

RUSSELL, J.:—I must make the summons absolute. Looking at the form of the plaint, I think the Advocate General's argument is well founded, that the first plaintiff is trying to make money out of his daughter's engagement. It appears to me that the first plaintiff is added merely to get over the difficulty as to security, if possible. The present case is clearly distinguishable from *Bai Porebai v. Devji Meghji*⁽¹⁾ and falls within the *dictum* of Bowen, L.J., in *Cowell v. Taylor*.⁽²⁾

The section vests a discretion in me, and, in my opinion, I must exercise it in favour of the defendant. I therefore order that the summons be made absolute. Plaintiff to deposit Rs. 400 as security within two months. In default, suit to be dismissed with costs. If the deposit be made, costs to be costs in the cause.

Attorneys for the plaintiffs—*Messrs. Mulla and Mulla.*

Attorneys for the defendant—*Messrs. Smetham, Byrne and Noble.*

(1) (1898) 23 Bom. 100.

(2) (1885) 31 Ch. D. at p. 38.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

DE SILVA, PLAINTIFF, *v.* DE SILVA AND DEVKARAN
NANJI, DEFENDANTS.*

1902.
September 12.

Administrator—Sale of immoveable property by administrator of deceased person—Title—Succession Act (X of 1865), sections 179 and 269—Administrator of trustee—Title of assignee of administrator as against cestui que trust—Priority.

One Anna De Silva, a Christian inhabitant of Bombay, died intestate in May, 1893, leaving her surviving a minor son (the plaintiff), her husband (defendant 1) and a daughter who died in infancy. Previously to her death the deceased purported to purchase certain leasehold property situate in Bombay, the sale-deed of which was duly executed in her name. In August, 1893, her husband (defendant 1), being called upon to make good a large sum of money for which he was responsible as cashier of Messrs. Graham & Co. of Bombay, handed over

* Suit No. 209 of 1902.

1902.

DE SILVA
v.
DE SILVA.

the title-deeds of the said property to two representatives of the firm, viz., J. F. N. Graham and another, stating that his deceased wife Anna De Silva was merely a trustee of it, and that the beneficial interest was vested solely in him. On the 18th September, 1893, he executed a conveyance of the property to the said two representatives of Graham & Co. He was shortly afterwards convicted of criminal breach of trust at the prosecution of Graham & Co. On the 1st November, 1893, J. F. N. Graham obtained a limited grant of letters of administration to the estate of Anna De Silva, under section 221 of the Indian Succession Act (X of 1865). Subsequently Graham & Co. sold the property to the second defendant, the said J. F. N. Graham joining in the conveyance as administrator of Anna De Silva's estate. In 1902 the plaintiff, as son and heir of Anna De Silva, brought this suit, claiming to recover his share of the said property, alleging that it belonged absolutely to his mother. The second defendant (the purchaser from Graham & Co.) denied that it had belonged to Anna De Silva. He alleged that it really belonged to her husband (defendant 1), who had paid for it and for whom she was a trustee. He further contended that, in any event, he had a good title as against the plaintiff, having purchased from the administrator of Anna De Silva's estate.

Held, that, assuming that the property did belong to Anna De Silva, the second defendant had acquired an indefeasible title to it by virtue of the conveyance to him to which her administrator was a party. Her interest in it had vested in her administrator under section 179 of the Succession Act (X of 1865), and under section 269 he could dispose of it as he might think fit.

Held, also, that even if Anna De Silva held the property as trustee, the second defendant was entitled. The legal estate passed to her administrator, and he conveyed it to the second defendant, who also obtained the equitable estate when he received the title-deeds from Graham & Co. as assignees of the first defendant, who was one of the heirs of Anna De Silva and who asserted his own title to the whole property to the exclusion of the plaintiff. The second defendant's title was therefore complete, unless he could have detected the falsehood of the first defendant's claim by reasonable diligence, and there was nothing to show that he could.

THE plaintiff was the minor son of the first defendant and he claimed in this suit to recover a share in certain leasehold property consisting of land with a dwelling house thereon situate in Bombay, alleging a title by inheritance from his mother, one Anna E. De Silva, deceased.

