1941 *Present* : **Howard C.J. and Soertsz J.**

SURIYAGODA *v.* WILLIAM APPUHAMY.

103—D. C. Kandy, 26.

Administration—Transfer of property by heirs—Seizure of property by creditor in execution—Rights of creditor—Executor a party to transfer.

A transfer of property by the heirs of an estate is subject to the payment of the debts of the estate if, without recourse to the property transferred, the debts cannot be satisfied.

The mere fact that the executor is a party to the transfer does not affect the rights of the creditors.

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera, K.C. (with him *C. C. Rasa-Ratnam*), for the fourth defendant, appellant.

L. A. Rajapakse, for the plaintiff, respondent.

Cur. adv. vult.

June 5, 1941. SOERTSZ J.—

This was an action to have it declared that the three allotments of land described in the plaint were liable to be seized and sold on a writ which the plaintiff had obtained against the first defendant who was the executor of the estate of one Aurelis Appuhamy.

When the seizure was effected, the fourth defendant successfully preferred a claim based on a deed 4 D 1 of June 21, 1937, given to him by the first defendant and his nieces, the second and third defendants.

The plaintiffs alleged that this deed had been executed fraudulently and collusively by the defendants and that it was therefore liable to be set aside. Alternatively, she alleged that the lands dealt with were liable to be sold on her writ inasmuch as a transferee from heirs takes a title liable to be defeated in the course of administration.

The learned trial Judge found that " the plaintiff has not proved fraud and collusion on the part of the fourth defendant or any of the ingredients necessary to succeed in a 247 and Paulian Action ". Perhaps, on the evidence, that is a correct conclusion, but I find it difficult to resist a very strong impression that the fourth defendant knew all about the state of affairs. As for the first, second, and third defendants, there can be no doubt that they were fraudulent. The first defendant was examined under section 219 of the Civil Procedure Code and filed an affidavit on August 24, 1936, disclosing these three lands and some others as properties of this estate. Thereafter, there were certain negotiations between the plaintiff's proctor and the first defendant with a view to satisfy the plaintiff's claim but as these seemed to linger in the stage of negotiation too long, the plaintiff enforced her writ on July 27, 1937, and then she was confronted with the deed of June 21, 1937. The defendants had used the interval of so-called negotiation with the plaintiff very effectively indeed. But the defendants have a finding in their favour on this question and we can hardly disturb that finding of fact on appeal.

The learned Judge, however, found for the plaintiff that the deed in favour of the fourth defendant must yield to the seizure by the

plaintiff because that seizure was effected in order to realize a debt due by the estate of the deceased to the plaintiff. In so finding, the learned Judge stated the law in regard to the matter too widely when he declared that even when there were lands belonging to the estate undisposed of "the entire estate is subject to the debts of a deceased and a creditor is entitled to proceed against any of them". But Counsel for the appellant attacked that finding on other grounds as well. He contended (*a*) that there is no material on which it can be asserted that the debt was a debt of the deceased, and not a debt of the executor; (*b*) that a person taking a transfer from an executor *bona fide* for value gets a title free from the debts of the estate.

Before I go on to consider these submissions, I would point out that deed 4 D 1 does not deal with land No. 1 in the Schedule to the plaint and that land is clearly liable to seizure and sale.

The question that remains is in regard to the liability to sale of the other two lands. As I have already stated the first objection taken by the appellant's Counsel is that there is no proof in the case that the debt sought to be enforced, is a debt of the deceased testator and not a debt of the executor. But the documents in the case establish beyond any doubt that the claim in reconvention made by the present plaintiff in D. C. Galle, case No. 31,956, was a claim based almost entirely on a wrongful conversion of property by the testator himself (see P 2 and P 3) and the decree entered in that case created a debt against his estate. It is well settled law that transfers by the heirs of an estate are subject to the debts of that estate, if, without recourse to the lands transferred, the debts, cannot be satisfied. See *Fernando v. Perera*[1]; *Ekanayake v. Appu*[2]; *Silva v. Silva*[3]; *Gopalasmay v. Ramaswamy Pulle*[4]; *Muttiah Chetty v. Ukkurale Korale*[5].

The second objection taken by the appellant's Counsel was that the fourth defendant's title was not liable to be defeated in this manner because he was a *bona fide* purchaser for value from the executor of the estate of the deceased. But here again the documentary evidence is against that contention. 4 D 1 is a transfer by the heirs of the deceased, his two daughters. The fact that the executor joined in the transfer appears to be due to the fact that the fiscal's transfer for one of the lands dealt with was in his name. Probably, it was a land bought by the deceased in respect of which the transfer was not ready till after the death of the deceased. In P 5 the executor shows that land as a land belonging to the heirs of the estate. It is also reasonably clear on the evidence that the proceeds of this sale did not go to pay debts to the estate, and that there are no other assets of the estate available for the payment of the plaintiff's debt.

For these reasons, I am of opinion that the appeal fails and must be dismissed with costs.

HOWARD C.J.—I agree.

Appeal dismissed.

[1] *8 S. C. C. 54.*
[2] *3 N. L. R. 350.*
[3] *10 N. L. R. 234.*
[4] *14 N. L. R. 238.*
[5] *27 N. L. R. 336.*