MUTTIAH CHETTY *v.* DE SILVA *et al.*

1896.
July 24 and 28.

D. C., Galle, 3,143.

Joint and several promissory note—Liability of executor of deceased maker to be sued jointly with the survivor—Civil Procedure Code, ss. 14 and 15.

Under section 15 of the Civil Procedure Code the executor of a deceased person who was a party to a joint and several promissory note can be joined with the surviving party in an action by the holder of the note.

THE facts of the case appear in the judgment of WITHERS, J.

Dornhorst and *Wendt*, for appellant. *Cur. adv. vult.*

28th July, 1896. WITHERS, J.—

In this case the plaintiff, as payee, seeks to recover the principal and interest of a note alleged to have been made at Galle on the 9th June, 1893, by one Sadris de Silva and one Janis. Janis is dead, and his executrix is made a party defendant in this case.

The order appealed from is an order directing that the name of the second defendant be struck out of the plaint as improperly joined. This being a case of a promissory note the English Law applies, subject to any modification by local Ordinances. This is a joint and several promissory note.

Formerly, all could be used jointly on such a note, or each could be sued separately.

When a note is joint only, the whole liability falls on the survivor, and if he dies the executor of the survivor can alone be sued (see *3 C. L. R. 90*).

In the 9th edition of Williams on Executors the law is thus laid down :—"But if the contract be several or joint and several, "the executor of the deceased contractor may be sued at law in "a separate action, but he cannot be sued jointly with the survivor "because one is to be charged *de bonis testatoris*, the other *de* "*bonis propris*."

For this statement the learned editor refers to *Hall v. Huffam* (*2 Lev. 228.*) He makes no reference to the rules of the Supreme Court, 1883. Order 16, rule 6, enacts as follows :—

"The plaintiff may at his option join as parties to the same "action all or any of the persons severally or jointly and severally "liable on any one contract, including parties to bills of exchange "and promissory notes."

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Section 15 of our Civil Procedure Code adopts that rule word for word.

There was no appearance for the respondent in this case. Counsel for appellant has not found any instance of an English case in which the surviving maker of a joint and several note and the legal representative of a deceased maker were joined in the same action.

I can find no precedent of such a case in modern works on pleading in Courts in England. I can well understand no case of the kind being found in England, because in the Queen's Bench Division it would be scarcely possible to work out a judgment *de bonis testatoris*, which must be the judgment against an executor as such. Our courts know no distinction of equity and common law. They are simply courts of law, one and indivisible so to speak.

In principle I see no objection to section 15 of the Civil Procedure Code being interpreted to include in persons liable as parties to promissory notes deceased persons who are bound in their estate duly represented to answer for debts contracted in their lifetime, and which at the time of their death have not become barred by any statute of limitations.

In the absence of express authority to the contrary, I propose to hold that in our courts, by virtue of section 15 of our Civil Procedure Code, the executor of a deceased person who was a party to a joint and several note can be joined with the surviving party in an action by the holder of the note.

For these reasons I agree with my brother in setting aside the order of the Court below.

LAWRIE, J.—

When one of two makers of a joint and several promissory note dies, his executor is liable to pay the debt.

Whether the executor can be sued along with the surviving maker of the note, or must be sued in a separate action, is a matter not of liability but of procedure, which is governed by the 14th and 15th sections of the Civil Procedure Code.

I recommend that the order to remove the name of the second defendant from the action be set aside, and that the case be sent back to the District Court in order that the second defendant be called on to file answer, and that the case be proceeded with according to law.

The plaintiff to have the costs of this appeal.

BANDIRALA *v.* SAIBO *et al.*

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July 2 and 7

D. C., Kurunégala, 931 (L 251).

Property sold subject to mortgage—Rights of mortgagee—Claim—Registration.