The plaint alleged that the said Anna E. De Silva died intestate in Bombay on the 24th May, 1893, absolutely entitled to the said property, leaving as her only heirs and next of kin her minor son (the plaintiff), her husband (defendant 1) and one daughter Anita, who subsequently died in infancy.

After the death of the said Anna E. De Silva, her husband, the first defendant, who was then in possession and enjoyment of the said property, sold it on the 8th September, 1893, to Messrs. W. and A. Graham & Co., by whom it was afterwards sold to the second defendant. At the date of the suit the second defendant was in possession as such purchaser.

In 1901 the plaintiff called upon the second defendant to come to a partition of the property and to hand over to him his share therein, but the second defendant had not done so.

The plaint further stated that the plaintiff by his guardian had applied for letters of administration to the estate and effects of the said Anna E. De Silva, which application was still pending.

The plaintiff prayed (a) for a declaration that the property in suit belonged to the estate of the said Anna De Silva, (b) that the property might be partitioned and the plaintiff's share ascertained and made over to him, (c) for an account, &c. &c.

The first defendant did not file any written statement.

The second defendant filed a written statement, in which he stated that the property in suit was conveyed to him for value by one J. F. N. Graham, the administrator of the said Anna E. De Silva, under letters of administration granted to him on the 13th September, 1894, "which letters were then and still are unrevoked," and that, assuming the statements in the plaint to be true, the plaintiff had no cause of action against him (defendant 2). He further stated that he did not admit that the said Anna E. De Silva had any beneficial interest in the said property; but that he believed that she was only the nominee of her husband (defendant 1), who had supplied the purchase money, and that this suit was filed at the instigation of the said first defendant.

It appeared at the hearing that the first defendant had married the said Anna E. De Silva in February, 1890, and that on the 24th March, 1893, she purported to purchase the property in question from one Valladares for Rs. 20,000, the conveyance thereof being in her name. She died, as above stated, on the 24th May, 1893, leaving her minor son (the plaintiff), an infant daughter (since deceased) and her husband (defendant 1) her surviving.

In August, 1893, the first defendant, who had been cashier to Messrs. Graham & Co. of Bombay for twenty-six years, was

1902.

DE SILVA

v.
DE SILVA.

1902.
 DE SILVA
 v.
 DE SILVA.

required to make good a large sum of money for which as such cashier he was responsible to the firm. He thereupon made over (*inter alia*) to two representatives of the firm, viz., J. F. N. Graham and another, the title-deeds of the said property, representing that his deceased wife, Anna E. De Silva, was merely trustee thereof, and that the beneficial interest was solely vested in him. On the 18th September, 1893, he executed a conveyance of the said property to the said two representatives of the firm.

In November, 1893, the first defendant applied for letters of administration to his deceased wife. His petition, however, was not proceeded with, because of his conviction in April, 1894, of the offence of criminal breach of trust.

On the 1st November, 1893, J. F. N. Graham applied for a limited grant of letters of administration to the estate of the said Anna E. De Silva, and they were granted to him.

Messrs. Graham & Co. subsequently sold the property in question to the second defendant, the said J. F. N. Graham joining in the conveyance as administrator of the estate of Anna E. De Silva.

The following issues were raised at the hearing :

1. Whether the plaintiff can maintain this suit.
2. Whether Anna E. De Silva was possessed of, or entitled to the property in suit.
3. Whether, in any event, the second defendant, as purchaser from the administrator of the said Anna E. De Silva, is not absolutely entitled to the said property.
4. Whether the representatives of Anita De Silva are necessary parties to the suit.
5. General issue.

Baptista and *Bhandarkar* for plaintiffs. They cited *Lopes v. Lopes*⁽¹⁾; *Kishen Koomar Moitro v. Stevenson*⁽²⁾; *Snell's Principles of Equity*, page 130.

Raikes and *Lowndes* for defendant 2. They cited *Jones v. Powles*⁽³⁾; *Taylor v. Russell*⁽⁴⁾; *Williams on Real Property*

(1) (1868) 5 B. H. C. R. 172 (O. C.)

(2) (1834) 3 My. & K. 581.

(3) (1865) 2 Cal. W. R. 141 (Civil Rul.)

(4) (1892) Ap. Ca. 244.

(Ed. 1855), page 193; Succession Act (X of 1865), section 179; Evidence Act (I of 1872), section 41.

