

SINNATHURAY

v.

ATTIKEN

SUPREME COURT.

SHARVANANDA, C.J., TAMBIAH, J. AND L. H. DE ALWIS, J.

S.C. No 33/85. C.A. No. 923/75 (F).

D.C. COLOMBO No. 2780/ZL.

MAY 29, 1986, JULY 1, 1986, AUGUST 5, 1986 AND OCTOBER 21, 1986.

Last Will – Settled agreement in testamentary proceedings for probate – Is such agreement a lawful compromise which can be enforced? – Co-executors – Trust – Trust Ordinance, s. 54 – Purchase by trustee of trust property – Purchase by executor of property of estate – Trust for sale – Residuary estate – Duties of an executor.

In testamentary proceedings instituted by one of two executors named in a Last Will to prove the Last Will the dispute was settled and an agreement was entered into to sign a conveyance in favour of the other co-executor in respect of premises No. 3, Mile Post Avenue, Colombo 3.

When this agreement was sought to be enforced in a separate suit the co-executor who had agreed to sign the conveyance refused to do so alleging that by reason of fraud, mistake and misrepresentation, the agreement was invalid and the executor being in the position of a trustee could not purchase property belonging to the estate by an agreement with a co-executor. This was sought to be met by contending that the agreement was one between co-heirs acting in the capacity of residuary legatees and not between two co-executors.

Held—

Our law as regards executors and administrators is the English law. The rule of English law is that a trustee is absolutely disabled from purchasing trust property and this is embodied in s. 54 of our Trusts Ordinance.

Under our law a trustee and other persons who occupy fiduciary positions are absolutely prohibited from purchasing the trust property. This is an inflexible rule and is not founded on fraud on the part of the trustee. It is a logical consequence of the position which he occupies. This rule is independent of any questions of adequacy of price or unfairness or undue advantage. This disability derives from his status and position and not from his conduct in a particular case.

An executor occupies a fiduciary position. No executor can purchase property belonging to the estate that he is administering. He cannot be vendor and purchaser and there cannot be a conflict of duty and interest.

Purchase of trust property by a trustee from himself must be distinguished from purchase by a trustee of his beneficiary's interest which is voidable but liable to be set aside if there is any hint of an abuse of the trustee's position or of undue influence exercised by him over the cestui que trust.

The duties of an executor consist in (1) the recovery and collection of the assets of the deceased (2) payment of debts, estate duty and other testamentary expenses and finally (3) payment and distribution of the legacies in terms of the will.

"Residuary estate" means the assets which ultimately remain out of the estate after payment of the testator's debts, funeral and testamentary expenses and costs of the administration of the estate, the costs of the administration suit and after payment of the legacies.

In the instant case the plaintiff, while still retaining the character of executor and trustee, entered into the agreement to purchase the trust property; he did not purport to purchase the half share of the other residuary legatee.

The court will not exercise its extraordinary powers to compel specific performance where to do so would involve a breach of trust. The sale agreement which is sought to be enforced in this case infringes the rule that an executor cannot purchase property entrusted to him for sale. The plaintiff is not capable of contracting with his co-executor for the purchase of the property in suit and a court of equity cannot lend its aid to enforce such a contract.

Cases referred to:

- (1) *In Re Boles v. British Land Companies Contract* – [1902] 1 Ch. 244.
- (2) *Thomas v. Allen* – [1930] 1 Ch. 203.
- (3) *Wright v. Morgan* – [1926] AC 788.
- (4) *Ex parte James* – (1803) 8 Ves 337.
- (5) *Mariam Beevi v. Ruqqiah Umma* – (1955) 53 NLR 15, 17.
- (6) *Malliya v. Ariyaratne* – (1962) 65 NLR 145.
- (7) *Bennyfield v. Baxter* – (1886) 12 AC 167.
- (8) *Holder v. Holder* – [1968] 1 All ER 665, 677.
- (9) *Rei Harvey v. Lambert* – (1888) 58 LT 449.
- (10) *Coles v. Trecothick* – (1804) 9 Ves 234, 244.
- (11) *Ex parte Lacey* – (1802) 6 Ves 625.
- (12) *William v. Scott* – [1900] AC 499, 508.
- (13) *Parke v. Makenna* – (1874) LR 10 Ch. 96.

