Present : Ennis J.

1922

APPUHAMY *v.* BANDA

166—C. R. Kandy, 1,249.

Executor de son tort—*Person transferring all his property to another just prior to death—Action by creditor against donee as* executor de son tort—*Courts Ordinance, s. 31—Appeal—No prejudice to rights of either party.*

M executed a promissory note in favour of the plaintiff in September, 1921, and in October, 1921, conveyed the whole of her property to defendant. M died three days later. Plaintiff sued the defendant as *executor de son tort* on the note. The District Judge gave judgment for plaintiff on the footing that defendant was an *executor de son tort*, inasmuch as he had obtained the property on a deed of gift fraudulently as against the donor's creditor.

Held, that defendant was not an *executor de son tort*. The judgment was, however, affirmed under section 31 of the Courts Ordinance, as the substantial rights of either party was not prejudiced.

Ennis J.—"It may be that the plaintiff should have sought first to set aside the deed to the defendant, or adopted some other procedure to realize his claim against the estate of M, but I am satisfied that any irregularities there may have been during the trial of this case have not prejudiced the substantial rights of either party, as it seems to me clear, on the admissions of the defendant and the attitude he has taken up, that the property acquired by him on D 1 could, by a proper procedure, have been made liable for the payment of the debt."

THE facts appear from the judgment.

Hayley, for appellant.

H. V. Perera, for respondent.

September 21, 1922. Ennis J.—

This was an action on a promissory note. The note was executed by one Bandu Menika on September 15, 1921, in favour of the plaintiff. On October 30, 1921, Bandu Menika conveyed the whole of her property to the defendant. She died three days later, on November 2. The plaintiff sued on this note, and made the defendant defendant in the action, on the ground that he was an *executor de son tort* of the estate of Bandu Menika.

At the trial two issues were framed: first, as to whether Bandu Menika executed the note sued upon ; and, secondly, whether the

1922.

ENNIS J.

Appuhamy v. Banda

defendant was *executor de son tort* of her estate. The evidence seems to have been directed to the first issue. The defendant did not give evidence in the case, but put in his document D 1 to prove the conveyance to him by Bandu Menika. The learned Judge finally held that the note sued upon was executed by Bandu Menika. With that finding of fact there is no reason to interfere.

The question on appeal is as to whether the Judge is right in holding that the defendant was liable as an *executor de son tort*. The learned Judge apparently relied upon some obscure passage in Halsbury where a reference was made to some bygone opinion that a person who had obtained goods by a deed of gift fraudulently as against a donor's creditor is, after the donor's death, liable to his creditor as *executor de son tort* in respect of the goods while they remain in his hands. Counsel for the appellant, I think rightly, suggested that this passage is based on questions relating to bills of sale in England before delivery of possession is given.

The petition of appeal complains that there was no issue as to fraud, and suggests that if fraud had been raised in a proper issue, the defendant could have proved that his sister, Bandu Menika, had married in *diga*, and so had forfeited all rights to the paternal estate, and had no right, title, or interest in the property conveyed to him on D 1. He also suggested that he could prove that Bandu Menika's estate was not insolvent and was able to meet her debts. With regard to the first of these conclusions he is confronted by his own deed in which he practically acknowledges that the legal estate of Bandu Menika was vested in him three days before her death, and he put this deed in as the foundation of his own title, and made no suggestion in his answer that the land was his and had been his all along independently of the deed.

With regard to the second of these contentions his answer suggests, in paragraph 3, that Bandu Menika left no property with which he could interfere as *executor de son tort*, and the learned Judge has recorded in his judgment the admission by the defendant that Bandu Menika left no property other than the property covered by the defendant's deed D 1.

It seems to me that this case is peculiarly one where the provisions of section 31 of the Courts Ordinance apply. However the issues are framed, the question between the parties was whether the estate of Bandu Menika was liable on the plaintiff's suit. The attitude taken up by the defendant that his title was based on the deed D 1 preclude any possibility of an injustice having been done by the decree under appeal. It may be that the plaintiff should have sought first to set aside the deed to the defendant, or adopted some other procedure to realize his claim against the estate of Bandu Menika, but I am satisfied that any irregularities there may have been during the trial of this case have not prejudiced the substantial

rights of either party, as it seems to me clear, on the admissions of the defendant and the attitude he has taken up, that the property acquired by him on D 1 could, by a proper procedure, have been made liable for the payment of the debt.

I accordingly dismiss the appeal, with costs.

Appeal dismissed.