1902.

 DE SILVA
 v.
 DE SILVA.

CHANDAVARKAR, J.:—The first point in this case is a dry point of law and must, in my opinion, be disposed of in favour of the second defendant, Devkaran Nanji. It arises in this way.

One Anna De Silva was the wife of the first defendant, John Joseph De Silva. He married her in February, 1890, and on the 24th of March, 1893, she purported to purchase the immovable property, which is the subject-matter of this suit, from one Valladares, for Rs. 20,000. The sale-deed (Exhibit A) was executed in her name. She died on the 24th of May, 1893, leaving an infant son, who is the plaintiff in the present suit, an infant daughter, and her husband, the first defendant.

About August, 1893, the first defendant, who had till then been cashier to Messrs. Graham & Co. for twenty-six years, was found short of moneys to a large amount belonging to the firm. Having been called upon to make good the amount, he agreed to make over to Messrs. Graham & Co. whatever property he had, and made over the title-deeds of the property in dispute to two of their representatives, Mr. John Frederick Noble Graham and another, representing that his deceased wife Anna was merely a trustee of the property and that the beneficial interest in it was vested solely in him. On the 18th of September, 1893, he executed a conveyance of the property in dispute in the names of the said two representatives of Messrs. Graham & Co. (Exhibit No. 2). On the 1st November, 1893, the first defendant applied to this Court on its Testamentary Side for letters of administration to the estate of his wife Anna, and in his affidavit, annexed to the petition, he swore that the property now in dispute belonged to him, and that Anna had held it merely as trustee (*vide* Exhibit No. 1). The petition was not, however, proceeded with on account of the conviction of the first defendant of the offence of criminal breach of trust.

On the 1st of November, 1893, Mr. John Frederick Noble Graham applied for a limited grant of letters of administration to the estate of Anna, and they were granted to him. Messrs. Graham & Co. sold the property to the second defendant, Mr. John Frederick Noble Graham joining in the conveyance as administrator of the estate of Anna.

1902.

DE SILVA
v.
DE SILVA,

The plaintiff now sues to recover by petition his share of the property as son and one of the heirs of Anna, and his case is that the property absolutely belonged to her. Assuming it did, it appears to me that the second defendant has obtained an indefeasible title to it by virtue of the deed of conveyance in his favour from Messrs. Graham & Co., to which Anna's administrator was a party. It is true that letters of administration were granted to Mr. John Frederick Noble Graham limited to the property now in dispute as property of which she was described as the sole trustee, and in which the said Mr. Graham, as assignee of the first defendant, was represented as the person beneficially interested. But though it was a limited grant under section 221 of the Indian Succession Act, the administrator became, in virtue thereof, the legal representative of Anna for the purposes of her interest in the property, and such interest as she had in the property became vested in him as such legal representative under section 179 of the Act. Under section 191 the letters of administration entitled the administrator to all the rights belonging to the intestate, and under section 269 he had power to dispose of the property of the deceased in such manner as he might think fit. The administrator could not, indeed, confer any title which the intestate had not, but on the assumption in this case that Anna was not merely the trustee but was the absolute owner, the grant, though limited it was, enabled the administrator to confer on a purchaser all the rights she had in the property.

But it was argued by Mr. Baptista, the plaintiff's counsel, that the administrator joined in the conveyance to the second defendant not as representing the absolute title of Anna, but as representing her in an alleged trusteeship which never existed, and as representing in his own person as assignee of the first defendant the beneficial interest in the property, which the first defendant did not own. But the conveyance to the second defendant purported to pass to him all the right, title and interest which Anna had in the property, and the mere fact that the party so conveying it professed to act as administrator of her estate as trustee cannot cut down the legal effect of the conveyance or limit the right of the second defendant to the title wrongly alleged to have existed in Anna,

if, as a matter of fact, she had a higher right. This view of the effect of the conveyance in favour of the second defendant is supported by the observation of Lord St. Leonards in *Drew v. The Earl of Norbury*,⁽¹⁾ where the Lord Chancellor said: "Nothing could be more mischievous or contrary to law than to hold that, when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance."