APPEAL from judgment of the Court of Appeal.

H. L. de Silva, P.C. with *Mahes Kanagasunderam, Chula de Silva, and S. Mahenthiran* for the plaintiff-appellant.

Dr. H. W. Jayewardene, Q.C. with *J. V. C. Nathanielsz and Miss T. Keenawinna* for respondent.

November 26, 1986.

SHARVANANDA, C.J.

By her Last Will dated 24.1.1964 the mother of the plaintiff-appellant and the defendant-respondent (hereinafter referred to as plaintiff and defendant respectively) appointed the plaintiff and defendant co-executors of her Last Will. The testator died on 18.3.1964. The defendant applied for probate. The plaintiff opposed the application and challenged the Last Will on the ground that it was not the act and deed of his deceased mother. On 19.5.66, the plaintiff and defendant settled their differences and entered into Agreement 'D1'. This document was tendered to court and the terms of settlement were recorded by court on 19.5.66 and the record was signed by both the plaintiff and the defendant. The terms of settlement are as follows:—

- (a) The respondent withdraws the objections to the petitioner's application for probate of the Last Will No. 1284 dated 24.1.64 of which probate is filed in court marked 'A' ;
- (b) Probate of Will No. 1284 be granted to the executors mentioned in the Will namely to Mrs. Agnes Margaret Sinnathuray Attiken and Edward Navaratnarajah Sinnathuray who are the petitioner and respondent respectively ;
- (c) The petitioner admits that the business known as the Commercial Tutory carried on at No. 46, Dematagoda Road, Colombo 9, does not form part of the estate of the deceased ;
- (d) It is further agreed that the respondent should purchase premises bearing assessment No. 3, Mile Post Avenue, Colombo 3, for Rs. 51,000 (Rupees Fifty One Thousand only) only and which said sum of Rs. 51,000 is to be utilised in paying off the debts due to the State Mortgage Bank on this property and the balance, if any, left to be applied in payment of Estate Duty and the legacies referred to in clause 5 of the Last Will ;
- (e) The petitioner further undertakes and agrees to sign the necessary conveyance in favour of the respondent in respect of the said premises No. 3, Mile Post Avenue, Colombo 3.

- (f) The respondent agrees and undertakes to pay to the petitioner during her lifetime a sum of Rs. 100 per mensem from date hereof;
- (g) All moneys brought into court on account of rents of the premises mentioned in the Will, subject to any claims by the Commissioner of Inland Revenue and Estate Duty, will be divided among the devisees of the said Will.

(The defendant and the plaintiff respectively are the petitioner and respondent referred to above).

The said Last Will, in terms of which the defendant and plaintiff were appointed joint co-executors, was admitted to probate.

The said Last Will provided inter alia for three specific devisees, namely—

- (a) Premises No. 3 1/1, Mile Post Avenue, Colpetty—to the plaintiff;
- (b) Premises No. 3A, Mile Post Avenue—to Manoharan Prins Sinnathuray, a son of the defendant.
- (c) Premises 3/1, Mile Post Avenue—to Manoharan Rajkumar Sinnathuray, another son of the defendant.

Clauses 5, 6 and 7 of the Last Will provided as follows:

Clause 5.—I direct and empower my executors if necessary to sell and convert into money No. 3, Mile Post Avenue, Colpetty depicted as lot Bx in plan No. 2647 dated 17th June 1963 made by S. Rajendra, Licensed Surveyor and out of the amount so realised pay the estate duty, the existing mortgage loans and all the other liabilities of my estate and thereafter pay by the sale money or alternative arrangement a sum of rupees five thousand (Rs. 5,000) to my brother Emmanuel Joseph Peiries Pulle a sum of rupees three thousand (Rs. 3,000) to my sister Mrs. V. T. Chellatamby a sum of rupees two thousand (Rs. 2,000) to my brother Anthony Philip Joachim Pulle a sum of rupees three thousand (Rs. 3,000) to George Attiken and remainder to be equally shared by Edward Navaratnarajah Sinnathuray and Agnes Margaret Sinnathuray Attiken.

