1936

Present: **Akbar S.P.J. and Maartensz J.**

LEBBE MARIKAR *v.* MOHAMED KALID.

14—D. C. (Inty.) Colombo, 5,582.

Administration—Death of executor—Right of his executor to administer estate of original testator—Civil Procedure Code, s. 549.

The executor of an executor is not entitled to administer the estate of the original testator without a fresh grant of administration.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, for first respondent, appellant.

C. X. Martyn, for second respondent, appellant.

N. Nadarajah (with him *C. Thiagalingam* and *D. W. Fernando*), for petitioner, respondent.

November 14, 1935. AKBAR S.P.J.—

Under a last will of 1905 of a Muslim lady who died in 1916 her husband was named as the executor and a bequest of Rs. 2,000 was made to the petitioner-respondent which was to be paid to him on his attaining 21 years, if " the executor shall deem him deserving of the said legacy ". The executor proved the will and filed his final account on November 20,

1916, in which he showed that he had retained the Rs. 2,000 being amount of legacy payable to the petitioner-respondent. According to the petitioners affidavit he attained majority about a month after final account was filed, namely, December 27, 1916.

The executor himself died on September 7, 1922, leaving a last will which was proved by the two appellants as executors in D. C. Colombo, 1,096, and final account was filed in this case on September 11, 1923. The petitioner filed his present application under section 720, Civil Procedure Code, on July 20, 1933, alleging that he had not been paid this legacy and that he came to know of it only recently. On June 6, 1934, the petitioner filed a petition stating that the appellants as executors of the original executor were " the executors *de bonis non* " of the lady's will and asked the Court to appoint them " executors *de bonis non* ", for a judicial settlement of the accounts of the estate of the testatrix and for payment of the legacy with interest.

On October 26, 1934, in spite of objection offered by the appellants they were appointed administrators *de bonis non* of the estate of the testatrix and on December 13 the Court entered a decree directing the appellants to pay the legacy with interest to the petitioner. Under section 549 of the Civil Procedure Code when a fresh grant of administration is made on the death of a sole executor the rules prescribed in the Code for a first grant must be followed.

In this case the learned District Judge dispensed with all these formalities as he was of opinion that the lady's will had been proved and all the formalities had been gone through. In my opinion this was a fatal omission which vitiated the whole proceedings. None of the heirs under the will of the testatrix were cited and the District Judge forced the two appellants who were unwilling to be the administrators *de bonis non* of the estate of the testatrix. At the inquiry on the December 6, 1934, the appellants took up the position that they did not know whether the first executor had paid the legacy to the petitioner or had exercised his discretion and had refused to pay the legacy. If the other heirs had been cited they might have helped the Court on this point. As it is there is only the affidavit of the petitioner to prove that the legacy was not paid to him.

Faced with this objection Mr. Nadarajah argued on the remarks of Lord Romily in *Brooke v. Haymes* [1] that the appellants were the executors of the original testatrix without any grant of fresh letters of administration. I am not prepared to hold that this is the law in Ceylon for several reasons. In the first place by the order of the Court of October 26, 1934, the Court did issue letters of administration to the appellants without following the formalities for a first grant. In the second place our law is to be found in statutory form in section 549, and to introduce the English law will be to do violence to the words of that section by introducing an exception which the draftsman could very well have included and did not. Moreover, it would be undesirable to allow the executors of an executor to administer the estate of the original testator without the supervision of the Court and perhaps leaving the Court in ignorance of such administration. Further, according to the decision of the Full Bench in *Silva v. Silva* [2], the powers of the personal representative of an

[1] *L. R. 6 Equity 25.* [2] *10 N. L. R. 234.*

estate are not the same in England and Ceylon. Nor do I think on the authority of the case reported in *2 Leader Law Reports, p. 58, that* the appellants cannot question the order of the District Court made on October 26, 1934, in this appeal.

I would allow the appeals and set aside the orders of the District Court made on October 26, 1934, and December 13, 1934. The appellants will be entitled to the costs of these appeals but each party will bear his own costs in the Court below.

MAARTENSZ J.—I agree.

Appeal allowed.