The facts of this case appear to me to resemble very nearly those of *Jones v. Poulles*⁽²⁾ so as to bring it within the principle of equity enunciated by the Master of the Rolls in the latter case. In *Jones v. Poulles* certain property had belonged to Jones, who had mortgaged it with possession. Jones died, having satisfied the mortgage, but without getting in the legal estate from the mortgagee. One Meredith asserted his title to the property as devisee under a forged will of Jones and induced the mortgagee to convey to him the legal estate. Meredith devised the property to his wife by his will, and the defendant in the case claimed as a *bond fide* purchaser under a purchaser from the wife of Meredith. The heir-at-law sued to recover possession from the defendant, but was non-suited on the ground that the latter was a *bond fide* purchaser, whose title was superior to that of the plaintiff because it was protected by the legal estate. The Master of the Rolls said in deciding the case (page 598): "The protection of the legal estate is to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession and the falsehood of the fact asserted could not have been detected by reasonable diligence." Here, on the assumption that Anna De Silva was owner, on her death her husband (the first defendant) became one of her heirs. He asserted the title in himself to the exclusion of his son (the plaintiff), alleging that his wife had only been

1902.

DE SILVA

v.
DE SILVA.

(1) (1846) 3 Jo. & Lat. 267.

(2) (1834) 3 My. & K. 581.

1902.

 DE SILVA
 v.
 DE SILVA.

trustee. He made over the title-deeds to Messrs. Graham & Co. The latter could, no doubt, have found out that Anna had died leaving a son (the plaintiff) and a daughter; the conveyance from Valladares to Anna De Silva was also notice to them that presumptively the title stood in her name. Assuming that they were therefore not *bond fide* purchasers, we have, however, the fact that Mr. John Frederick Noble Graham took out letters of administration to the estate of Anna De Silva in her alleged character of trustee of the property. He was clothed with the legal estate, at any rate. The equitable title, upon the assumption on which I am now proceeding, vested in the heirs of Anna De Silva. Now as trustee, at any rate, of Anna De Silva's estate, Mr. John Frederick Noble Graham could act. "A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee and who are his *cestuis que trust*": per James, L.J., in *Smith v. Anderson*.⁽¹⁾ The second defendant had the legal estate conveyed to him from Mr. Graham and he obtained the equitable title when he received the title-deeds from Messrs. Graham & Co. as assignees of John Joseph De Silva, one of the heirs of Anna De Silva. The second defendant's title was thus complete unless he could have detected the falsehood of the title asserted by John Joseph De Silva by reasonable diligence. There is nothing to show that he could have so detected it.

On the merits also I think the plaintiff's case must fail. It is true that the conveyance from Valladares stood in the name of Anna De Silva, and that it was her hand which paid the purchase money. But the question is, whose was the purchase money and what was the intention of the purchase? The first defendant, John Joseph De Silva, admitted to Mr. Owen, Solicitor, in 1893, that the property belonged to him although the conveyance was made in his wife's name. In his petition for letters of administration to the estate of his wife, he made the same admission with reference to the property, and he repeated it in his affidavit annexed to the petition. The first

¹⁾ (1880) 15 Ch. D. 247 at p. 275.

1902.

 DE SILVA
 v.
 DE SILVA.

defendant now states that he made the admission because of the pressure brought to bear upon him by Messrs. Graham & Co. at the time when he was charged by them with defalcations to a large amount and when they threatened to prosecute him if he did not make it good. There is no evidence to show that any pressure was brought to bear upon or any threat was administered to the first defendant for the purpose of getting him to admit that the property now in dispute belonged to him and not to his wife. Mr. Owen, on the other hand, states that at the interview which the first defendant had with him, the latter distinctly told him that the property belonged to him and that it had been bought with his money. Mr. Owen also states that no one from Messrs. Graham & Co. was present at the interview. It may be—it is indeed probable—that the first defendant expected that if he made good the amount of the defalcations Messrs. Graham & Co. might abstain from prosecution; but “any expectation that the defendant may have entertained, that, if he gave the required security, he might escape prosecution, will not of itself vitiate the transaction”: per Maule, J., in *Ward v. Lloyd*.⁽¹⁾ The admission made by the first defendant to Mr. Owen and also in his petition for letters of administration must be taken as having been made by him of his own accord. But I will not, however, rely strongly upon it for the purposes of this case. I will take the evidence which he has now given as to his rights to the property as more important, and what does it come to? It only goes to corroborate the admission. He states that he gave to Anna all his first wife Margarita had on her death, ignoring the rights of the six children the latter had left. That property consisted of jewels worth Rs. 6,000 and Government paper worth Rs. 3,000; and he made over to her debts due to him from outsiders to the extent of Rs. 5,000. As to the Government paper he says: “The Government paper of Rs. 3,000 was originally mine, bought with my money and put in my first wife’s name. In fact I found that paper after my first wife’s death and it had been bought by her without my knowledge out of the savings of moneys I had given to her out

