1937 *Present* : **Soertsz J. and Fernando A.J.**

SAMARASINGHE *v.* SECRETARY, DISTRICT COURT, MATARA.

1—D. C. Matara, 3,590 (Testy).

Estate duty—Application for execution and sale of property—Application must be made by Commissioner of Stamps—Citation to issue to donee of property—Person interested—Mortgage of property—Ordinance No. 8 of 1919, ss. 18 and 32.

An application for execution by sale of property for failure to pay estate duty must be made by the Commissioner of Stamps under section 32 of the Estate Duty Ordinance upon a citation issued to the person accountable to pay the duty.

Where the duty is payable by a person to whom the deceased has gifted the property notice must be served on such party.

A mortgagee of the property on which the duty is leviable is a person interested in the application.

Mackie v. Commissioner of Stamps (*15 C. L. Rec. 123*) and *Kagoo v. Commissioner of Stamps* (*5 C. L. W. 90*) referred to.

APPEAL from an order of the District Judge of Matara. The facts are stated in the judgment of Fernando A.J.

H. V. Perera, K.C. (with him *N. E. Weerasooria*), for appellant.

A. L. Jayasuriya, for second and third respondents.

Elliot, K.C. (with him *Jayasuriya*), for fourth respondent.

Cur. adv. vult.

June 21, 1937. SOERTSZ J.—

Mr. Elliot in the course of his argument, stated repeatedly that this case would probably go to the Privy Council. I do not quite understand the purpose of this peristent intimation—but I wish to say that I have given this case as careful a consideration as this Court gives to all cases, including cases in which an appeal to the Privy Council is not adumbrated, and I agree with my brother that the appeal must be allowed. It is clear, and it is not denied that the appellant has very substantial interests in the land that has been sold and he, therefore, had a right to come before the Court and ask that he be allowed to pay the

estate duty due by instalments, and when that application was refused, and an order was made for the sale of the land, he was entitled to appeal. I cannot, therefore, understand the preliminary objection which Mr. Elliot sought to take that no appeal lies from the order of the District Judge.

In regard to the merits of the appeal, Mr. Elliot contended that because this sale was carried out on the orders of a Court which had jurisdiction and his client purchased the land at such a sale, the sale could not be canvassed any further. To my mind, he was there begging the question of jurisdiction by putting upon the word "jurisdiction" the meaning that the sale was the act of a competent Court for testamentary matters and that the sale was ordered by a Court within the limits of which the parties reside, and ignoring the appellant's contention that the Court had no jurisdiction to make the order in the sense that the Court was not authorized by law to make it. The journal entries show that there has been great delay in the payment of estate duty and the administrator on several occasions brought to the notice of the Court the fact that the Commissioner of Stamps was pressing him for payment. He finally moved that he be authorized to lease this land for five years in order to raise a sufficient sum to pay the amount due on account of duty. The Court ordered notice of this application to issue on the heirs and then on June 4, 1935, overlooking the fact that the notice issued on the heirs was one calling upon them to show cause why the land should not be leased for five years, made order in the absence of the heirs that some other property be sold. That sale fell though for want of bidders and then the administrator on December 23, 1935, disregarding his earlier application to be allowed to lease this land for five years, and evidently taking a cue from the order of June 4 asked that writ be issued to sell this land. Now it is perfectly clear from section 32 of Ordinance No. 8 of 1919 that the proper course would have been for the Commissioner of Stamps to ask for execution to issue for the recovery of estate duty and in the event of his making such an application, citations would have to be served on the person or persons in default to show cause against execution issuing under section 19 (2) of the Ordinance. The appellant was one of the parties in default and he was therefore entitled to a citation. Here no citation went on any party to show cause against the proposed sale. This case is much worse than a case in which an order is made without the other side being heard. For here not even one side was heard. I mean the Commissioner did not make the application although he was the proper person to make it. In my opinion, therefore, the order for sale was unlawful and therefore without jurisdiction. The fact that the parties whose land has been sold came forward (see journal entry of May 18, 1933) and stated that they did not authorize the appellant to pay the estate duty and asked that his application be refused, does not and cannot cure that defect. This desire that their land should be sold and that the money of another should not be accepted to save it cannot be regarded as a pure altruism on the part of the owners of the land. To my mind it is an attempt pure and simple on their part to get back their land through the medium of a friendly purchaser entirely freed of all obligations in which they have involved themselves towards the appellant.

I agree to the order proposed by my brother.

FERNANDO A.J.—

This is a testamentary action in which the estate of Mohamed Joonoos who died in October, 1929, is being administered by the first respondent. It would appear that Joonoos gifted a tea estate called Razeena Group to four of his children, namely, Samee, Anvar, Razeena, and Jezima the second respondent, by a deed of gift dated July 24, 1929. Joonoos having died in October, 1929, the estate which was gifted in July, 1929, must be considered as property passing on the death of Joonoos in terms of Ordinance No. 8 of 1919, and estate duty became payable on the value of Razeena Group on that footing.

It would appear that on June 4, 1935, a writ was issued to sell premises described as situated at Station road, Matara, but the Fiscal reported that the sale fell through for want of bidders, and the Official Administrator on December 23, 1935, moved that writ do re-issue for the sale of the second respondent's share of this estate in order to recover her share of the estate duty. That application was allowed, and writ re-issued returnable on March 16, 1936.

