[PRIVY COUNCIL.]

1917.

Present: Lord Buckmaster, Lord Dunedin, Lord Parmoor, and Sir Walter Phillimore, Bart.

COSTA *et al.* *v.* SILVA *et al.*

D. C. Colombo, 35,701.

Executor purchasing property of testator in the name of his son—Sale set aside.

Where an executor being anxious to buy the estate of his testator bought it for himself in the name of his son, the sale was set aside.

THE facts are set out in the judgment.

February 19, 1917. Delivered by LORD BUCKMASTER:—

Two questions are involved in this appeal: the one as to whether the appellants are entitled to set aside a deed of conveyance, No. 5,118, dated June 14, 1902; and the other, which only arises if the first be affirmatively answered, what form the order granting such relief should assume. Neither question involves any intricate considerations of law, nor are the material facts capable of serious dispute.

The appellants are the five children of Philippa Moraes, and are together entitled in possession to one-fourth share of certain real estate, which was the subject of a general gift contained in the joint will of one Simon Moraes and his wife, Justina Pereira. This real estate, in turn, consisted of certain fractional interests in five different properties acquired by Simon Moraes at various dates between 1874 and 1885. The joint will was dated July 7, 1894; by it the first and second respondents were appointed executors, and under its terms the appellants became entitled to half of a half of these fractional interests in reversion expectant on the death of their mother, Philippa Moraes.

Simon Moraes died on December 23, 1897; his wife survived him, and died on July 28, 1908; and Philippa Moraes died on February 18, 1907.

It is uncontradicted upon the evidence that in 1902 the second respondent was anxious to buy the property in question for himself; there is no reason to impute to him improper or dishonest motives for this desire. He was associated with the family, and there may have been many good and fair reasons which prompted his wish. He accordingly inquired of Mr. E. W. Pereira, a proctor of the Supreme Court, as to whether his proposal could be properly accepted, and was clearly told that it could not. The direct

1917.

LORD BUCKMASTER

Costa v. Silva

transfer to himself was therefore abandoned, but on June 14, 1902, the conveyance in dispute was executed, transferring the whole of the interests in the real property in question to his son, the third respondent to this appeal, for the price of Rs. 5,500. No purchase money was provided by the son on this transaction, the whole amount being raised by a mortgage of the purchased estate and of certain other property belonging to the second respondent, by whom this mortgage was subsequently redeemed.

In 1909 the appellants commenced proceedings under the testamentary jurisdiction of the District Court of Colombo, and, as they alleged that the sale in question had been made at an under-value, an issue was directed to ascertain the facts.

This issue was tried with witnesses, and on January 11, 1912, the District Judge held that the allegation as to under-value had been established, and that the executor was himself the real purchaser of the estate. The third respondent, the son of the executor, was no party to these proceedings, and, as the property stood in his name, separate proceedings were necessary to set aside the deed.

The action out of which this appeal has arisen was accordingly begun on January 27, 1913.

Between the date of the judgment of the District Judge and the commencement of this suit, namely, on December 14, 1912, the second and third respondents executed a mortgage of the property to the fourth and fifth respondents, who were consequently made defendants; but as a caveat had been registered against the title on November 23, 1912, their position does not differ from that of their mortgagors. The case was heard before the District Judge, who on December 10, 1914, gave judgment in favour of the plaintiffs setting aside the deed. On appeal to the Supreme Court this judgment was reversed, and from their judgment the present appeal has been brought.

In their Lordships' opinion much of the confusion in this case has been caused by the exaggerated importance attached in all the Courts to the question of the true value of the property. The District Judge decided, after hearing and seeing the witnesses, that the price of Rs. 5,500 was grossly inadequate. The learned Chief Justice and Ennis J. in the Supreme Court disagreed with this conclusion, and devoted nearly the whole of their judgments to the examination of this point. The question of value might, no doubt, in the absence of other evidence, be of great weight in determining the true character of the impeached transaction, but in the present case there is other evidence of a most striking and convincing nature. The learned District Judge found the following facts:—

(*a*) That the alleged purchaser, the third respondent, had no money wherewith to buy the property.

(*b*) That the repayment of the mortgage, by which the price was found, was not made by him.

(c) That the deeds after redemption remained in the custody of the executor.

(d) That the executor cultivated the lands and took the crops.

(e) That the third respondent never had anything to do with the lands.

And, finally, that he told falsehoods, deliberate and designed, and was wholly unworthy of credence.