Clause 6.—I devise and bequeath my entire business known as the Commercial Tutorry carried on at No. 46, Dematagoda Road, Maradana together with the entire equipment consisting of typewriters, furniture fittings and other effects to Edward Navaratnarajah Sinnathuray my brother Emmanuel Joseph Peiries Pulle and George Attiken equally provided that the said Emmanuel Joseph Peiries Pulle shall not sell or assign his share to any one other than the co-owners Edward Navaratnarajah Sinnathuray and George Attiken and on his death his share shall devolve on the said co-owners equally.

Clause 7.—I devise and bequeath my residuary estate both movable and immovable to Edward Navaratnarajah Sinnathuray and Agnes Margaret Sinnathuray Attiken in equal shares.

The plaintiff instituted this action on 13.03.1973 complaining that though he had complied with all the terms and conditions of the settlement dated 19.05.1966 marked "D1" and had requested the defendant to execute a conveyance of premises No. 3, Mile Post Avenue, Colpetty, for the agreed consideration, in terms of the said Agreement, the defendant had wrongfully and unlawfully failed and neglected to do so. He prayed inter alia, that the defendant be ordered and directed to execute a conveyance of the premises No. 3, Mile Post Avenue, Colombo 3.

By her answer dated 27.02.1974 the defendant challenged the validity of the said Agreement that was sought to be enforced and stated that no valid or enforceable contract was entered into between the parties. She said that the Agreement was invalid because she was induced to sign the record of the said date—

- (a) by a fraud practised on her by the plaintiff;
- (b) by mistake on her part, as to the nature and contents of the document she was signing;
- (c) by a misrepresentation made to her by the plaintiff and others in regard to the terms of the said alleged Agreement.

The principal question which arose for determination in the trial was whether the aforesaid Agreement was a lawful compromise which is capable of being enforced. The trial judge held in the negative and held that the plaintiff being an executor of the Last Will of the deceased was in the same position as a trustee and could not therefore

purchase any property belonging to the estate, by an agreement with a co-executor. He dismissed the plaintiff's action. On appeal to the Court of Appeal the judgment of the District Judge was affirmed. The plaintiff has now preferred this appeal to this court.

Counsel for the plaintiff-appellant has submitted that upon a proper construction of the Last Will it is beyond dispute that the plaintiff and defendant as joint executors were not obliged to sell the premises No. 3, Mile Post Avenue, Colpetty and could agree to make other arrangements for the payment of estate duty, the mortgage loan and the legacies referred to in clause 5 of the Last Will, instead of selling the property. In that event both plaintiff and defendant were entitled to half share of the property as the only persons entitled to the residuary estate, in terms of clause 7 of the Last Will and were free to dispose their interest in the property in any manner they chose as the legal owners and as heirs. It was also urged that under the Agreement the plaintiff undertook to pay Rs. 51,000 which sum was to be utilised for the payment of the estate duty, mortgage loan and the legacies and the discharge of the other liabilities of the estate and had also undertaken to make a payment of Rs. 100 per month to the defendant during her lifetime.

The basic contention of the senior counsel for the plaintiff is that the said agreement 'D1' was an agreement between two co-heirs, and not between two co-executors and that it was in the capacity of residuary legatees that the parties entered into the said agreement, for the sale of premises No. 3, Mile Post Avenue, Colpetty. Reliance was placed on the case of *In Re Boles v. British Land Companies Contract* (1) where it was held that apart from any circumstance of doubt or suspicion, there is no rule of court that a person, who has ceased for 12 years to be a trustee of an instrument which contains a trust for sale cannot become a purchaser of property that was subject to the trust. In that case Buckley, J., stated that—

"The principle that lies at the root of this matter is that a trustee for sale owes a duty to his cestuis que trust to do everything in his power for their benefit and it is therefore absolutely precluded from buying a trust property, irrespective of questions of undervalue or otherwise, because he may be thus induced to neglect his duty. Beyond that if he retires with a view to becoming a purchaser so as to put himself in a position to do what otherwise would be breach of trust, that would not do. But if he has retired and there is nothing to

show that at the time of the retirement there was any idea of a sale, and in fact there is no sale for 12 years after his retirement, is there anything to prevent him from becoming a purchaser? I think not."

The rule of English Law that a trustee is absolutely disabled from purchasing trust property is embodied in section 54 of our Trust Ordinance (Chap. 87). It provides that—

"No trustee whose duty it is to sell trust property, and no agent employed by such trustee for the purpose of the sale may, directly or indirectly, buy the same or any interest therein on his own account or as agent for a third person."

