Present : Ennis J. and Shaw J.

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ARUNASALEM *v.* SOMASUNDERAM

98 and 99—D. C. Jaffna, 7,668

Land held in trust for another—Action by heir against trustee—Is administrator the only party entitled to sue ?—Interlocutory appeal—Does it ipso facto *stay proceedings in the action ?—Appeal—Bond hypothecating security—Stamps instead of money tendered for serving notice of appeal—*Res adjudicata*—Withdrawal of case by administrator—Action by heir—Prescription.*

Plaintiff and defendants were the heirs of one Arunasalem Chetty, and entitled to a half share of his property. Arunasalem Chetty's agents in Ceylon conveyed the lands in question to the defendants, when he in turn became Arunasalem Chetty's agent. After Arunasalem Chetty's death plaintiff brought this action for declaration of title to a half share of the lands or for a conveyance. It was contended for the defendant that as the legal title vested in the defendant, the only claim possible was for a conveyance, and that such a claim was "a chose in action," upon which the administrator alone had the right to sue.

Held, that the plaintiff had the right to maintain this action.

SHAW J.—The property of a deceased person who dies intestate passes on his death to his heirs, subject to the right of the administrator to sell for the purposes of administration if necessary. This principal applies to property held in trust for the deceased as well as to property the legal title to which was vested in him, and the heir can enforce his rights to such property if it is not required by the administrator for the purposes of administration. An interlocutory appeal does not *ipso facto* stay proceedings in the action pending the determination of the appeal.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Samarawickreme* and *Canakaratne*), for appellant.

A. St. V. Jayawardene (with him *Drieberg*), for respondent.

B. F. de Silva (with him *Thiagarajah*), for added respondent.

Cur. adv. vult.

July 16, 1918. ENNIS J:—

In this action the plaintiff, Arunasalem Chetty, claimed against the defendant, Somasunderam Chetty, a declaration of title to a half share in five lands, or in the alternative that the defendant be ordered to convey a half share to him. The plaintiff further prayed

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for possession ; for Rs. 37,976.50 as balance due in respect of profits for a half share from 1901 to 1908 ; for an account, or Rs. 20,625, in respect of a half share of the profits from 1908 to the date of action, viz., December 16, 1910 ; and for further damages thereafter at the rate of Rs. 900 per annum. The learned District Jundge found in favour of the plaintiff, and the defendant appeals (Appeal No. 99).

The lands Nos. 1 to 4 originally belonged to James Price Todd, who conveyed them by deed No. 319 of April 28, 1898, to Suppramaniam Chetty, who on May 1, 1910, conveyed them to the defendant by deed No. 911.

Land No. 5 originally belonged to Henry J. Todd, and on a writ of execution against him was sold by the Fiscal and conveyed to Nachchiappa Chetty on March 16, 1900, who by deed No. 907 dated April 24, 1900, conveyed to the defendant.

Both Suppramaniam Chetty and Nachchiappa Chetty were the agents of Arunasalem Chetty, the grandfather of the present plaintiff, and bought with his money for him. The lands were conveyed by them to the defendant, when he in turn became the agent. The question as to whether the defendant held the land in a representative capacity was decided in favour of Arunasalem Chetty in Jaffna District Court case No. 6,697 between the same parties. The decision was affirmed by this Court on appeal, [1] and again on appeal to the Privy Council. [2] Counsel for the defendant-appellant accepts the findings in that case that the lands were conveyed to the defendant in trust.

After the institution of the present action on December 16, 1910, it was stayed until the decision in No. 6,697; and that case having been finally disposed of by the Privy Council on October 26, 1917, the present case came on for trial.

Arunasalem Chetty, the senior, died in 1901, and the plaintiff and defendant are his sole heirs, each entitled to a half share in his property. At the trial the defendant took the objection that the plaintiff could not maintain the action, as the administrator had not been joined, and on June 8, 1918, the learned District Judge made an order, with the consent of the administrator, adding the administrator as a plaintiff. The defendant also appeals from this order (Appeal No. 98).

Three preliminary objections were taken to the appeals :—

(1) That no money had been deposited in Court, within the prescribed period, to meet the expenses of serving notice of appeal, as required by section 756 of the Civil Procedure Code ;

(2) That the amount deposited as security for the appeal has not been hypothecated ; and

(3) That the appeals were not properly constituted, as the administrator had not been made a party.

