one-third share thereof in trust for the respondent, and, further, that the respondent, who sues only as specific legatee, has no interest in the rents and profits of the houses prior to the 24th January, 1924, at which date, on the expiry of twenty years from the testator's death, she first became entitled in possession to her specific bequest. Further, while the suit was pending, the first appellant, on the 24th January, 1927, assigned the three houses in Victoria Street

to her daughter, Hassan Oosain Bewi, who is not a party to the suit, and, since the present appeal was taken, the first appellant has died and her appeal has abated. Counsel for the appellants stated that he had the authority of Hassan Oosain Bewi to allow her name to be added as a defendant and appellant on condition that no costs should be asked for as against her, and this was agreed to. The respondent by her counsel also agreed to waive her rights as against the first appellant under the order of the 4th February, 1928, as varied in so far as that entitled her to an account for any period prior to the 24th January, 1924.

Their Lordships are of opinion that the order of the 4th February, 1928, as varied by the order of the 24th August, 1928, should be discharged save only in so far as it deals with costs, that the record should be amended by adding Hassan Oosain Bewi, wife of Ahna Moona Mohamed Ismail, as a defendant and appellant, and that it should be declared as follows:—

- (a) The appellant Ahna Moona Kader Oly stands possessed of No. 61, Bussorah Street, Singapore, as to one equal undivided third part thereof upon trust for the respondent ;
- (b) The appellant Ahna Moona Mohamed Syed Allapitchay stands possessed of No. 60, Bussorah Street as to one equal undivided third part thereof upon trust for the respondent ;
- (c) The appellant Naina Mohamed Nachial Binte Mohamed Hussain stands possessed of No. 62, Bussorah Street aforesaid as to one equal undivided third part thereof upon trust for the respondent, and
- (d) The appellant Hassan Oosain Bewi stands possessed of Nos. 237, 238 and 239, Victoria Street, Singapore, as to one equal undivided third part thereof respectively upon trust for the respondent.

Further, that the following accounts should be directed to be taken, viz.:—An account of the nett rents and profits (after making all proper deductions and allowances) received by—

- (a) The appellant Ahna Moona Kader Oly in respect of No. 61, Bussorah Street aforesaid from the 24th January, 1924, till the date of this order ;
- (b) The appellant Ahna Moona Mohamed Syed Allapitchay in respect of No. 60, Bussorah Street aforesaid for the like period ;
- (c) The appellant Naina Mohamed Nachial in respect of No. 62 Bussorah Street aforesaid for the like period ;
- (d) The appellant Hassan Oosain Bewi in respect of Nos. 237, 238 and 239, Victoria Street aforesaid from the 24th January, 1927, till the date of this order ; and
- (e) The late appellant Achi Thayer Ammal (in substitution for the account directed by the order of the 4th

February, 1928) or her legal personal representatives when constituted in respect of Nos. 237, 238 and 239, Victoria Street aforesaid from the 24th January, 1924, till the 24th January, 1927 ;

with liberty to the respondent to apply for payment of the amounts found due to her on taking the said accounts upon the footing of the foregoing declarations, and with general liberty to apply.

Their Lordships will humbly advise His Majesty that the appeal should be sustained to the effect of varying the order appealed against as above suggested.

The appellants (other than the new appellant) will pay the costs of the appeal.

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AND OTHERS

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DELIVERED BY LORD THANKERTON.

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