DIAS

v.

DE MEL AND ANOTHER

COURT OF APPEAL.
ATUKORALE, J. (PRESIDENT) AND B.E. DE SILVA, J.
C.A. No 365/76 (F)–D.C. COLOMBO 74575/M.
DECEMBER 15, 1983.

Civil Procedure Code, section 219, section 222 as amended by Civil Procedure Code (Amendment) Act, No. 53 of 1980–Administration of Justice (Amendment) Law, No. 25 of 1975, section 549–Decree for payment of monies out of estate of deceased–Personal liability of legal representative–Burden of proof–Form of application under section 222 (2) of the Civil Procedure Code

The plaintiff obtained decree against the two defendants in their capacity as executors of the estate of the late A. M. C. Dias for the recovery of a sum of Rs. 28,828.71 cts. The first defendant, upon notice issued under section 219 of the Civil Procedure Code, filed affidavit that the executors were not in a position to pay the amount due on the decree as no liquid or realisable assets of value were available except one estate Kitulhena which was vested in the Land Reform Commission but not yet compensated for. At the section 219 inquiry, it transpired that another estate Mahavila had been possessed by a beneficiary who had conveyed it to her son.

After the section 219 inquiry the plaintiff filed an application under section 222 (2) of the Civil Procedure Code to have the decree executed against the defendants personally on two grounds, viz., (a) the defendants had failed to apply two of the properties, namely, Kitulhena and Mahavila belonging to the deceased which had come into their possession, for the purpose of paying the decreed amount and (b) the defendants had given an undertaking not to terminate the proceedings in the testamentary action until the amount due on the decree was settled. After the repeal of the Civil Procedure Code, and the coming into force of the Administration of Justice (Amendment) Law, No. 25 of 1975, the plaintiff filed a fresh application under section 549, the corresponding section of the said Law, to have the decree executed against the defendants personally. The judge dismissed the plaintiff's application after inquiry. The plaintiff appealed.

Held–

(1) Although under section 549 (1) of the Administration of Justice (Amendment) Law, No. 25 of 1975, a decree such as the present one may be executed by the seizure and sale of any property of the deceased in the hands or under the control of the party against whom decree is entered, the decree-holder is not entitled to proceed against the personal property of the legal representative against whom the decree is passed. Section 549 (2) which is almost identical with section 222 (2) of the Civil Procedure

Code, creates an exception to this general rule and enables the decree-holder, in certain circumstances, to execute the decree against the legal representative personally. For this exception to be invoked the decree-holder must establish that some property belonging to the estate of the deceased came into the hands or under the control of the legal representative and that at the time execution is sought no such property remains in his hands or under his control. Once the decree-holder establishes this fact the burden shifts to the legal representative to satisfy court that he has duly applied the property which has been proved to have come into his hands or under his control. If he fails to do so, he becomes personally liable upon the decree to the extent of the property that has not been duly applied by him.

(2) The undertaking not to conclude the testamentary case without first settling the liability to plaintiff has no relevance.

(3) The failure of the plaintiff to make an averment in her petition that there were no assets left out of the deceased's property to meet her claim on the decree does not preclude her from maintaining an application under section 549 (2) of the Administration of Justice (Amendment) Law, No. 25 of 1975.

(4) An application under section 222 (2) of the Civil Procedure Code as amended by the Civil Procedure Code (Amendment) Act, No. 53 of 1980, should be by way of petition and affidavit setting out the material facts, to which the judgment-debtor must be made a respondent. In terms of this provision, the court must after inquiry grant the application, if it is satisfied that the decree should be executed against the judgment-debtor personally.

APPEAL from an order of the District Court of Colombo.

Miss M. Seneviratne S. A. with *Hilton Seneviratne* for the plaintiff-appellant.

Mark Fernando for the defendant-respondents.

Cur. adv. vult

March 2, 1984.

ATUKORALE, J. (President).

The plaintiff, who is the present appellant, filed this action against the two defendants, who are the executors of the estate of the late A. M. C. Dias, for the recovery of a sum of Rs. 28,828.71 cts. consisting of monies advanced by her at the request of the defendants for running certain estates which formed part of the estate of the deceased and of monies spent by her in connection with the deceased's funeral. The defendants were sued in their capacity as executors and the claim was for money to be paid out of the estate of the deceased. The case was settled on 7.12.1972 and a decree was entered in favour of the plaintiff for the full amount. Upon a notice issued under s. 219 of the Civil Procedure Code the 1st defendant filed an affidavit dated 22.10.1973 together with a copy of the inventory filed in the