[1] *(1914) 17 N.L.R. 257* [2] *Privy Council Appeal No. 79 of 1915.*

With regard to the first objection, it appears that stamps were affixed, within the prescribed period, to the notices of appeal, which were duly served. Stamps are used as a means for accounting for money, and that they were affixed proves that the amount was received by the Court. I would over-rule the first objection.

With regard to the second objection, it appears that the bonds contain a clause " for better securing the payment ..... I hereby deposit ..... the said sum ..... as per kachcheri receipt No. ..... ". The mention in the bond of the specific deposit " for better securing the payment " is, in my opinion, an hypothecation of that deposit. I would over-rule the second objection.

With regard to the last objection, it was agreed that the administrator should be added as a party to the appeals, leaving open the appellant's objection to his addition as a party plaintiff in the case, and, as counsel for the administrator was present and also agreed, this was allowed, and the hearing of the appeals proceeded. It was argued for the appellant—

(1) That the first plaintiff could not maintain the action.

(2) That the matter was *res adjudicata* against the administrator, and through him against the plaintiff, by the withdrawal of case No. 7,208, D. C. Jaffna, filed by the administrator in respect of the same cause of action, and that the learned Judge was wrong in refusing to frame an issue on this point.

(3) That the filing of the appeal No. 98 against the order of June 8, 1918, stayed proceedings, and that all proceedings after that date were null and void.

(4) That the claim was prescribed.

With regard to the first point, it was contended that as the legal title vested in the defendant, the only claim possible was for a conveyance, and that such a claim was " a chose in action, " upon which the administrator alone could sue. To meet this, it was pointed out that the administrator had filed an action, viz., No. 7,208, in which the present appellant, in answer, had objected, on the ground that the administrator could not do so without an averment that the lands in question were required for the purposes of administration; that the administrator could not then make such an averment ; and that, since he has been joined in the present action, has declared that he does not so require the lands. Counsel for the respondent further urged that the plaintiff's action was an action by an heir who had reduced the lands to possession. He relied on P 1, an agreement made in 1901 between the plaintiff and the defendant, whereby one Raman was appointed their joint agent for the management of these lands, and the evidence of Palaniappa Chetty, who was the Colombo agent for the plaintiff and defendant for the three years 1901 to 1904, and who received from Raman remittances in respect of the lands. There is, in my opinion, ample proof that the defendant was in possession through Raman,

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and that his possession was not interfered with till 1908, when plaintiff first claimed the whole estate, as found in the case No. 6,697. In my opinion the plaintiff as heir in possession can maintain the action, especially as the administrator does not require the lands for purposes of administration.

On the second point, section 406 of the Code of Civil Procedure was cited, and the appellant filed, with an affidavit, a copy of the proceedings in case No. 7,208. In my opinion the learned District Judge was right in refusing to allow the issue proposed by the defendant. The point could have been raised in case No. 6,697, for the decision in which the present case has been standing over for years. It was not raised in that case, and it is too late to raise it now. Moreover, to raise it would require an amendment of the plaint in this case in so far as the first plaintiff is concerned, and no application to amend it has been made. Further, the applicability of section 406 is not beyond question: if the alternative (*b*) is omitted, the rest of the section read with (*a*) would seem to have no meaning, unless after the word " application " the words " for permission to withdraw " are understood; the section, moreover, does not expressly bar privies of parties withdrawing. It was sought to draw an analogy in this respect with section 207. I do not see any analogy, as a withdrawal is not an adjudication. The authorities dealing with section 207 have held that the section is not exhaustive of the subject of *res adjudicata*, and there is no reason that I can see for applying such a ruling by analogy to cases of withdrawal.

For the appellant's third argument the case of *Cassim Lebbe Marikar v. Surayi Lebbe*,[1] *4 Nathan 2360, and Voet 49, 6, 1*, were cited. I see no occasion to refer to the Roman-Dutch authorities. Section 4 of the Civil Procedure Code governs the question. As to the practice, it seems to me to be clear that when an act or omission of a party is to abate the action, special provision is made in the Code, and, short of abatement of action, proceedings can only be stayed by an order. In the case of *Cassim Lebbe Marikar v. Surayi Lebbe*,[1] the Court from which the appeal was had was to consider the stay of proceedings in execution. No case has been cited to us where the act of a party alone stays proceedings.

With regard to prescription. This point appears to have been raised in case No. 6,697, and decided on the same set of facts. The argument presented in this case was that the conveyances to the defendant did not establish an express trust. In my opinion the learned Judge is right in holding that the prefix of the *vilasam* before the defendant's name in the documents establishes an express trust, against which there is no prescription.