(1) (1848) 6 M. & Gr. 785.

1902.

DE SILVA
 v.
 DE SILVA.

of my salary. She used to make household expenses out of my salary and to save as much as she could out of it." As to the debts due from outsiders he says: "The demand receipts in respect of the debts due to me from outsiders were in the cupboard and I gave my second wife the keys. The receipts were in my name and she used to recover the moneys on my behalf." It is clear from this that, so far as the Government paper and the demand receipts were concerned, they were not assigned by the first defendant to his second wife Anna so as to make her the owner. They were moneys which belonged to him and she held them for him. As to the jewels worth Rs. 6,000, the first defendant says that there is nothing beyond his word to show that his first wife had left jewels. I can come to no other conclusion on this evidence than that Anna De Silva had no moneys of her own, but that the purchase of the property was out of the money belonging to the first defendant.

Anna De Silva's sister, Mrs. Anna Maria Boyes, who is the next friend suing on behalf of the plaintiff and who has been examined, has given evidence to the effect that Anna De Silva had jewels worth Rs. 10,000. Those jewels, she says, belonged to her elder sister Margarita, who was the first defendant's first wife, being presents from relations and friends, and she before her death transferred them to Anna De Silva. I cannot believe that, assuming that Anna De Silva had jewels worth Rs. 10,000 when she married the first defendant in February, 1890, they were sold for the purpose of purchasing the property now in dispute. The property was purchased for Rs. 20,000 from Valladares and there is nothing to show that Anna De Silva had moneys of her own to that amount to pay for it. The property was bought in her name out of moneys advanced by her husband, the first defendant, in March, 1893, just about the time when he had been misappropriating moneys belonging to Messrs. Graham & Co.

Mr. Baptista has raised the question of advancement, but apart from the question whether the doctrine of advancement applies to the Portuguese in Bombay, neither the plaint nor the issues raised the question distinctly. Besides, the doctrine of advancement applies where the husband buys in the name of

the wife. But here the wife purchased property in her own name out of her husband's money, and even if there were any presumption of advancement, it is rebutted by the evidence in, and circumstances of the case.

1902.

DE SILVA
v.
DE SILVA.

I find in the affirmative on the first issue; in the negative on the second; in the second defendant's favour on the third; in the negative on the fourth and fifth. I reject the claim. The second defendant to recover his costs from both the next friend of the plaintiff and the first defendant, because, in my opinion, the first defendant is the real mover of this litigation.

Suit dismissed.

Attorneys for plaintiff—*Messrs. Sorabji and Jhangir.*

Attorneys for defendants—*Messrs. Mansukhlal, Jamselji and Hiratal.*

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

IN THE MATTER OF THE BOMBAY BURMAH TRADING CORPORATION, LIMITED.

1902.

October 17.

Company—Articles of Association—General meeting of shareholders—Proxies—Qualification of proxy—Memorandum of Association—Alteration of Memorandum of Association—Act XII of 1895.

The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending on the contract between them and other parties, then all the requisitions of the contract as to the exercise of that right must be followed.

Article 65 of the Articles of Association of the Bombay Burmah Trading Corporation, Limited, provided as follows: "No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company."

Held, that the above article imposed two essential conditions, viz., that the proxy should be a shareholder at the date of his appointment and also at the date when he acted.

By a power-of-attorney dated 14th October, 1881, some of the shareholders in the above Company authorized and appointed certain specified persons "and all persons who at any time during the continuance of these powers-of-attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted.....and in the absence from Bombay" of all the said persons, "then the person or persons for the time being holding the