Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

Aug. 8, 1910

SILVA *et al.* *v.* APPUHAMY *et al.*

D. C., Kalutara, 4,197.

Action on a mortgage bond—Property mortgaged under Rs. 1,000 in value—Estate of mortgagor over Rs. 1,000—Person appointed under s. 642, Civil Procedure Code, to represent estate of mortgagor—No necessity for administration—Civil Procedure Code, ss. 547 and 642.

In an action on a mortgage bond where the mortgaged property is under the value of Rs. 1,000, it is sufficient under section 642, Civil Procedure Code, for the mortgagor to get a person appointed to represent the estate of the deceased mortgagor for the purpose of the action, even though the estate of the mortgagor may be over Rs. 1,000 in value.

Section 547, Civil Procedure Code, must be read subject to the provisions of section 642.

A mortgagee who brings an action on a mortgage bond does not seek to recover, in the sense used in section 547, property belonging to or included in the estate of the mortgagor.

THE facts of the case are fully set out in the judgment of the Chief Justice as follows:—

This is an appeal by the plaintiffs from an order settling an issue. The action is brought for a declaration of title to a piece of land and to recover possession. The plaintiff's case is that Don Salman Wijeykoon and his wife Abeynayakage Nonohamy, who were married in community of property about thirty-four years ago, and who were the owners of the land mortgaged it to the first plaintiff by deed dated January 19, 1893; that Nonohamy died intestate about twelve years ago, leaving an estate under the value of Rs. 1,000; that the first plaintiff in 1902 applied to the District Court for an order, under section 642 of the Civil Procedure Code, to appoint some person to represent the estate of Nonohamy for the purpose of an action on the mortgage deed, and the Court on December 19, 1902, made an order appointing her husband, Don Salman, to represent her estate for the purpose of the said action; that the first plaintiff then brought the said action, No. 2,664, in the District Court of Kalutara, against Don Salman, for himself and as representative of Nonohamy's estate, and by the decree in the said action on February 5, 1903, the land was declared bound and executable for the mortgage debt; and that under a writ of execution in the said action the land was sold by public auction, and the first plaintiff bought it and obtained a Fiscal's transfer dated

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December 21, 1903. The second plaintiff is lessee of the land from the first plaintiff. The plaintiffs allege that the defendants took forcible possession of the land in October, 1909.

The first four defendants in their answers deny the first plaintiff's right, and claim certain shares of the land through Don Harmanis, father of Don Salman; the fifth defendant claims under a lease and planting voucher from the first three defendants; the other defendants do not admit the plaintiffs' title, and deny that they ousted the plaintiffs. The first four defendants also, amongst other pleas, denied that Nonohamy's estate was under the value of Rs. 1,000, and said that it was worth more than that sum, and that no administration has been taken out to her estate.

The District Judge settled issues, the fourth of which was: "Was the estate of Abeynayakage worth Rs. 1,000 ?"

The plaintiffs appealed against the settling of this issue.

H. A. Jayewardene (with him *Prins*), for the plaintiffs, appellants.—The issue framed is quite irrelevant.

(1) Section 547, Civil Procedure Code, is subject to provisions of section 642, which is a later section. The provisions of the Code as to mortgage actions are quite distinct.

(2) Even section 547 does not apply to actions against an estate. (*Sevalingam Kangany v. Kumarihamy*,[1] *Prins v. Pieris* [2]).

(3) Under the Roman Dutch Law, where community of property exists, a decree against the surviving spouse binds the estate, whatever the estate may be worth.

(4) As long as the decree in the mortgage action stands, the purchaser's title could not be questioned. Counsel also cited *Silva v. Silva*.[3].

A. St. V. Jayewardene (with him *Weerasekera*), for the respondents.—The plaintiffs claim title through Nonohamy, whose estate was not administered. If the estate was worth Rs. 1,000 in value, plaintiff cannot succeed in establishing title (*Gunaratne v. Hamine*,[4] *Ponnamma v. Arumogam*,[5] *De Silva v. Thomis Appu* [6]).

H. A. Jayewardene, in reply.

Cur. adv. vult.

August 8, 1910. HUTCHINSON C.J.—

His Lordship set out the facts, and continued:—

The plaintiffs object to this issue, and contend that it is not open to the defendants to raise the question of the value of Nonohamy's estate in the present proceedings. They alleged in their plaint that her estate was worth less than Rs. 1,000, but they say now that that allegation was immaterial.

[1] *(1891) 1 C. L. R. 74.*
[2] *(1901) 4 N. L. R. 353.*
[3] *(1907) 10 N. L. R. 234.*
[4] *(1903) 7 N. L. R. 299.*
[5] *(1905) 8 N. L. R. 223 ; 1 Bal. 166.*
[6] *(1903) 7 N. L. R. 123.*

By section 547 of the Civil Procedure Code no action shall be maintainable for the recovery of any property in Ceylon belonging to or included in the estate of any deceased person where the estate amounts to Rs. 1,000, unless probate or letters of administration shall first have been issued to some person as executor or administrator of the deceased; and if any such property is transferred without such probate or administration being first taken out, the transferor and the transferee are guilty of an offence and are liable to a fine. And the defendants say that this is an action for the recovery of property belonging to the estate of Nonohamy.