Thus under our law a trustee and other persons who occupy fiduciary positions are absolutely prohibited from purchasing the trust property. This is an inflexible rule and is not founded upon any question of fraud on the part of the trustee. It is a logical consequence of the position which he occupies. This rule is independent of any questions of inadequacy of price or unfairness or undue advantage. This disability derives from his status and position and not from his conduct in a particular case.

Clauson, J., in *Thomas v. Allen* (2) at 215 states the principle thus—

"The rule of universal application is that an executor and trustee having duties to discharge of a fiduciary nature towards the beneficiaries under the will... shall not be allowed to enter into any engagement in which he has or can have personal interest conflicting, or which possibly may conflict with the interest of those whom he is bound to protect."

"Equity will not allow a person who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest." *Wright v. Morgan* (3).

An executor occupies a fiduciary position. No executor can therefore purchase property belonging to the estate that he is administering. He is bound to do everything in his power, for the benefit of the estate and therefore is absolutely precluded from buying assets of the estate which he is administering by himself or with co-executor, irrespective of undervalue or otherwise.

The rule is a rule of general policy, to prevent the possibility of fraud and abuse.

In *Ex parte James* (4) Lord Eldon observed—

“This doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchaser is not permitted in any case, however honest the circumstances; the general interest of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.”

The strictness with which the rule is applied is well illustrated by the decision of the Privy Council in *Wright v. Morgan* (*supra*) (3). A testator left the residue of the estate comprising land and stock on it, on trust to sell and divide the proceeds amongst the widow, his sons and daughters. He appointed his widow and his sons ‘H’ & ‘D’ to be his executors in trust. There was a clause in the will postponing public sale until the property had been offered at valuation to ‘H’ and refused by him. After the testator’s death ‘D’ purchased ‘H’s share in the estate together with the option to purchase the trust estate. Thereafter ‘D’ resigned his trusteeship after agreeing to purchase the trust estate, but before completion of the sale. The Privy Council refused to allow this transaction to stand, as it violated the rule invalidating purchase of the trust property by a trustee.

Counsel for the appellant submitted that purchase of an estate by an executor is not absolutely void but it is only voidable, according to Roman Dutch Law. Our Law as regards executors and administrators, however is the English Law. The English concept of Executorship and Administratorship has been adopted into our law and it is too late in the day to go back to the Executor under the Roman Dutch Law. Vide *Mariam Beevi v. Ruqqiah Umma* (5) and *Malliya v. Ariyaratne* (6).

It was further submitted by President’s Counsel that the principle that an executor cannot purchase an asset of the estate from another executor without the permission of court does not apply where both the executors are heirs of the deceased, and one executor sells the asset bequeathed to him to the other executor; there he sells qua owner of the asset. He further urged that clause 5 of the will does not contain a direction or mandate to sell but that it imposes only a charge

and that it need not be sold when in the judgment of the executors it was not necessary to sell as funds could be found otherwise. Counsel for the defendant on the other hand submitted that clause 5 imposed on the executors a trust for sale and that legal title had been vested by clause 5 on the executors to enable them to carry out the trust for sale; the plaintiff and the defendant were trustees for sale and it was in discharge of that duty that they entered into the agreement to sell (P1): the plaintiff was purchasing trust property and not any part of the residuary estate that was free of the trust.

The principle underlying the law against purchase of trust property by a trustee is that a man who undertakes to act for another in any matter, cannot in the same matter act for himself. This rule applies in a strict form not only to trustees strictly so called; it applies to all who though differing in name are invested with the like fiduciary character, such as executors or administrators *Bennyfield v. Baxter* (7).

The principle of equity that a trustee may not purchase a part of the trust estate rests on two reasons—first that a man may not be both vendor and purchaser, secondly there must not be conflict of duties and interest. A purchase by a trustee of the trust property is voidable at the instance of any beneficiary under the trust—*Holder v. Holder* (8). However honest and fair the sale may be a 'cestui que trustee' has an absolute right to have the conveyance set aside within a reasonable time after he discovers the circumstances. It matters not whether the purchase by the trustee was for himself alone, as sole trustee or as some co-trustee. *Rei Harvey v. Lambert* (9); *Wright v. Morgan* (*supra*) (3).

