

1950

Present : Nagalingam J. and Palle J.

NATCHIRE, Appellant, and LEWIS HAMY *et al.*,  
Respondents

*S. C. 150—D. C. Gampaha, 114*

*Mortgage Ordinance (Cap. 74)—Representation of estate of deceased mortgagor—Sections 6 and 7.*

Where a hypothecary action was instituted against an heir of a deceased mortgagor who was in possession of the mortgaged property—

*Held*, that where there is no executor or administrator appointed to the estate of a deceased mortgagor, an order of Court should be obtained under section 7 of the Mortgage Ordinance (Cap. 74) to appoint a person to represent the estate and such person must be made a party to the action. Otherwise, the action is not properly constituted and cannot be maintained.

**A** PPEAL from a judgment of the District Court, Gampaha.

*H. W. Jayewardene*, with *J. M. Jayamanne*, for the 1st defendant appellant.

*S. C. E. Rodrigo*, for the plaintiffs respondents.

*Cur. adv. vult.*

October 20, 1950. NAGALINGAM J.—

The question for decision on this appeal is whether a hypothecary action instituted against an heir of a deceased mortgagor in possession of the mortgaged property is well constituted.

The 1st defendant appellant who is the sole defendant in the case and who is the widow of the deceased mortgagor has been sued by the plaintiffs for the recovery of the principal and interest alleged to be due upon a mortgage bond executed by the deceased mortgagor hypothecating property referred to in the plaint. The estate left by the deceased mortgagor who died intestate is admittedly under Rs. 2,500 in value and the land hypothecated would appear to be also below the value of Rs. 2,500. The appellant took the plea that she was not liable to be sued as an heir in possession who had adiated the inheritance. The learned District Judge has held against her and the appeal is from that order.

The determination of the rights of parties centres round the construction of the provisions of the Mortgage Ordinance (Cap. 74). Now, section 6 (1) of the Ordinance declares that every person is a necessary party to a hypothecary action who has an interest in the mortgaged property, to confine one's attention to so much of the section as is relevant for the purpose of the present case. There is no express requirement in this section that a mortgagor or an administrator or executor of a deceased mortgagor is a necessary party but they are all compendiously referred to by the phraseology adopted, "Every person who has an interest in the mortgaged property." The mortgagor and the executor

or administrator of a deceased mortgagor would undoubtedly come under the category of persons who have an interest in the mortgaged property. That this is the construction to be placed on section 6 (1) is made manifest by the other provisions of the Ordinance. Sub-section 2 of section 6 draws a distinction between two main classes of necessary parties, one that may be termed an absolutely necessary class and the other a class necessary only in certain circumstances. The one class consists of (a) the mortgagor, (b) the executor or administrator of a deceased mortgagor, (c) the assignee of the estate of an insolvent mortgagor. The other class consists of puisne encumbrancers who become necessary parties only where the instrument under which they claim title is duly registered and an address of service of legal documents on them has also been registered. The effect of sub-section 3 is that where any person falling under the latter class has failed to comply with the requirement as to registration of the instrument or of the address, he need not be made a party, and though not so made a party he would be bound as effectually as if he had been. It will be noticed that there is no similar provision in regard to the former class of persons and the reason for such absence is easy to see because that class of persons must in every instance be made a party defendant to a hypothecary action.

What is the effect of declaring that a mortgagor or the executor or administrator of a deceased mortgagor is a necessary party to a hypothecary action in all circumstances whatsoever? Or, to put it shortly, that a mortgagor or the executor or administrator of a deceased mortgagor should be an absolutely necessary party to a mortgage action? I think the only answer to that question is that unless an absolutely necessary party is made a party to the action, the action is not properly constituted and any decree entered would be ineffective to bind the property hypothecated, for to take any other view would be to render nugatory the requirement of the statute.

It has been contended that section 6 (2) applies only to cases where there is already in existence an executor or administrator and not to cases either where the estate of the deceased mortgagor requiring administration has not been administered or where no administration is in fact necessary. I think the first part of this contention is sound while the same cannot be said of the second part. The unsound part of the contention either ignores the provision of section 7 of the Ordinance or does not give a proper meaning to it. The opening words of section 7 "where the executor or administrator of a deceased mortgagor is a necessary party to a hypothecary action" clearly indicate an assumption by the Legislature that every estate, whatever its value, may be the subject of administration proceedings. It will be obvious that an estate not more than Rs. 2,500 in value must of necessity be administered if the deceased died testate; and even though an estate may be under Rs. 2,500 in value and the deceased may have died intestate, there is no legal bar to the administration of such an estate; so that, recognising these eventualities the section proceeds on the basis that to any estate of a deceased mortgagor there may be an executor or an administrator and it then proceeds to make provision for cases

where no appointment of an executor or administrator may in fact have been made to the estate of a deceased mortgagor, by enacting that the Court may appoint a person to represent such an estate for the purpose of the hypothecary action. The estates to which such an appointment could be made are divided into two broad groups: (1) where the mortgaged property—and be it noted not the estate—does not exceed the value of Rs. 2,500, (2) where, whatever the value of the estate, the appointment of an executor or administrator is likely to be unduly delayed. That the person appointed to represent the estate in these circumstances should himself be regarded as a necessary party flows from the provision that if such a person is made a party to the action, then, every order, decree, and sale, or thing done in a hypothecary action should be as effective as if the executor or administrator of the deceased (who has already been declared to be a necessary party) were a party to it.

It must necessarily follow from this provision that where no executor or administrator has been appointed in respect of the estate of a deceased mortgagor and no person has been appointed to represent such an estate under section 7, then any order, decree and sale or thing done in the hypothecary action would not be as effective as if the executor or administrator of the deceased were a party to the action and must result in the order, decree or thing done in such a hypothecary action being altogether ineffective and the mortgaged land would not be bound in consequence. I do not accept the contention of Counsel for the respondent that section 7 is merely a permissive section in regard to the appointment of a person to represent the estate of a deceased mortgagor to whose estate no appointment of an executor or administrator has been made. The view I have reached is in consonance with the previous history of the case law on the point which was finally and authoritatively enunciated in the Divisional Bench case of *Thambaiyar v. Paramusamy Iyer*<sup>1</sup> which was decided under the repealed provisions of the Civil Procedure Code, and I am satisfied that the new Ordinance has not the effect of altering the law in this regard.

I am therefore of opinion that where there is no executor or administrator appointed to the estate of a deceased mortgagor, then an order of Court should be obtained under section 7 of the Mortgage Ordinance to appoint a person to represent the estate and such person must be made a party to the action, otherwise the action is not properly constituted and cannot be maintained.

I therefore hold that the plaintiffs' action is not properly constituted and that the action fails. The judgment of the learned District Judge is set aside and the plaintiffs' action is dismissed with costs here and in the Court below.

PULLE J.—I agree.

*Appeal allowed.*

<sup>1</sup> (1917) 19 N. L. R. 385.