

1937

Present : Soertsz J. and Fernando A.J.

SAVARIMUTTU v. ANNAMAH.

128—D. C. Colombo, 4,138.

*Prescription—Mortgage action—Thediathetam property mortgaged by husband—Decree against husband's administrator—Subsequent action against widow—Ordinance No. 22 of 1871, s. 6—Mortgage Ordinance, No. 21 of 1927, s. 16 (1).*

B, a Jaffna Tamil, subject to the Thesawalamai mortgaged *thediathetam* property. After his death the mortgage bond was put in suit against his administrator and decree entered in favour of the mortgagee.

The present action was instituted against the widow of B to make her half share of the property bound and executable under the decree.

*Held*, that although section 16 (1) of the Mortgage Ordinance permitted a second action to be brought, the action must be brought within the period of limitation created by section 6 of the Prescription Ordinance.

*Kadappa Chettiar v. Ramanayake* (38 N. L. R. 33) and *Ambalavanar v. Kurunathan* (37 N. L. R. 286) followed.

**B**Y mortgage bond No. 38 dated October 3, 1925, A. Bastianpillai hypothecated a house and premises in Colpetty. Bastianpillai was a Jaffna Tamil subject to the Thesawalamai and the property mortgaged was *thediathetam* property. Bastianpillai died in 1933 and two years later the mortgage bond was put in suit against his administrator and a decree entered, which declared the property bound and executable. This action was brought against the defendant, Bastianpillai's widow, asking for a declaration that her half share of the property be held bound and executable for the payment of the mortgage debt.

The learned District Judge entered judgment for the plaintiff.

*C. Nagalingam*, for defendant, appellant.—This is a second action by the plaintiff upon a mortgage bond, which has already been sued upon by him in action No. D. C. Colombo, 3,377. The first action was against the administrator of the estate of the mortgagor, who was the Secretary

<sup>1</sup> 4 S. C.C. 38.

<sup>2</sup> 1 Broune's Rep. 374.

of the Court and decree has been entered therein directing the payment of the full amount and declaring the entire property mortgaged liable to be sold in execution. This action is against the widow.

[SOERTSZ J.—Why was this action brought?]

In view of the decision in *Ambalavanar v. Kurunathan*<sup>1</sup>.

A second action does not lie as the bond is merged in the decree already entered and section 16 of the Mortgage Ordinance, No. 21 of 1927, does not enable the plaintiff to institute this action. But there is a ruling against me on this point in the case of *Kadappa Chettiar v. Ramanayake*<sup>2</sup>. I do not canvass that ruling in this appeal as I am entitled to succeed on another point, namely, the question of prescription.

The bond sued upon was executed on October 3, 1925, and this action was not instituted till October 18, 1935, so that if this was the first action, it would have been clearly prescribed. The trial Judge has held against the appellant on the plea of prescription on the ground that the present action is not one for the recovery of a money decree but only for a declaration that a moiety of the mortgaged property is liable to be sold. One need only look at the prayer to the plaint to see if the action is for the recovery of money or not as contemplated by section 6 of the Prescription Ordinance. Even the prayer for sale of the property has as its object the recovery of money. It is difficult to resist the conclusion that however ingeniously the plaint may be worded, it is nevertheless an action for the recovery of money and as such it is prescribed.

*N. Nadarajah* (with him *H. V. Perera*; K.C.), for plaintiff, respondent.—The Divisional Bench ruling in *Sangarappillai v. Devaraja Mudaliyar*<sup>3</sup>, is an authority for the proposition that a mortgage decree against the husband alone in respect of *thediathetam* property would be sufficient to bind the property even as against the wife, if she were alive. But a difficulty arises where at the date of action the wife is dead, this Court has held that in those circumstances the heirs of the deceased spouse must be made parties to the action to effectually bind the share of the property that devolves on them. See *Ambalavanar v. Kurunathan* (*supra*).

A second action lies to obtain an effectual decree and this is not contested.

On the question of prescription, there is an unreported judgment which would apply. S. C. 109, D. C. Chilaw 2,965—S. C. Minutes February 17, 1905. The respondent has already obtained a money decree for the entire sum due and does not ask for a money decree against the appellant, who is not personally liable for any sum. We only seek a declaration that the moiety belonging to the widow be sold in execution of the decree entered in D. C. Colombo, 3,377. Section 6 of the Prescription Ordinance has no application and action is not prescribed.

*Nagalingam*, in reply.—The unreported judgment does not apply as the judgment of Moncrieff J. shows that the second action was in the nature of a 247 action, and the cause of action was the claim by the defendant, though incidentally the plaintiff had pleaded the mortgage bond in his favour.

*Cur adv. vult.*

<sup>1</sup> 37 N. L. R. 236.

<sup>2</sup> 38 N. L. R. 33.

<sup>3</sup> 38 N. L. R. 1.