Purchase of trust property by a trustee from himself must be distinguished from purchase by a trustee of his beneficiary's beneficial interest. Unlike the former, where the trustee is both buyer and seller the latter will not always be voidable. Certainly it will be watched by the court with the utmost diligence. *Coles v. Trecothick* (10) per Lord Eldon, L.C., and is liable to be set aside if there is any hint of an abuse of trust position or of undue influence exercised by him over the cestui que trust.

With regard to such purchase by trustees from themselves (as distinguished from purchase from their beneficiaries) the doctrine stands much more on principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted,

in any case, however honest the circumstances be, the general interest of justice requiring it to be destroyed in every instance; because no court is equal to the examination and ascertainment of the truth.

“The rule I take it to be this; not that a trustee cannot buy from his cestui que trust, but that he shall not buy from himself”—Per Lord Eldon in *Ex parte Lacey* (11).

A trustee for sale of trust property cannot sell to himself *William v. Scott* (12). A trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor—*Parke v. Makenna* (13).

Under the terms of the Last Will the specific devises referred to in clauses 2, 3 & 4 vested in the legatees on the death of the testator. The testatrix bequeathed the residuary estate to the plaintiff and defendant. “Residuary” estate means the assets which ultimately remain out of the estate after the payment of the testator’s debts, funeral and testamentary expenses and the costs of the administration of the estate, the costs of the administration suit and after payment of the legacies.

The plaintiff and defendant in terms of clause 7 of the Last Will could become equally entitled to the residuary estate only after the discharge of the obligations referred to in clause 5. The payment of the debts and legacies referred to in the said clause are antecedent to the ascertainment of the residuary estate.

The duties of an executor consist in (1) the recovery and collection of the assets of the deceased (2) payment of debts, estate duty and other testamentary expenses and finally (3) payment and distribution of the legacies in terms of the Will. It is not disputed that there was no money in the estate available for the payment of the estate duties, mortgage loans and other monetary legacies referred to in clause 5 of the Will. Hence it was necessary to sell and convert into money No. 3, Mile Post Avenue, Colpetty, as provided for by clause 3 of the Will. The sale was part of the process of realising the estate and payment of the monies referred to in clause (3). It is significant that in clause ‘D’ of the agreement between the parties it is provided that—

“It is further agreed that the respondent should purchase premises bearing Assessment No. 3, Mile Post Avenue, for Rs. 51,000 only and the said sum of Rs. 51,000 is to be utilised in

paying off debts due to the State Mortgage Bank on this property and the balance, if any left to be applied in payment of estate duty and the legacies referred to in clause 5 of the Last Will."

The motivation for the sale of the said premises is clear; it was to pay the debts and legacies as directed by the testatrix; until that direction was complied with the "residuary estate" referred to in clause 7 of the Last Will could not be identified. The stage was not reached where it could be said that the premises had vested in the residuary legatees for them to deal with that property as residuary legatees.

It is relevant to note that according to paragraph 8 of the plaint, in terms of the agreement of contract, the plaintiff agreed to purchase and the defendant agreed to sell and convey the entire premises. The prayer of the plaintiff is that the defendant be ordered and directed to execute a conveyance of the entire premises and not her half share of the said premises which she might get as residuary legatees. The plaint makes it clear that by the agreement P1, the plaintiff was not seeking to purchase the share or rights of the beneficiary under the Will. The plaintiff, while still retaining the character of executor and trustee, entered into the agreement to purchase the trust property; he did not purport to purchase the half share of the other residuary legatee.

The court will not exercise its extraordinary powers to compel specific performance where to do so would involve a breach of trust. The sale agreement which is sought to be enforced in this case infringes the rule that an executor cannot purchase property entrusted to him for sale. The plaintiff is incapable of contracting with his co-executor for the purchase of the property in suit and a court of equity cannot lend its aid to enforce such a contract. The plaintiff's action has therefore to be dismissed.

I affirm the judgment of the Court of Appeal and dismiss the appeal with costs, in all the courts.

TAMBIAH, J. – I agree.

L. H. DE ALWIS, J. – I agree.

Appeal dismissed.