25/1962

IN THE PRIVY COUNCIL No.19 of 1961

ON APPEAL

FROM THE COURT OF APPEAL OF MALTA.

BETWEEN -

(1) MICHAEL ABELA,
(2) ANTHONY ABELA and
(3) MARY ABELA Appellants

- and -

(1) MARIA FELICIA CREMONA and
(2) GIUSEPPA ABELA Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a judgment, dated the 27th June, 1960, of the Court of Appeal of Malta (Mamo, P., Montanaro-Gauci and Harding, JJ.) allowing the Respondents' appeal from a judgment, dated the 29th January, 1960, of the Civil Court of Malta (Magri, J.) dismissing an action in which the Respondents claimed rescission of a deed dated the 17th April, 1952, whereby one Joseph Abela, now dead, purported to sell a villa to the Appellants, on the ground that the said purported sale was fictitious. pp.65-78 pp.50-53

2. The first Respondent is the daughter and sole heiress of Joseph Abela, and the second Respondent is his widow. The Appellants are two brothers and a sister of Joseph Abela. Joseph Abela died in August, 1958.

3. By the Writ, issued in the Civil Court of Malta on the 14th of April, 1959, the Respondents claimed rescission of a deed dated the 17th of April, 1952, by which Joseph Abela purported to sell to the Appellants a villa at St. Paul's Bay for £800; the rescission was claimed on the ground that this was a fictitious sale. In their Declaration, the Respondents stated that Joseph Abela had lived apart from his pp.1-2 p.3

family and resided with the Appellants. By the deed of the 17th of April, 1952, he had purported to transfer the villa to the Appellants under the appearance of a sale for a fictitious price of £800, describing the villa in the deed as being then under construction. The construction had in fact been completed in 1951, and the statement in the deed of the compensation for the price was fictitious. At the date of the deed Joseph Abela had spent £2,044.18.0. on the construction of the villa, and the value of the site was between £200 and £320. Even after the date of the deed, Joseph Abela had remained in occupation of part of the villa, had let the rest of it, and had instituted judicial proceedings as owner of it.

pp.89-90 4. The deed of the 17th of April, 1952 was exhibited to the Declaration. By it Joseph Abela purported to sell and transfer to the Appellants a "small villa which is not yet completed". The Appellants undertook to continue the works, and Joseph Abela declared that he had already received the sale price of £800. The Respondents also exhibited to their Declaration a Writ issued by Joseph Abela in the Commercial Court on the 30th September, 1952 against a certain Zammit, who had installed some roofing in the villa. It was alleged in the Writ that this work had been improperly done, with the result that there was "danger to the safety of the tenants" of the building. With the Writ Joseph Abela had filed an application for urgency, which was also exhibited to the Respondents' Declaration. In this application Joseph Abela stated that he had suffered damage consisting of loss of rent because the tenants had had to abandon the villa.

pp.93-95

pp.95-96

pp.5-6 5. By their Defence, dated the 21st of April, 1959, the Appellants pleaded that the period of limitation for bringing the action had expired. Apart from this, they pleaded only "the untenability of the Plaintiffs' claim". The plea of limitation was taken as a preliminary issue, and judgment was given in the Respondents' favour on the 26th of June, 1959. There was no appeal from that judgment, and no question of limitation now arises.

pp.7-10

p.9,ll. 37-41. 6. By the judgment of the 26th of June, 1959, the Court appointed a Legal Referee "to verify and report whether the Plaintiff's demand is tenable or not and to make his observations on the matter at issue". The Referee sat and heard evidence on the 4th and 9th of July, 1959. The following evidence was called by the Respondents:

a) Joseph Pavia said that Joseph Abela had let part of the villa to him, another part to his (Pavia's) brother, and had kept for himself the remaining part of the villa and the garden. The witness and his brother had paid rent to Joseph Abela, but he had not given them any receipts. Joseph Abela remained in occupation of his part of the villa until his death. The witness was not aware that he had transferred the villa to a third party. Joseph Abela's brothers have never mentioned to Pavia or his brother that they had a share in the villa. Pavia and his brother had paid the first six months' rent falling due after Joseph Abela's death to the third Appellant, but afterwards, learning that the Respondents claimed the villa, had paid the rent into Court. After Joseph Abela's death, Pavia and his brother had bought rent books and Pavia's brother had written receipts for periods when Joseph Abela had still been alive and had himself signed them with the name of the first Appellant. Pavia's brother had been accustomed to making out receipts in the name of the first Appellant for rent received by Joseph Abela. Pavia was subsequently recalled, and said that one day after Joseph Abela's death he had been in his car with his brother, the first Appellant and a priest. The first Appellant had asked the priest whether he would be committing perjury if he were to say under oath that the villa was his. The priest had told him to seek the advice of a higher authority.