I see no reason whatever for interfering with the order and judgment of the learned District Judge, and would dismiss the appeals, with costs.

SHAW J.—

This is a step in some protracted legal proceedings, by means of which the defendant has succeeded in keeping a co-heir out of his inheritance for many years. So far as the facts and merits of the present case are concerned, they are precisely similar to those involved in the action between the same parties reported in *17 N. L. R. 257.*

That case related to another land claimed by the present defendant as his property, under identical circumstances to those under which he claims the lands the subject of the present action. In that case the facts were all found against him, and the judgment of this Court was affirmed by the Privy Council, their Lordships in their judgment stigmatizing his claim as a dishonest one.

The findings and decision in the previous case are accepted on behalf of the defendant as governing the present action, but numerous technical objections are raised, by which it is attempted to defeat the plaintiff's claim to the lands. The first and principal objection taken is that the plaintiff himself cannot maintain the action to enforce the right to his share of the lands, and that the administrator of the estate of the late Arunasalem Chetty alone has the right to sue.

It is also contended that the Judge was wrong in allowing the administrator to be added as a plaintiff in the action, and that further proceedings in the action became *ipso facto* suspended by the plaintiff's appeal from the interlocutory order of the Judge adding the administrator as a party, and that the subsequent proceedings are therefore void. It was further urged that any claim by the administrator was barred by prescription at the time he was made a party to the suit, and that both he and the heir are precluded from succeeding in this action by reason of the withdrawal of a previous action commenced by the administrator, in which he, as administrator, claimed the lands in dispute from the defendant, and that the Judge was wrong in refusing to settle an issue to try this question.

In my view the decision of the Judge that the plaintiff was himself entitled to maintain the action is correct. It was decided in the Full Court case of *Silva v Silva*,[1] that the property of a deceased person who dies intestate passes in Ceylon on his death to his heirs, subject to the right of the administrator to sell for the purposes of administration if necessary. I can see no sufficient reason to hold that this does not apply to property held in trust for the deceased as well as to property the legal title to which was vested in him, and, in my opinion, the heir can enforce his rights to such property, if it is not required by the administrator for the purposes of administration. This does not appear to me to conflict with the decision in the unreported case, *Fernando v. Sumanasara*,[2] to which I was

[1] *(1907) 10 N.L.R. 234.* [2] *Reported Later.*

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a party, that an executor or administrator is the only person who can sue in respect of debts due to, or contracts entered into by, a deceased whose estate amounts to Rs. 1,000 and upwards. That the properties in dispute were not required for the purposes of administration is clear, not only from the statement of the administrator himself, but from the fact that from the death of Arunasalem Chetty until the year 1908, when the defendant repudiated his co-heir's rights, the properties remained in the possession of the heirs, and were managed under the agreement of April 8, 1901, to which both the plaintiff and defendant were parties.

With regard to the contention that an interlocutory appeal *ipso facto* effects a stay of proceedings in the action pending the determination of the appeal, there appears no foundation for it, either in the Civil Procedure Code or the practice of the Courts. On the contrary, to judge from the provisions of chapter LIX. regarding the somewhat analogous case of an apeal from a decree, it would appear that the Code does not contemplate an appeal acting as a stay of proceedings, and, in my opinion, there is no stay of proceedings on an interlocutory appeal, unless an application is made for the purpose and acceded to.

The opinion I have arrived at on these points renders it unnecessary to consider the defendant's possible defences in an action by the administrator. Clearly, if the plaintiff can maintain the suit as heir under his title from the deceased, no withdrawal of any previous action brought by the administrator can affect his rights.

Only one other point remains for consideration, namely, whether the heir's claim or any part of it is barred by prescription. The action was commenced in December, 1910, and, according to the evidence in this case and the findings in the previous case, the plaintiff was in receipt of some of the rents and profits of the lands in dispute collected by Raman Chetty under the agreement between the plaintiff and the defendant of April 8, 1901, up to the year 1908. Moreover, it was found in the previous case, and affirmed by the Privy Council, that the conveyance to the defendant was a conveyance to him as representing the firm of R. M. A. R. A. R.; and he was, therefore, an express trustee of the lands and their proceeds The provisions of sections 14 and 15 of the Prescription Ordinance, 1871, seem also to be a sufficient answer to this objection.

I would dismiss the appeals, with costs.

Appeals dismissed.