Certain lands mortgaged to B were seized in execution of a money decree obtained by A against the mortgagors. B, as mortgagee, made a claim under section 241 of the Civil Procedure Code. The Court, after inquiry, directed, under section 246, that the seizure be continued subject to the mortgage. The lands were put up for sale by the Fiscal with intimation to intending bidders of B's mortgage, and B bid up to the amount of his mortgage. The lands were ultimately knocked down to A. Before A got his Fiscal's conveyance or obtained possession of the lands B brought an action against his mortgagors on the mortgage bond, obtained payment, and had the same lands seized in execution A, who in the meantime had obtained a Fiscal's conveyance, in which no mention was made as to the sale to him being subject to the mortgage in B's favour, claimed the lands. His claim was upheld, and B sued him and the mortgagor to have it declared that the lands were executable under B's writ. The Fiscal's conveyance in favour of A had been registered prior to the mortgage bond in favour of B.

Held, that the lands were still subject to the mortgage in B's favour, and that he was entitled to succeed in the action.

THE facts of the case appear in the judgments.

Dornhorst, for appellant.

Bawa, for respondent.

Cur. adv. vult.

7th July, 1896. LAWRIE, J.—

Certain lands were mortgaged to Bandirala. They were seized in execution on a money decree obtained by Assena Pulle against the mortgagors. Bandirala, as mortgagee, made a claim under section 241. His claim was investigated, and the Court (under section 246) thought fit to continue the seizure subject to the mortgage. The lands were sold by the Fiscal. At the sale intimation of Bandirala's mortgage was given and Bandirala himself bid up to the amount of the mortgage, but Assena Pulle bid more and the lands were knocked down to him. Before Assena Pulle got the Fiscal's transfers Bandirala brought action on his mortgage against the mortgagors, only omitting Assena Pulle, because he was not yet in possession.

When the Fiscal executed the conveyance to Assena Pulle he made no mention that the sale was subject to Bandirala's mortgage. When Bandirala caused the Fiscal to seize the lands under the mortgage, Assena Pulle claimed them. His claim was sustained by

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the Court on 3rd August, 1894, and on 7th August, 1894, Bandirala brought this action against the mortgagor and against Assena Pulle to have it declared that the mortgage debt was still due, and that the lands were bound and executable for that debt. Assena Pulle pleaded his Fiscal's transfers and their prior registration, and urged that he was not bound by the decree in the mortgage action to which he was not a party.

The District Judge sustained the defence and dismissed the action. Assena Pulle knew, from the time of his seizure, that Bandirala had a mortgage over the lands, and that if he brought at the Fiscal's sale he would purchase a property burdened; and why with that knowledge he should oppose the lands being sold for the mortgage debt (if he himself did not choose to redeem) I do not know.

The lands are undoubtedly subject still to the mortgage.

The judgment must be set aside, and the plaintiff must get the decree he asks for, subject to his succeeding in the inquiry which my brother Withers suggests.

WITHERS, J.—

I think this appeal is entitled to succeed. I do not think that the cases cited to us in argument, or the case cited in the judgment, apply to the circumstances of the present action. The plaintiff is the creditor of the first defendant, and his debt is secured by a bond and mortgage over the four lands in question. The bond made on the 31st October, 1874, was not registered till 17th February, 1892. I do not think that registration plays any part in this case. Those lands on the 13th February, 1892, were seized in execution of a money judgment obtained by one Mana Assena Pulle against the present first defendant in the District Court of Kurunégala.

Plaintiff offered an objection to the seizure and sale of these lands as a mortgagee. The sale was stayed pending inquiry into this objection. By section 246, Civil Procedure Code, it is enacted, "If the Court is satisfied that the property is subject to a "mortgage or lien in favour of some person not in possession, and "thinks fit to continue the sequestration or seizure, it may do so "subject to such mortgage or lien." The Court, after inquiry, made an order that the lands should be sold subject to the present plaintiff's mortgage bond. It seems to me that that order impressed plaintiff's mortgage on those lands, and, whether or not it is expressed in the Fiscal's conveyance, the purchaser took them subject to the mortgage so impressed upon them.

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The impression of course disappears with the debt, and if the plaintiff has a debt subsisting under his mortgage bond it seems to me he is clearly entitled to have it satisfied by the sale of the property which, by the order of the Court, was sold subject to his mortgage. I would set aside the judgment and remit the case to the Court to ascertain what, if anything, is due by way of principal or interest under the first defendant's mortgage bond. If anything is found to be due, it must be declared liable out of the lands in question. The successful appellant will have his costs.