testamentary case in which he averred that as no liquid or realisable assets of value were available, they (the executors) were not in a position to pay the amount due on the decree. He further averred that steps were being taken to sell a property called Kitulhena, that the sale was expected to realise about Rs. 25,000 but that the proceeds were not sufficient to pay the outstanding estate duty, income tax and the testamentary expenses. He also stated that all the estates (except Kitulhena) were vested in the Land Reform Commission and that as such the executors were not in a position to sell them and that the bonds issued as compensation for these estates will have to be utilised to liquidate the liabilities and no payment could be made to the plaintiff until then. On 15.1.1975 the 2nd defendant was examined under s. 219. At the inquiry it transpired that the estate called Mahavila Estate was possessed by a beneficiary, one Swarna Mendis, and that she had transferred the same to her son. On 6.8.1975 the plaintiff filed an application under s. 222 (2) of the Civil Procedure Code to have the decree executed against the defendants personally. Two grounds were urged in the application. One was that at the inquiry held under s. 219 it was revealed that the defendants had failed to apply two of the properties (namely, Kitulhena and Mahavila Estates) belonging to the deceased and which came into their possession for the purpose of paying the decreed amount. The other ground was that the defendants had on 5.9.1974 in this case given an undertaking not to terminate the proceedings in the testamentary case until the amount due on the decree was settled. After the repeal of the Civil Procedure Code and the coming into force of the Administration of Justice (Amendment) Law, No. 25 of 1975, the plaintiff filed a fresh application on 5.7.1976 under the corresponding section (s. 549) of the said Law, to have the decree executed against the defendants personally. The defendants filed their objections on 2.9.1976. The matter came up for hearing on 28.10.1976. At the hearing no evidence was led by either party. Counsel on both sides made oral submissions. The learned Judge by his order dismissed the plaintiff's application. He held that there was nothing to show that the testamentary case had concluded and that the defendants had acted contrary to the undertaking given by them. He further held that as the plaintiff's petition contained no averment to the effect that no assets of the estate were left to pay the amount due on the decree after the alienations of Kitulhena and Mahavila Estates, the plaintiff was not entitled to execute the decree against the defendants personally. The present appeal is from this order of the learned Judge.

In the present case although the decree does not in express terms direct that the amount decreed is to be paid out of the property of the deceased there seems to be no doubt and it was not disputed before us that the defendants' liability on the decree was to pay out of the assets of the estate of the deceased. The provisions of law under which the plaintiff made the two applications for execution of the decree against the defendants personally, namely, s. 222 (2) of the Civil Procedure Code and s. 549 (2) of the Administration of Justice (Amendment) Law, No. 25 of 1975, are almost identical. S. 549 (1) of the said Law stipulates that a decree such as the present one may be executed by the seizure and sale of any property of the deceased in the hands or under the control of the party against whom it is entered. According to this subsection the decree-holder is not entitled to proceed against the personal property of the legal representative against whom the decree is passed. Subsection (2) of s. 549 of the said Law, however, creates an exception to this general rule. It enables the decree holder in certain circumstances to execute the decree in the same manner as if the decree had been entered against the legal representative personally. Subsection (2) to s. 549 reads as follows :

> "(2) If no such property can be found, and the judgment-debtor fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally."

The opening words "if no *such property* can be found" in the above subsection, in my opinion, refer to property of the deceased in the hands or under the control of the party against whom the decree is passed. That is to say, before this subsection can be invoked it must be established that there is no property belonging to the deceased in the hands or under the control of the legal representative of the deceased against whom the decree has been passed. The burden of establishing this fact is on the decree-holder. He must therefore, in the first instance, satisfy court that some property belonging to the estate of the deceased came into the hands or under the control of the legal representative and that at the time execution is sought no such property remains in his hands or under his control. Once the decree-holder establishes this fact the burden shifts to the legal

representative to satisfy court that he has duly applied the property which has been proved to have come into his hands or under his control. If he fails to do so, he becomes personally liable upon the decree to the extent of the property that has not been duly applied by him. Subsection (2) of s. 549 of the Administration of Justice (Amendment) Law, No. 25 of 1975, thus enacts a rule of procedure by which a legal representative is made personally liable to the extent to which he fails to duly account for the property of the deceased that has come into his possession. As stated by me earlier s. 549 of the aforesaid Law is almost identical with s. 222 of the Civil Procedure Code. The latter section has been amended by the Civil Procedure Code (Amendment) Act, No. 53 of 1980, by the addition of a further subsection immediately after subsection (2). The amendment prescribes that the application under subsection (2) should be by way of a petition and affidavit setting out the material facts to which the judgment-debtor must be made a respondent. It also provides that the court shall after inquiry grant the application, if it is satisfied that the decree should be executed against the judgment-debtor personally.

The learned Judge has, in my opinion, failed to address his mind to the matters that arose for his consideration on the plaintiff's application under s.549 (2) of the Administration of Justice (Amendment) Law, No. 25 of 1975. His conclusion that there is no material to show that the defendants have acted contrary to the undertaking given by them seems to be correct. But it had no relevance to the application before him. On the construction placed by me on s. 549 (2) as set out above, I am also of the opinion that the failure of the plaintiff to make an averment in her petition that there were no assets left out of the deceased's property to meet her claim on the decree does not preclude her from maintaining the application. The order of the learned Judge is therefore set aside and the case is remitted to the District Court for a fresh inquiry under s. 222 (2) of the Civil Procedure Code as amended by Act No. 53 of 1980. The defendants will pay the plaintiff the costs of this appeal fixed at Rs. 315 recoverable from the estate of the deceased.

B. E. DE SILVA, J.–I agree.

Order set aside.
Case remitted for fresh inquiry.