1926.

Present: Jayewardene A.J.

FERNANDO *v.* ROSA MARIA *et al.*

31—C. R. Negombo, 32,251.

Administration—Share by payment of debts—Heirs hold estate in trust for creditors—Partition suit.

Where the heirs of a deceased person take possession of his estate, they hold the property in trust for the legal representative, as representing the creditors, to the extent necessary for the payment of the debts of the estate.

Where such property becomes the subject matter of a partition action, the shares allotted to the heirs in severalty are held in trust for the creditors to that extent.

THIS was an action brought by the plaintiff for a declaration that certain lands were liable to be seized and sold in execution of his decree. The property formed part of the estate of one Marianu Fernando, who died leaving, as his heirs, a widow (the first defendant) and two minor children (the third and fourth defendants). The estate was administered by the first defendant who had been appointed administratrix. In case No. 30,041 of the Court of

Requests, Negombo, the present plaintiff had sued the first defendant both personally and as administratrix of her husband's estate on a mortgage and obtained judgment in 1922. In the year 1923, a partition action was brought for the partition of the lands by a person who had purchased the widow's interests in them. An interlocutory decree was entered declaring the plaintiff in that action entitled to three-fourth share and the children to the balance one-fourth; and final decrees were entered in August, 1923, and January, 1924, allotting the lots now in question to the third and fourth defendants. In October, 1924, the plaintiffs seized these lots when they were claimed on behalf of the defendants and their claim was upheld. The learned Commissioner of Requests dismissed the plaintiff's action.

Croos Da Berera, for plaintiff, appellant.—The heirs hold the property in trust for the creditors. This trust is not wiped out by the partition decree. There is a charge on the property. The mere filing of a final account does not close the estate. (*Gopalsamy v. Ramasamy Pulle*,[1] *Vallipilla v. Ponnusamy*,[2] *Marikar v. Marikar*.[3])

E. G. P. Jayatilleke, for defendants, respondent.—The partition decree creates new title (*Bernard v. Fernando* [4]). All previous charges are extinguished. The title by inheritance has been wiped out. The estate has been closed. The proper remedy is to ask for a judicial settlement. The creditor has been guilty of delay.

Cross Da Brera, in reply.

May 13, 1926. JAYEWARDENE A.J.—

This case raises an interesting question with regard to the effect of section 9 of the Partition Ordinance, that is, whether a block of land allotted under a partition decree to a party who claimed it by inheritance is liable to be seized and held in execution of a decree obtained against the estate of the person from whom he inherited it.

Two lands called Ambagahawatte and Siyambalagahawatte belonged to one Mariano Fernando, who died leaving a widow (the first defendant) and two minor children (the third and fourth defendants), who are represented in this action by their guardian *ad litem* the fifth defendant. Under our law, these lands vested in the widow and the children on the death of the intestate, subject, however, to the right of the personal representatives to deal with the property for the purposes of administration. (*Silva v. Silva*,[5] *Gopalasamy v. Ramasamy Pulle* (*supra*), and *Horne v. Marikar*.[6])

[1] (*1911*) *14 N. L. R. 238.*
[2] (*1913*) *17 N. L. R. 126.*
[3] (*1920*) *22 N. L. R. 137.*
[4] (*1913*) *16 N. L. R. 438.*
[5] (*1907*) *10 N. L. R. 234.*
[6] (*1925*) *27 N. L. R. 185.*

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JAYEWARDENE A.J.

Fernando v. Rosa Maria

The estate of Mariano Fernando was administered by the first defendant who had been appointed administratrix. In case No. 30,041, Court of Requests, Negombo, the present plaintiff had sued the first defendant both personally and as administratrix of her husband's estate on a mortgage bond and had obtained judgment in the year 1922. In the year 1923, a partition action had been brought for the partition of these lands. It was brought by a person who had purchased the widow's interests in them. An interlocutory decree was entered declaring the plaintiff in that action entitled to a three-fourth share, and the children to the balance one-fourth, and final decrees were entered in August, 1923, and January, 1924 (D1 and D2), allotting the lots now in question to the third and fourth defendants. In October, 1924, the plaintiffs seized these lots when they were claimed on behalf of the minors, and the claim was upheld.

The plaintiff brings the present action to have it declared that they are liable to be seized and held in execution of his decree. The defendants contend that as the lots have been allotted to them under the partition decree, they are not possessing the property as the heirs of their father but under a new title created in their favour by the partition decree. The learned District Judge upheld their contention and dismissed the plaintiff's action. He said that as the estate had been closed (it had been closed in January, 1924), and the estate distributed, the property distributed would not be liable for the payment of debts especially, as in this case, there was some money deposited to the credit of the administration suit and the plaintiff had been very lax in setting about to get his money. He also held that the lands seized had become the property of the defendants by virtue of the partition decree. I am not prepared to give an unqualified assent to the first ground given by the learned Judge. If the claim of the creditor is a stale one, which he had failed to enforce or to bring to the notice of the administrator while the estate was being administered, there may be something to be said for refusing to allow a creditor to seize property belonging to an estate which has been closed and which has been distributed among the heirs by a decree in a judicial settlement. But here the plaintiff had obtained judgment against the administratrix, and she must have been fully aware of the plaintiff's claim. She should have brought that fact to the notice of the Court when the estate was being closed, and asked the Court to allow her to retain in her hands sufficient property or to deposit in Court a sum of money to pay the plaintiff's claim under section 742 of the Civil Procedure Code. Perhaps the plaintiff himself might have intervened in the administration action and asked for a judicial settlement of the accounts of the estate, and payment of his debt. The mere filing of a final account and " closing " of an estate without a judicial settlement,