pp.10-11

p.12,ll. 22-29.

b) E.E.Sant' Fournier, an architect and civil engineer, said Joseph Abela had instructed him to build a villa at St. Paul's Bay. The Building Control Board's permit had been issued in June, 1950, and the works had been under the direction of the witness and his partner. When the villa was constructed, the witness had measured works to the value of £2,002.18.0. This valuation had been made between 1951 and 1952. It did not cover all items. At the time of which it was made, the garages under the road facing the villa had not been built.

pp.11-12

c) The first Appellant, called by the Respondents, said that after the publication of the deed of the 17th of April, 1952 he had ordered some woodwork and some railings at the villa. Joseph Abela had commissioned both the carpenter and the blacksmith, and the first Appellant had no idea how much he had spent on this work. Referring to the conversation in Pavia's car, he said the priest had told

p.13, ll. 22-38.

him that if he had not paid any money for the villa, he would be committing perjury by saying that the villa was his, but he would not be making a false oath if he had paid some money for it.

7. The following evidence was given by the Appellants:

p.14 a) The second Appellant said that he and the other Appellants had lived with Joseph Abela. There had been a partnership styled "Abela Brothers" for harbour work. As Joseph had not given his brothers their share of the profits, they had agreed that Joseph should transfer the villa to them for £800, this sum to be regarded as their share of the common funds which Joseph had in his possession. They had decided to include the third Appellant in the transfer, although she had no share in the partnership. At the date of the deed, he said, the villa had not been finished; work had continued after the date of the deed, at the expense of the first Appellant - at least, that was what the first Appellant had said.

pp.15-16 Cross-examined, the second Appellant said that, besides the work of the partnership, the first Appellant had worked on his own as a weigher, he had money he had saved from his private earnings, but had never touched the money earned by the partnership. The work of the partnership had been carried out in the name of Joseph. The second Appellant himself had been working at the Dock Yard for ten years, but had sometimes stayed away from that work to help his brothers. He had always had a shop, and closed that shop when his help was needed by his brothers. He had helped them by sticking stamps on workers' cards in his shop. Work in the harbour area had been carried out principally by Joseph and the first Appellant, and since the War the first Appellant had often been sick and had avoided strenuous work. Joseph, he said, had instituted the proceedings against the roofing contractor because the Appellants had told him to do so. The brothers Pavia had paid the rent for the part of the villa let to them to Joseph, who had kept it for himself. The witness did not know how much the building of the villa had cost Joseph. He thought that the garages (sometimes called boathouses) under the road facing the villa had been built on

part of the site transferred by the deed of the 17th April, 1952. They had been built after the date of that deed at his expense and that of the first Appellant. He produced 24 receipts, which he said were for work carried out in the villa after the date of the deed. The payments had been made by the first Appellant. p.16, ll. 28-33. pp.102-115

b) The first Appellant said the garages had been built at his expense after the date of the deed. Receipts for the rent of these garages had been prepared by the brothers Pavia and signed by them with the first Appellant's name, because he could not write. He said that Joseph had offered to sell the villa to him, but he had suggested that the second Appellant should be included, and later, when they came to sign the deed, had suggested that the third Appellant be included as well. The price of £800 had been determined by Joseph, and the first Appellant had told him that he would give him (Joseph) no money, because Joseph had their money. Cross-examined, he said Joseph had looked after the construction of the garages because they had left matters in his hands. The first Appellant had taken the money for the construction of the garages from his savings from his private work. Joseph had never given him any money out of the partnership funds. After Joseph's death, all that they had found belonging to him was £10 in cash and a Bank Book showing a balance of £14. Joseph had instituted the proceedings against the roofing contractor because they had left everything in his hands. The brothers Pavia had paid their rent either to Joseph or to the first Appellant or to somebody else, and "these", the first Appellant said, had handed the money to him. He had made out receipts to the brothers Pavia even during Joseph's lifetime. p.17, ll. 8-32. pp.17-19

c) The third Appellant said she had not known the villa had been acquired in her name until some days after the publication of the deed. The witness Pavia's brother had regularly made out receipts for the rent, both of their part of the villa and of the garages, on behalf of the first Appellant. Cross-examined, she said that after Joseph's death they had found in a box £10, a bank book of the National Bank of Malta showing a balance of £14, and three books of the Lombard Bank showing a balance of about £1,700 in the name of Joseph and the first and second Appellants. pp.18-19