The plaintiffs rely on section 642, which enacts that in an action by a mortgagee for the money secured on mortgage, and where the mortgagor is dead and no executor has been appointed and no administration has been taken out to his estate, and the property mortgaged is under the value of Rs. 1,000, the Court may, on the application of the mortgagee before action brought, and on its appearing to the Court necessary or desirable, appoint some person to represent the estate of the deceased mortgagor for all the purposes of the action; and the order so made, and any order consequent thereon, shall bind the estate of the deceased mortgagor in the same manner in all respects as if a duly constituted administrator of the deceased mortgagor had been a party to the action.

Effect must be given to both these enactments: section 547 must be read subject to the provisions of section 642. And the order of December 19, 1902, made under section 642, and the orders made in action 2,664 consequent thereon, and the sale and the Fiscal's transfer, bind the estate of Nonohamy in the same manner as if an administrator of Nonohamy had been a party to that action, notwithstanding that her estate may have been worth Rs. 1,000 or more. The purchaser at the Fiscal's sale got a good title to so much of the mortgaged property as formed part of her estate and had been mortgaged by her, no matter what was the value of her estate; and neither the Fiscal nor the purchaser was guilty of the offence or liable to the fine mentioned in section 547.

The fourth issue was, therefore, not material, and the order of the District Court allowing it should be set aside; and the defendants should pay the plaintiffs' costs of the contention as to that issue in the District Court and on this appeal.

MIDDLETON J.—

This was an action to vindicate title to property by the first plaintiff as lessor and the second plaintiff as lessee. The first plaintiff was a purchaser under a Fiscal's sale upon a decree in an action on a mortgage bond which he brought against Don Salman personally and as the duly appointed representative, under section 642 of the Civil Procedure Code, of his deceased wife Nonohamy,

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with whom, while married in community, Don Salman mortgaged the property in question to the plaintiff. The defendants were the alleged successors in title of Harmanis, the father of Nonohamy, and pleaded that the estate left by Nonohamy exceeded Rs. 1,000, and that it was necessary under section 547 to maintain this suit; that the plaintiffs should prove that Nonohamy's estate was under Rs. 1,000, as no letters of administration had been obtained to her estate. This contention was upheld by the District Judge, and the plaintiffs appealed.

The defendants, in effect, impeach the transfer of the property to the plaintiffs, and claim that the same is bad on the ground that they did not fulfil the obligations which they allege section 547 imposed on them. I have carefully looked into all the cases quoted by counsel, which are *Sevalingam Kangany v. Kumarihamy;* [1] *Fernando v. Dochchi;* [2] *Prins v. Pieris;* [3] *De Silva v. Thomis Appu;* [4] *Gunaratne v. Hamine;* [5] *Ponnamma v. Arumogam;* [6] *Silva v. Silva;* [7] *Supreme Court Minutes, June 14, 1910,* in D.C., Batticaloa, 3,140.

The primary object of section 547 is to compel those persons who claim benefit by inheritance from the estate of deceased persons, testate or intestate, leaving property in value exceeding Rs. 1,000, to obtain letters of probate or administration, and so to secure the payment of the legal stamp duties, and it bars all actions for the recovery of such property unless so complied with, and makes the transferor and transferee liable to fine. I think counsel for the appellants is right in arguing that it is not intended to bar claims against an estate for debt, and is not obligatory in such a case as this.

In the present case, the first plaintiff, being a mortgage-creditor of Nonohamy, fulfilled the obligation laid upon him by section 642 in obtaining the appointment of her husband Don Salman as her representative in the mortgage action. He was not then seeking to recover, in the sense used in section 547, property belonging to or included in the estate of Nonohamy, but a debt secured by mortgage on her property. All then that he had to do was to comply with section 642, and this he has done. It is said, however, now that, as he is seeking to recover property which at one time belonged to or was included in the estate of Nonohamy, he is bound by section 547.

The property, however, passed out of the estate of Nonohamy in perfectly legal fashion, and, in my opinion, it was not intended that every creditor and purchaser, under the circumstances of the present case, was bound as well to act under secton 642 as to obtain letters of administration to his debtor's estate, or prove that the same was

[1] *(1891) 1 C. L. R. 74.*
[2] *(1901) 5 N. L. R. 15.*
[3] *(1901) 4 N. L. R. 353.*
[4] *(1903) 7 N. L. R. 123.*
[5] *(1903) 7. N. L. R. 299.*
[6] *(1905) 8 N. L. R. 223.; 1 Bal. 166.*
[7] *(1907) 10 N. L. R. 234.*

under Rs. 1,000 in value under section 547. The words of section 642 are very strong, and declare that an order made under the latter part of the section shall bind the estate of the deceased mortgagor in the same manner in all respects as if a duly instituted administrator of the deceased mortgagor had been appointed.

I think that the test of the obligation under section 547 to prove that the estate is worth under Rs. 1,000, or that administration should be taken out, must be sought for by inquiring whether it was so obligatory at the time when the impeached transfer took place. In my opinion it was not obligatory here at the time of the transfer to the first plaintiff, and I would therefore set aside the order of the District Judge admitting the fourth issue, and allow the appeal with costs.

Appeal allowed.