It would appear from the journal entries that a sale of the property under this writ was fixed for a date later than May 18, and on May 18, Proctor for the appellant moved that the writ be re-called and that he be allowed to pay the estate duty in certain instalments. This application was made on the footing that the appellant had a lease and a mortgage of a one-fifth share of the estate, and it is stated that the second respondent had mortgaged her share to the appellant by a bond dated March, 1932, and had also entered into an agreement dated July, 1933, by which the appellant was allowed to work the land and take a certain share of the profits to himself. On May 19, after hearing Counsel for the appellant, the learned District Judge refused his application and ordered the sale to be carried out at an upset price of Rs. 10,000. It is now stated that the appellant has also purchased the two-fifths share of the estate which had been gifted to Samee, and had a lease of the two-fifths share belonging to Anvar and Razeena.

Counsel for the appellant contends that section 32 of Ordinance No. 8 of 1919 provides that the Commissioner of Stamps may apply to the Court to issue a citation to the person accountable for the duty calling upon him to pay the estate duty due on the property that has been gifted to him, and if such person fails to appear or to show sufficient cause, the Court may cause execution to issue for the amount of the estate duty. In this case he urges that there was no application for a citation, that no citation issued, and that in these circumstances, the Court had no power to order that writ should issue for the sale of the second respondent's share of this estate.

Counsel for the fourth respondent, the purchaser at the sale, contended that it was not open to the appellant to appeal to this Court. He argued that this was a sale by order of Court, that the fourth respondent had purchased the property, and that the appellant could no longer dispute the power of the Court to order the sale as against the fourth respondent who was no party to the action. I do not see how this contention can prevail. The appellant claims to have an interest in the property that was sold, and he seeks by this appeal to have it declared that the order

by which the learned Judge issued writ for the sale of this property was an order made without jurisdiction, and that the sale held in pursuance of that order is therefore a nullity. If a person claims an interest in a property, and if that property has been sold by an order which the Court had no power to make, I cannot understand how such a person can be barred from appealing to this Court against the order made directing the sale of the property.

Counsel for the fourth respondent next argued that the question of the jurisdiction of the Court to make the order complained of, was not raised in the District Court, and therefore, cannot now be raised in appeal. For this reason he at first declined to argue the question raised by the appellant, namely, whether the Court had jurisdiction to make the order. I am unable to understand the ground on which this contention is put forward. The question whether the Court has the power to make a particular order or not is a question that can be raised by any party who is affected by that order, and even if in the Court below the question of jurisdiction of the Court was not expressly raised, I find it difficult to say that a person cannot in appeal contend that the order was without jurisdiction. We, therefore, invited Counsel for the fourth respondent to address us on the question raised by Counsel for the appellant.

Mr. Elliot then argued that the Official Administrator was appointed in 1931, that the duty of paying the estate duty was on such Administrator, and that the Administrator was, therefore, entitled to ask the Court to order the sale of property in order to enable him to pay the duty. Section 18 of the Ordinance, however, makes such portion of the duty as is levied on the value of property gifted by the deceased a first charge on such property in the hands of the person to whom the property has been gifted, and the obligation of the Administrator to pay estate duty is limited to such portion of the duty as is levied on the property that comes into his hands. Mr. Elliot also contended that the appellant was not the owner of the property, his interest being merely that of a mortgagee or of a person allowed to possess the property under an agreement.

Counsel for the appellant contended, on the other hand, that in terms of section 32 of the Ordinance, it is only the Commissioner of Stamps that can apply for execution on the failure to pay estate Duty. He also argued that where estate duty was demanded by the Commissioner of Stamps, a notice should issue even to a person in whose favour a mortgage bond had been executed by the deceased, and relied on the authority of *Mackie v. The Commissioner of Stamps*[1]. He also referred to the case of *Kagoo v. The Commissioner of Stamps*[2], where it was held that an application for a citation signed by a subordinate officer for the Commissioner of Stamps was not sufficient, and that the application must be signed by the Commissioner of Stamps himself. It seems to me that the contention for the appellant on this point must succeed. The Commissioner of Stamps has the power to make arrangements with regard to the payment of estate duty on such terms as he may think fit, and the property left by the deceased or donated by him is ordinarily not to be sold for the recovery of estate duty, unless it become impossible

[1] *15 Ceylon Law Recorder 123.*

[2] *5 Ceylon Law Weekly 9 0.*

to arrive at some arrangement with the executor or the donee. The Official Administrator as such has no more power than any other Administrator, and he has to apply for leave of Court to sell property even for the payment of the duty which has to be paid by him. The estate duty in this case was payable by the second respondent or by any other person having an interest in the property, and the order issuing writ for the sale of this property appears to have been made without any notice either to the second respondent or to any other person. The appellant was, therefore, entitled to ask that the writ be re-called. It is not necessary at this stage to discuss the rest of the application made on behalf of the appellant on May 18, 1936. The order reissuing the writ, and the order made by the Court on May 19 that the sale was to be carried out in spite of the appellant's application, must be set aside. In the result, the sale to the fourth respondent must also be set aside, and it will be open to the Commissioner of Stamps, if he so desires, to make an application for execution for the recovery of the estate duty due from the second respondent. The second and third respondents, and the fourth respondent jointly and severally will pay to the appellant his costs of this appeal.

Appeal allowed.