it has been held, does not prevent a judicial settlement of an estate at the instance of a creditor or other party interested (*Vallipilla v. Ponnusamy* (*supra*)). Perhaps in the present case the fact that the plaintiff was suing on a mortgage might have led the administratrix to believe that the sale of the mortgaged property would satisfy the plaintiff's claim. It is unfortunate that the plaintiff did not take steps in the administration suit; if he had done so, there might have been an equitable settlement of his claim instead of some of the heirs only being deprived of their share of the inheritance. However that may be, the main contention for the respondents in this case was that the final decree of partition conferred on them a new title and that they cannot be regarded as holding the property in their capacity of heirs of their father. As was said in *Bernard v. Fernando* [1]—

> " Partition decrees are conclusive by their own inherent virtue, and do not depend for their final validity upon anything which the parties may or may not afterwards do. They are not, like other decrees affecting land, merely declaratory of the existing rights of the parties *inter se*. They create a new title in the parties absolutely good against all other persons whomsoever. "

On the other hand, it was argued that the heirs held the property in trust and that their character as trustees was not destroyed by a decree under section 9 of the Partition Ordinance (*Marikar v. Marikar* (*supra*)). An administrator or executor may become a trustee for the heirs in certain circumstances, but can an heir be said to be a trustee for a legal representative in respect of land which devolved on him from an intestate ? As stated above, the heirs receive the property of an intestate subject to the right of the legal representative to deal with such property by sale or otherwise, to pay debts, &c., so that the interest of the heirs is not an absolute, but only a qualified one. A certain interest vests in the legal representative also.

Now section 96 of the Trusts Ordinance, 1917, declares that—

> " In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands. "

[1] *(1913) 16 N. L. R. 438.*

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This section deals with constructive trusts not expressly provided for in the other sections of Chapter IX. of the Trusts Ordinance. The first illustration to section 96 runs as follows:—

> " A, an executor, distributes the assets of his testator, B, to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed. "

This illustration would cover the case of an administrator when there is an intestacy. Therefore, where an administrator distributes the estate of his intestate to the heirs without having paid the whole of the intestate's debts, the heirs would hold for the benefit of the creditors to the extent necessary to satisfy their just demands, the assets so distributed. There is then a form of constructive trust between legatees or heirs and the creditors. According to this principle, where the heirs take possession of the estate of a deceased as they are entitled to do under our law, they would, in my opinion, hold the property of the estate in trust for the legal representative, as representing the creditors, to the extent necessary to satisfy the debts of the estate. The legal representative, in such a case, stands in the same position as a creditor, or the general body of creditors. In such cases, a creditor or the legal representative may be said to have an equitable interest in the property of the intestate while the legal estate is in the legatees or heirs. As Shaw J. said in *Marikar v. Marikar* (*supra*) in discussing section 9 of the Partition Ordinance:—

> " Section 9 of the Partition Ordinance, 1863, does not and was not intended to extinguish equitable interests. The provision that the decree shall be good and sufficient evidence of the titles of the parties to such shares or interests as have been thereby awarded in severalty, refers to legal titles only, and cannot properly be stretched to extinguish a trust attaching to the property. The provision in section 9, in so far as it takes away previously existing rights, must, under the ordinary rules of construction of statutes, be construed strictly, and not be extended to interfere with such rights further than the wording of the enactment necessitated. Had it been intended to extinguish equitable interests in the land partitioned, or in the proceeds if the land is directed by the decree to be sold, it should and would have said so. The decree is good and conclusive against all persons whatever, including a *cestui que trust*, as to the partition or sale and as to the specific lot or sum of money to which the trust relates, but the effect, so far as the *cestui que trust* is concerned, is merely to set apart a specific portion of the common estate to which his rights attach in severalty. "

Bertram C.J. expressly agreed with this view, and de Sampayo J. came to the same conclusion. This is a judgment of a Bench of three Judges and is binding on me.

In view of section 94 of the Trusts Ordinance, the heirs in this case held the property in trust for the creditors, and that trust has not been destroyed by the partition decree but attaches to the share in severalty allotted to them.

In the present case it has to be considered whether the plaintiff should be allowed to seize and sell the lands of the minors leaving untouched the share inherited by the widow. In view of what the learned Judge has said in his judgment, I think the plaintiff should seek satisfaction of his decree in the testamentary case, where all the heirs could be called upon to contribute their shares to pay the plaintiff's claim. The plaintiff can still apply for a judicial settlement of the estate. See also section 222 of the Civil Procedure Code.

In the circumstances, I would uphold the dismissal of the plaintiff's action, and dismiss the appeal also with costs.

Appeal dismissed.