In addition to these findings, there must be mentioned the fact that the executor, whose action was challenged, never ventured to give evidence. It is true that he was old and was said to be in ill health, but he attended the Court throughout the trial. No application was made to take his evidence on commission, and no medical evidence tendered to show he was incapable of giving testimony. From these findings, and in these circumstances, the District Judge concluded that the third respondent was nothing but the nominee of his father, and this conclusion—which, whether the value be sufficient or inadequate, completely establishes the plaintiffs' case—is dismissed in two sentences of the Supreme Court: the Chief Justice saying that the finding of the purchase money by the executor and his own control of the property after the sale do not, in the circumstances, conclusively show that the third defendant is merely his nominee; and Ennis J. adds: "I am unable to see any act of the second defendant that cannot be attributed to a parental regard for a son's welfare."

Their Lordships cannot think that the Supreme Court was right in taking this view. Had the third respondent been a stranger to the executor the case would not admit of argument, for it would then be nothing but the case of an executor who, being anxious to buy the estate of his testator, bought it for himself in the name of a nominee instead of his own—a device so transparent would not deserve a moment's attention. How is the matter altered by the fact that the nominee is his son? Mr. Lawrence has urged that this introduces the principle that such a purchase is, in fact, a gift by way of advancement from the father to the son. But a gift of what? The property he could not give, because he could not buy it; the purchase money he never attempted to give. The ordinary rule as to the presumption arising from a purchase of a father in his son's name is only of general application in a competition between the father and the son and those claiming under them or in virtue of their rights, and then it is only relevant where the purchase has, in fact, been made by the father and not by the son, and where, as in this case, the father could not purchase, the rule could not apply, unless and until the transaction had become validated by the assent of all the beneficiaries.

It is urged against the appellants that the estate has recently increased in value, and that it is due to this fact that these proceedings have been instituted. If this argument could have been

1917.

LORD BUCKMASTER

Costa v. Silva

carried to the point of establishing that the appellants with knowledge of their rights had waited until they knew that the estate had improved, and had then asserted a claim which before they were not prepared to make, it would be a serious answer to the appellants' case. This, indeed, would be part of the defence of laches, and it appears greatly to have influenced the judgment of Ennis J.; but for this defence it is essential to prove knowledge on the part of the person who has lain by, and no such knowledge is shown in the present case before the decree was made in the testamentary proceedings. In all cases of avoidable transactions a party entitled either to affirm or to disaffirm the matter in dispute is sure to regulate his action by the consideration of which course will in the end prove to be most profitable. If the property has fallen in value, no doubt the appellants would have been content, and because it has risen, they seek to enjoy the gain. But it is precisely this right that is given to a person in their position, and it is this risk that is run by any person who enters into a transaction subject to such defect.

The appellants, therefore, are, in their Lordships' opinion, entitled to relief, and it becomes necessary to determine in what form that relief shall be granted.

The decree of the District Court declared that the deed of June 14, 1902, was null and void, and ordered that the property which it affected should be declared to form part of the estate of Simon Moraes and his wife, and as a consequential order directed that the mortgage of December 14, 1912, was not entitled to registration. Counsel for the respondents have urged that in any event this order is too wide; they assert that the present appellants are the only beneficiaries who have challenged the transaction; that the others must be assumed to have knowledge of all material facts, and to have elected to adopt instead of to repudiate the deed. In these circumstances, they contend that it is only necessary to declare the deed void so far as it affects the interest of the appellants.

The argument appears to be fair, but it is impossible to give it effect without interfering with the full rights of the appellants in the administration of the estate. If the property in question were required to be sold for the payment of the debts, the appellants contend that they were entitled to have whatever benefit might arise from the estate being sold as a whole, and that, although this whole was of itself but a series of fractional interests, yet it was impossible to say that the same result would be reached by selling one-fourth of those fractions as would be arrived at were the whole sold and one-fourth taken of the proceeds.

This contention is, in their Lordships' opinion, well founded. The sale of the property is one that cannot be supported, and must consequently be set aside. The result of this order will be worked out in the testamentary proceedings that are still on foot. In those proceedings the executors would be entitled to credit for the money

that they have actually provided for payment of the debts, together with interest thereon at the current rate, from the day when those sums were paid. They will also be entitled to credit for all sums properly spent in improvement to the property, with interest on such sums at the same rate; while, on the other hand, they will be bound to account for the rents and profits. For the balance found due to them on this account they will be entitled to sell the whole of the estate, and they must then divide the balance of the proceeds among the beneficiaries according to their respective shares and interests.

Accordingly, their Lordships think that the decree of the District Court was perfectly right. This decree must be confirmed, and the judgment of the Supreme Court set aside. The respondents must pay the costs of the appeal to the Supreme Court and of this appeal; and their Lordships will humbly advise His Majesty accordingly.