1951 *Present :* **Dias S.P.J. and Gunasekara J.**

KANDIAH, Appellant, *and* SARASWATHY *et al.*, Respondents

S. C. 288—D. C. Jaffna 4689M

Administration of estate—Right of creditor to follow movable property sold by heir—Applicability of maxim mobilia non habent sequelam—Thesavalamai—*Applicability to a given case—Must be specially pleaded—Civil Procedure Code, s. 154—Records of other actions not to be admitted in bulk.*

Quaere, whether the principle that a creditor of a deceased person's estate may follow property alienated by an heir applies to movable property.

Per DIAS S.P.J.—There is no presumption of law by which a Court can say, without proof, that the *Thesavalamai* applies to a particular Tamil who happens to reside in the Jaffna Peninsula. In the absence of such a presumption the burden of proof is on the party who contends that a special law has displaced the general law in a given case to prove the applicability of such special law.

The requirement of section 154 of the Civil Procedure Code should be strictly observed ; when relevant portions of the record of another action are admitted in evidence each of them must be separately marked and stamped.

APPEAL from a judgment of the District Court, Jaffna.

H. W. Tambiah, with *V. Ratnasabapathy*, for the plaintiff appellant.

S. Thangarajah, for the 1st defendant respondent.

A. Nagendra, for the 3rd and 4th defendants respondents.

Cur. adv. vult.

September 14, 1951. DIAS S. P. J.—

The facts which give rise to the present dispute are as follows : The 1st defendant respondent was the wife of a man named Ponnambalam who met his death on July 28, 1946. The plaintiff appellant, who is the sister of Ponnambalam, says that prior to his death she had lent him money and some of her jewels for the purpose of purchasing a motor car X—4793. The certificate of registration 4D1 shows that this car was a second-hand vehicle when Ponnambalam purchased it about February 1945. The car is now about eight years old. It is alleged that at the date of the death of Ponnambalam the plaintiff's debt had not been repaid. On the other hand the 1st defendant asserts that the motor car is her property bought with her money although registered in the name of her husband.

Ponnambalam left surviving him his widow the 1st defendant, and two minor children, Seevaratnam and Jeganathan. A posthumous child also was born.

On November 26, 1946, the plaintiff filed action in D. C. Jaffna 3189 against the two minor children of Ponnambalam with the 1st defendant as their guardian *ad litem*. By its decree dated January 30, 1948, the Court entered judgment in favour of the plaintiff against the two minor defendants for a sum of Rs. 910. Under a writ of execution issued by the plaintiff, the motor car X—4793 was seized in the possession of the 4th defendant respondent who claimed it. The evidence shows that on July 31, 1946, the 1st defendant (widow), who three days after her husband's death had been registered as owner, sold the vehicle to the 2nd defendant for Rs. 2,200 on December 17, 1946, who in turn transferred it to the 3rd defendant on May 22, 1947, and the 3rd defendant sold it to the 4th defendant on November 4, 1947. There is no evidence to show that the 4th defendant, who is a man of a different community and a perfect stranger, was aware of the decree in favour of the plaintiff. Nor is there any evidence which proves that the 2nd, 3rd and 4th defendants did not buy the car for valuable consideration. Having regard to the age of the car, it would seem that this litigation must have cost the parties much more than this old vehicle is worth at present, unless the vehicle has been completely renovated.

The claim of the 4th defendant to the motor car having been upheld, the plaintiff on July 21, 1948, commenced the present action against the widow of Ponnambalam and the three purchasers seeking a declaration that this motor car was liable to seizure under her writ and that the sales may be set aside as being in fraud of the creditors of Ponnambalam. The case went to trial on eight issues of which the District Judge only dealt with the 7th and 8th issues, viz.—

> " 7. Is the 4th defendant a *bona fide* purchaser for the value of the said car ?
>
> 8. If so, can the plaintiff have the said car seized and sold as against the 4th defendant ? "

Both sides have criticised the judgment of the District Judge for not dealing with all the issues.