May 27, 1937. SOERTSZ J.—

The original plaintiff in this case had lent A. Bastianpillai a sum of Rs. 5,000 and had taken mortgage bond No. 38 dated October 3, 1925, to secure the payment of that sum and interest. By that bond Bastianpillai hypothecated a house and premises in Colpetty. Bastianpillai was a Jaffna Tamil subject to the Thesawalamai, and he and his wife were governed by Ordinance No. 1 of 1911. He acquired the property he hypothecated on the bond referred to, during the subsistence of his marriage with the defendant in this action and therefore this property was *thediathetam* and by the law governing the parties vested on acquisition equally in him and his wife. Bastianpillai died on March 2, 1933. Some two years later the original plaintiff sued the administrator of his estate on the bond and obtained a decree which declared the entirety of the mortgaged property bound and executable. If that decree had been entered against Bastianpillai himself, the plaintiff would have had a clear course in view of the Divisional Bench ruling in the case of *Sangarapillai v. Devaraja Mudaliyar*<sup>1</sup>, that the husband as the manager of *thediathetam* property could mortgage it and that it would suffice to sue him in order to render the whole property executable. But a difficulty arose in consequence of the decree, being one against the administrator of Bastianpillai's estate. His wife was no party to that action and, therefore, on the ruling in *Ambalavanar v. Kurunathan*<sup>2</sup> she was not bound by the mortgage decree. In view of this the plaintiff appears to have made an application to the Testamentary Court in Jaffna to be allowed to sell the entire premises, but this application was refused and he was informed that he could sell only Bastianpillai's half share, which was the only share inventoried in the testamentary case. He then launched this action against the defendant, Bastianpillai's widow, and prayed "that the court be pleased to declare that the said undivided one half (i.e., the widow's share . . . .), be held and bound executable for the payment of the said debt of Rs. 10,000 and legal interest, &c.," The learned District Judge entered decree in terms of plaintiff's prayer.

The appeal is from that order. For the appellant, it was contended, (1) that the earlier case instituted by the plaintiff against Bastianpillai's administrator, was a bar to this case, (2) that this action is barred by the Statute of Limitations.

Mr. Nagalingam for the appellant frankly admitted that the ruling in *Kadappa Chettiar v. Ramanayake*<sup>3</sup>, was against him on the first point, but he pressed the second point and relied on section 6 of Ordinance No. 22 of 1871. It is admitted that the present action was instituted after ten years had elapsed from the date of the bond. But Mr. Nadaraja maintained that section 6 of Ordinance No. 22 of 1871, does not apply because, he said the present action is not one for the recovery of money, and that its purport is only to render Bastianpillai's widow's half share executable for a debt due on a decree he has already obtained. At this point I think it best to consider section 6 of the Prescription Ordinance. It enacts "no action shall be maintainable for the recovery of any sum due upon any hypothecation or mortgage . . . . unless the same shall be commenced in the case of an instrument payable at or providing

<sup>1</sup> 38 N. L. R. 1.

<sup>2</sup> 37 N. L. R. 286.

<sup>3</sup> 38 N. L. R. 33.

for the performance of its conditions within a definite time within ten years from the expiration of such time, and in all other cases within ten years from the date of such instrument of mortgage or hypothecation, or last payment of interest . . . . .

The question is whether the present action is one for the recovery of any sum due upon any hypothecation or mortgage of any property. On the face of it, it certainly is such an action. Paragraph 7 of the plaint runs as follows: "There is now justly due and owing to the plaintiff on the said bond the total sum of Rs. 10,009.61 which sum though often demanded the defendant the said administrator in the said testamentary case . . . . . has failed to pay. The plaintiff restricts his claim to Rs. 10,000. Paragraph 8 continues—"A cause of action has thereby accrued to the plaintiff to have the said undivided half of the said land declared held and bound for the payment of the said sum of Rs. 10,000 and liable to be sold for the payment of the same *unless the defendant or the administrator pays the said debt*. Clause 2 of the prayer is in these terms: "that in *default of payment* of the said debt by the said administrator . . . . . or the said defendant, the said undivided half . . . . . be sold", &c. Mr. Nadaraja, however, sought to argue that although ostensibly this was an action to recover Rs. 10,000 from the defendant, in reality the plaintiff's object was to have the defendant's half share sold for a judgment which the plaintiff had already obtained. But the answer to that, in my opinion, is that although the plaintiff had obtained a judgment against the administrator he found himself unable to recover all his money in that quarter, and was now seeking to recover it from the defendant as well, by making her pay the amount or suffering her land to be sold. It cannot be denied that the plaintiff has made a gallant attempt to frame his plaint so as to enable such an argument as that put forward to be advanced, but he could not escape the necessity of an averment that the land be declared executable, if the amount due is not paid. The more he tries to change the appearance of the action the more it remains an action for the recovery of a sum due upon a hypothecation or mortgage. It was also contended that a mortgage creates a *jus in rem* and that the right subsisted so long as the debt was due. There is no doubt about its creating a real right. But the enforcement of the right however real is subject to legal bars such as, for instance, those created by the statute of limitations. Section 16 (1) of the Registration Ordinance does not affect this question. That section makes it possible for more than one action to be brought in respect of the same remedy notwithstanding section 34 of the Civil Procedure Code but all the possible actions must be commenced against the different parties sought to be bound within the period mentioned in section 6 of Ordinance No. 22 of 1871.

I have examined the case cited to us from the S. C. Minutes of February 19, 1905, but the ruling in that case has no bearing on the facts of the present case. In the present case, the position would have been different and Mr. Nadaraja's argument sound, if on the decree obtained in the earlier case the plaintiff was seeking to levy on the widow's share. Whether he could do so despite the fact that the widow was not a party to the earlier action was a question that arose incidentally in *Sangarappillai's case* (*supra*) and Dalton J. observed "having regard to the powers

of the husband in respect of the common property of the spouse to mortgage the whole of the property, the wife is not a necessary party to the action to make her interest in it bound by the decree of the Court in a suit on the mortgage bond . . . . It is possible that other considerations might arise in cases where the community had come to an end before the action was brought or in the course of the action, but whether they would or not it is not necessary here to decide.

But in the later case of *Ambalavanar v. Kurunathan* (*supra*) to which I have already referred Poyser and Koch JJ. held that in the contingency contemplated by Dalton J. the wife would have to be added as a party. Once the plaintiff yielded to the authority of *Ambalavanar v. Kurunathan* and acknowledged that a separate action was necessary to bind the widow's share, he had to be clear of the bar created by section 6 of Ordinance No. 22 of 1871.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

FERNANDO A.J.—I agree.

*Appeal allowed.*

