

MOHAMADU LEBBE *v.* UMMA NATCHIA.

D. C., Kalutara, 1,134.

Res judicata—Action by mortgagor against representative of deceased mortgagee—Civil Procedure Code, s. 642—Effect of mortgage decree on such representative—Personal claim of representative to land mortgaged by deceased.

A mortgage decree in an action brought against the representative, appointed under section 642 of the Civil Procedure Code, of a deceased mortgagee, will estop such representative from questioning the right of the mortgagor to mortgage the lands decreed executable.

If the representative, who was the widow of the mortgagor, was entitled to the land in her own right, she should not have assumed the representative character imposed on her.

Per LAWRIE, J.—Under a decree passed in such an action no other land can be seized in execution than those named in the decree as executable.

IN a previous case plaintiff having sued the defendant, as representative of the estate of her deceased husband, for the recovery of a sum of Rs. 353 and interest secured by a mortgage bond executed by her late husband, obtained a judgment declaring the mortgaged lands bound and executable for the said debt. On writ being issued, the Fiscal seized certain other lands in addition to the land that was mortgaged, and the defendant claimed these lands and one of the mortgaged lands as her own. The District Judge upheld her claim, and the plaintiff brought the present action against the defendant, under section 547 of the Civil Procedure Code, to have a declaration that the said lands were liable to be sold under the said writ.

The District Judge dismissed the plaintiff's action, and the plaintiff appealed.

Dornhorst, for appellant.

Peries, for respondent.

11th February, 1886. LAWRIE, J.—

Meera Lebbe Marikar mortgaged some lands to the plaintiff; after the mortgagor's death his widow was appointed to represent the estate of the deceased mortgagor for all the purposes of an action on the mortgage.

The widow appeared and contested the mortgagee's claim, but her objection or defence, whatever it was, was repelled, and a mortgage decree was pronounced.

On writ on this decree some lands were seized, and the widow claimed these as her own by a title adverse to her late husband.

1896.
*Jan. 31 and
Feb. 11.*

The Court sustained the claim and released the property from seizure.

LAWRIE, J.

The plaintiff then brought this action under section 547. One of the lands seized and claimed was a land mortgaged which had been declared bound and executable in the judgment against the defendant.

It seems to me clear that she is bound by that judgment, and that the plaintiff is entitled to have the land sold.

As to the other lands seized, which were not mortgaged, the defendant is entitled to claim that these be excluded from the seizure. She does not represent the whole estate of the deceased; assuming that these mortgaged lands belonged to the deceased, they can be touched only in a suit to which his general legal representative is a party. I need not enter on the question whether these unmortgaged lands belonged to the widow personally. It is enough that we decide that, under a decree passed in an action against a representative of the estate, appointed under section 642, no other land can be seized than those named in the decree as executable.

The judgment dismissing the action is set aside. The plaintiff is entitled to judgment declaring the mortgaged land executable, but his action, *quoad* the other lands, must be dismissed. I would give no costs, success being divided.

WITHERS, J.—

It seems to me that defendant cannot escape the consequences of taking up the appointment of administratrix of the deceased mortgagor's estate for the purpose of this hypothecary action, and not limiting her defence—if it were possible to do so—to the existence and subsistence of the debt for which the specially hypothecated properties were secured by her deceased husband.

She could easily have found out by inquiry the fact that her lands, as she claims them to be, had been secured by her husband without any right so to bind them, and she was not obliged to assume the representative character imposed on her.

I fail to see how she can now be heard to say that the lands specially mortgaged by her late husband are not executable under the mortgage decree to which she was a party.

I am therefore of opinion that the judgment should be modified in the manner proposed by my brother Lawrie.