Record

pp.19-30

8. The Legal Referee's report was filed on the 16th of July, 1959. He said that simulation might be either absolute, when the parties had not intended to conclude any legal transaction at all, or relative, when they had intended to conclude a transaction different from that emerging from the words of the deed. In a case of absolute simulation, the deed was entirely null. The Respondents were claiming that the deed of the 17th of April, 1952 was effected by absolute simulation. The Referee referred to authorities showing that specific and detailed evidence was needed to invalidate a public deed. The Respondents had stressed the fact that the price was very low, and the evidence pointed unmistakeably to the fact that the price was "considerably low". At the date of the deed the villa, if not completed, was probably already occupied, and the expenditure of £2,002.18.0. mentioned by the architect had probably been incurred by then. The learned Referee considered, however, that the argument drawn by the Plaintiffs from the derisory character of the price was not clear enough. He referred to the other evidence, and said that the most serious argument in favour of the Respondents was, in his opinion, the statement by Joseph Abela, in the application for urgency in his action against the roofing contractor, that he had suffered damage by way of loss of rent as a result of the removal of the tenants from the villa. He went on to hold that that statement, being a unilateral statement by Joseph, was not sufficiently strengthened by other evidence. The Respondents' case was greatly weakened, in his view, by their failure to give any evidence of a motive for the alleged simulation. Even on the most favourable view of the evidence, it appeared that the simulation, if it existed was only relative, being intended to hide the contract of donation. The learned Referee therefore submitted that the action should be dismissed.

p.21, ll. 9-43.

p.22-23

p.23,l.33-p.24, l.39.

pp.24-29.

p.29, ll. 4-24.

pp.29-30

9. After the filing of this report, written submissions were made by both sides. The Respondents' submissions were accompanied by the following exhibits:

pp.31-40

i) A deed of the 11th of March, 1958 containing a grant to Joseph, in which the land on which the villa stands was described as Joseph's property.

pp.115-116

ii) A Schedule of Pre-emption of the 29th of April, 1959, by which the Appellants acquired

pp.116-119

the thirteen garages from the Respondents.

iii) A letter from Joseph to the Director of Public Works of the 22nd of July, 1958, in which Joseph referred to the roof of "my two garages at ..... St. Paul's Bay". p.119

iv) The record of evidence given by the Appellants in another action between the parties in the Civil Court. pp.120-124

The exhibits filed with the Appellants' submissions included a deed of the 13th of September, 1955, in which reference was made to certain property at St. Paul's Bay as being the property of "the brothers Abela". pp.40-45 pp.125-128

10. Magri, J. delivered judgment on the 29th of January, 1960. After referring to the points in the evidence on which the Respondents relied, he said that, in his opinion, the evidence could only lead to the conclusion that the deed was effected by relative simulation. The statement in the deed of the 11th of March, 1958, had, in the learned Judge's view, no bearing, because it had been made unilaterally by Joseph; there was also the reference by the Appellants in the deed of the 13th of September, 1955 to their own property, "apparently", as the learned Judge put it, the villa. He held that no inference of absolute simulation could be drawn from the institution of the proceedings against the roofing contractor, because everything had taken place with the consent and understanding of the Appellants. The Respondents had not succeeded in proving absolute simulation, and it was not open to them to rely upon relative simulation. The learned Judge therefore dismissed the action, but made no order for costs except that the Respondents should pay the registry fee. pp.50-53 p.51 p.52, ll. 2-26. p.53

11. The Respondents appealed to the Court of Appeal. The Appellants cross-appealed on the question of costs. The judgment of the Court of Appeal was delivered on the 27th of June, 1960. The Court said that the Respondents' claim was based on absolute simulation. If the Respondents succeeded in proving that the deed of the 17th of April, 1952 was fictitious as a transaction of sale, their demand must succeed, because the Appellants themselves had never suggested that the deed concealed a donation. They had always maintained that it was truly and really a sale transaction and nothing else. In the absence of any submission by the Appellants that pp.57-62 pp.65-78 p.69, l.31 - p.70 l.25.