From the names of the parties one can assume that they are Tamils. The alleged cause of action arose in the Jaffna Peninsula. Are these facts sufficient to establish that it is the Thesavalamai that governs the jurisdiction of Ponnambalam's property, assuming that the motor car is his property ? The Thesavalamai is a special law, and there may be many Tamils resident in the Jaffna Peninsula who are not governed by the Thesavalamai. No authority has been cited to show that there is any presumption of law by which a Court can say without proof that the Thesavalamai applies to a particular Tamil who happens to reside in the Jaffna Peninsula. In the absence of such a presumption I am of opinion that the burden of proof is on the party who contends that a special law has displaced the general law in a given case to prove the applicability of such special law. In the absence of such proof on the facts in the record I hold that on the death of Ponnambalam his rights are to be determined according to the principles of the general law. There is nothing in Mr. H. W. Tambiah's treatise on the Laws & Customs of the Tamils of Jaffna which throws light on this point. No doubt there are local customs in the Jaffna Peninsula which govern everybody, whether Jaffna Tamil or not ; but this case does not come within any of those customs. In the absence of proof that the Thesavalamai applies I hold that on the death intestate of Ponnambalam, the general rules of intestacy applied to him—that is to say, his widow the 1st defendant, on Ponnambalam's death on July 28, 1946, inherited one half of this motor car, and his children the other half, assuming that the motor car was his.

The 1st defendant sold the car on December 17, 1946. D. C. Jaffna 3189 was instituted on November 26, 1946. Was she aware that this action had been filed ? That would depend on whether she had been made aware of the action on the date of such sale. This question has not been developed at the trial. Before an action against minors is instituted there would probably be a letter of demand, steps would have to be taken to appoint a guardian *ad litem* over the minor defendants, the appointment would have to be made and summons would have to be issued and served. Therefore the probabilities are that at the time the 1st defendant sold her share of the car, she must have known of the possibility that an action would be filed. It is to be noted that the 1st defendant was made 3rd defendant to that action in her capacity as guardian *ad litem*. No relief was claimed against her personally.

In regard to the minors' half share of this vehicle, the mother is the natural guardian of her fatherless minor children. The law is that a guardian cannot without the sanction of the Court sell the *immovable* property of the minors—*Mustapha Lebbe v. Martinus* [1], *Girigorishamy v. Lebbe Marikar* [2]. Does the same rule apply in the case of movable property ? Professor R. W. Lee in his book on the Roman Dutch Law (4th edition) page 110 says : " A guardian may in due course of administration sell or mortgage any *movable* property under his charge. But the alienation or hypothecation of *immovable* property, except by the leave of the Court, is prohibited ".

[1] *(1903) 6 N. L. R. 364.* [2] *(1928) 30 N. L. R. 209.*

The resultant position then is that the widow had the right to sell her half share of this motor car as well as the share of her minor children. The probabilities are that she was well aware that the plaintiff was about to claim the alleged debt due to her, and if she was successful in that action, this car might be seized and sold in execution. The story of the 1st defendant is that she had to sell this car as there was no other movable property available. This is supported by the evidence of the plaintiff herself. The matter, however, does not end there.

In the case of *Perera v. Marimuttu Canniah* [1] this Court laid it down that the creditor of an estate may follow property sold by an heir even where there are other assets in the estate. Where the proceeds of property sold by an heir are not applied towards the payment of the debts of the deceased, a creditor may follow the property in the hands of the purchaser. De Kretser J contrasted the positions of an executor (and administrator) with that of a creditor. He said " A creditor has none of these duties. He has a right to be paid. In the deceased's lifetime he could levy against any of his properties, and there is no reason why his rights should diminish because of the deceased's death. In other words his position is totally different from that of an executor. It has been laid down in a number of cases, and the position is not contested, that he may follow property alienated by an heir, *who takes only a defeasible title* ". So far as I can see this principle applies both to movable as well as immovable property. Therefore in this case, the rights of the widow of Ponnambalam and his children to sell this motor car were always subject to the right of the judgment creditor (the plaintiff) to follow the property sold even in the hands of a *bona fide* purchaser. There is no proof that the proceeds of sale were applied towards the payment of the debts by the deceased. We know that the plaintiff was not paid. The case of *Perera v. Marimuttu Canniah* [1] was cited to the District Judge at the argument, but he has not dealt with it in his judgment. I agree with the learned counsel that his judgment renders no assistance in the elucidation of the problems we have to solve.

I have been proceeding so far on the assumption that this motor car was the property of the deceased man. The plaintiff's evidence is that the deceased, who was her brother, bought that car out of money lent by her to him. She says that the deceased man told her that he would sell the car and repay the debt, but he was murdered before he could do that. Her witness Vaithialingam stated that the deceased had asked him to negotiate the sale of this car so that he could repay the plaintiff. Before the sale which the witness negotiated could be put through, the deceased man was killed. The 1st defendant on the other hand swears that the car was really hers although it was registered in the name of the deceased. She called Soosaipillai to state that 1st defendant had told him that the car was here. The parties therefore are at issue on this point. The question of the ownership of this car arises under issues 1 and 6—but the trial Judge has not answered either of those issues. Had he done so and found in favour of the 1st defendant, then she being absolute owner, the car could be sold by her, and it would not be liable for seizure under plaintiff's writ against the children. On this disputed

[1] *(1944) 45 N. L. R. 337.*

question of fact, which might have gone to the root of the case, the defendants had the right to demand that the trial Judge should decide those issues one way or another. The defendants ask that this case should go back for a new trial. It seems to be a distinct hardship that in a trivial dispute like this about an ancient motor car, that the parties should have to face a new trial. The defendants demand this and I cannot see how this can be denied them.

In the circumstances of this case I think it should go back for a decision on issues 1 and 6. The order appealed from is set aside, and the case is now sent back with the direction to the District Judge that he should make an order after a decision on issues 1 and 6. The costs of the appeal should be costs in the cause.

I trust that even at this late stage the parties may be able to reach some reasonable settlement.

I cannot part with this record without drawing attention to another irregularity in the proceedings which the trial Judge permitted. He allowed the plaintiff to produce, as exhibit P1, the whole body of the proceedings in the earlier action D. C. Jaffna 3189. This is a violation of s. 154 of the Civil Procedure Code which enacts " It shall not be competent to the Court to admit in evidence the entire body of proceedings and papers of another action indiscriminately. Each of the constituent documents, pleadings or processes of the former action which may be required in the pending action must be dealt with separately as above directed ". The attention of Judges of first instance is directed to the words of Bertram C. J. in *Falalloon v. Cassim* [1]. Each relevant portion of the record of another action must be separately marked *and stamped*. Proctors should beforehand obtain certified copies of such portions of the record as they wish to produce at the trial and Judges and their Secretaries should see that these requirements are strictly observed.

GUNASEKARA J.—

The facts are set out fully in my brother's judgment and it is not necessary for me to recapitulate them.

The learned District Judge's note of the argument addressed to him by the plaintiff's counsel contains a reference to the case of *Perera v. Marimuttu Canniah* [2], which is cited by my brother. Though the District Judge has not expressly referred to it again in his judgment he appears to have regarded the principle laid down in that case as being applicable only to a transfer of immovable property, for he holds that " the maxim that would apply to a movable like the motor car in question would be '*mobilia non habent sequelam*' ". He concludes (rightly, in my opinion) that in this view of the law his findings on issues 7 and 8 involve a negative answer to issue 1 and render it unnecessary to answer the other issues. I agree, however, with Mr. Tambiah's contention that the learned Judge's view of the law is erroneous for the reason that the question of title must be decided by the application of the provisions of section 21 (1) of the Sale of Goods Ordinance (Cap. 70) and not the

[1] *(1918) 20 N. L. R. at p 334.* [2] *(1944) 45 N. L. R. 337.*

maxim cited by the learned Judge. This sub-section enacts that subject to the provisions of the Ordinance, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Issue 1 is as follows : " Is car No. X–4793 liable to be seized and sold under decree in case No. 3189 of this Court ? "

It has been answered as follows :

" I answer issue No. 1 in the negative because I find that at the time of the seizure the car was the *bona fide* property of the 4th defendant. "

I would set aside this finding for the reason that in my opinion it is based on an erroneous view of the law.

I agree that the case must be sent back for a decision on this issue and issue 6, " Was the said car the absolute property of the 1st defendant ? " and I concur in the order proposed by my brother.

Case sent back for further proceedings.