there had been a transaction of another kind, if there was no sale transaction it followed that the deed had been absolutely simulated. The question, therefore, was whether there really was a sale, and the Court, keeping well in view the rule that the burden rested upon the Respondents and the evidence must be sound and convincing, held that the answer to that question must be negative. The price had been very low. The circumstances in which the sale and the price were supposed to have been agreed were simply incredible. Joseph, who was supposed to have kept the profits of the partnership belonging to all the brothers, was said suddenly, and without anybody asking him, to have proposed to sell the villa to one of the brothers, fixing the price himself and agreeing to set it off against the profits allegedly belonging to all the brothers. The second Appellant had said in his evidence before the Legal Referee that "we" had agreed that Joseph should transfer the villa to them for £800, but in his evidence in the other action, of which the record had been exhibited, had said he had not even known what the sale price was. Moreover, the Court did not believe that the price, ridiculous as it was, was really set off against any amount owing to the first and second Appellants. If this had been the real arrangement, Joseph would have seen that there was a clear declaration of the fact to avoid any claim by the Appellants thereafter for their share of the profits. The first Appellant's evidence that Joseph left only £10 in cash and a Bank deposit of £14 was not true, for there was also the sum of £1700 in the Lombard Bank in the name of Joseph and the first and second Appellants. This balance, according to the first Appellant's evidence in the other action, the record of which had been exhibited, had been transferred from Joseph's name into the name of the three brothers at the bidding of the first and second Appellants. It was therefore not true that these two Appellants had never received any of the partnership profits from Joseph, nor could it be true that the alleged price for the sale of the villa represented the whole of the share of those profits to which they were entitled. The Court referred to the incident of the first Appellant's question to the priest in Pavia's car, and said they doubted whether this could be explained on the supposition that there had been a genuine sale. By the deed the buyers had covenanted to continue the work on the villa, but the work had in fact been continued by Joseph, and, in his evidence in the other action, the first Appellant had said that

p.70, ll. 29-34.

p.70, l.42- p.72, l.20.

p.72, ll. 21-33

p.72, l.34- p.73, l.28.

p.73, ll. 29-44.

p.74,l.7- p.75,l.11

10 20 30 40 50

there were only one or two occasions on which he had paid for this work with his own money and not with money which Joseph had given him for the purpose. The first Appellant's evidence that Pavia's rent had either been paid to him, or paid to Joseph or somebody else and then handed to him, was contradicted both by Pavia, who said that he and his brother had paid their rent to Joseph, and by the second Appellant. The clear truth was that Joseph had known, and the Appellants had known, that, in spite of the appearance of the deed, Joseph continued to be the true owner of the villa. The receipts exhibited by the Appellants were not inconsistent with this, because they did not refer to the villa but to another plot of land. The Court was therefore of the opinion that the Respondents had succeeded in proving that the deed of the 17th of April, 1952 was fictitious; consequently, the cross-appeal did not arise. This cross-appeal was therefore dismissed, the Respondents' appeal was allowed, the judgment of the Civil Court revoked, and a declaration made that the deed of the 17th April, 1952 was fictitious and so void.

p.75, ll. 18-39.

p.76, ll. 7-19.

p.77,l.30-p.78,l.9.

12. The Respondents respectfully submit that the issue to be decided is simply whether there was a sale of the villa by the deed of the 17th April, 1952. The Respondents contended by the Writ that this purported sale was fictitious. The Appellants relied in their Defence solely (apart from the point of limitation, now dropped) upon the 'untenability' of the Respondents' claim. Throughout the proceedings in the Courts below the Appellants sought to establish the genuiness of the purported sale. There was no evidence, nor even any suggestion, that the villa had been conveyed to the Appellants by way of gift, or by any transaction other than the purported sale. If, therefore, the purported sale was found to have been fictitious, it necessarily followed that absolute simulation had been established.

13. The Respondents respectfully submit that the learned Judges of the Court of Appeal were right in concluding from their full and detailed examination of the evidence that that evidence proved that the deed of the 17th April, 1952 was fictitious and Joseph Abela never transferred the villa to the Appellants.

14. The Respondents respectfully submit that the judgment of the Court of Appeal of Malta was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (among other)

REASONS

1. BECAUSE the evidence proved that the purported sale of the villa by the deed of the 17th April, 1952 was fictitious.

2. BECAUSE the Appellants never alleged that the villa was transferred to them by any means other than the said purported sale.

3. BECAUSE there was no evidence of any genuine transfer of the villa to the Appellants.

4. BECAUSE of the other reasons set out in the judgment of the Court of Appeal. 10

T.G. ROCHE

J.G. Le QUESNE.

No.19 of 1961

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF MALTA

B E T W E E N :-

(1) MICHAEL ABELA,
(2) ANTHONY ABELA and
(3) MARY ABELA

Appellants

- and -

(1) MARIA FELICIA CREMONA and
(2) GIUSEPPA ABELA

Respondents

CASE FOR THE RESPONDENTS

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