1923. *Present* · Ennis A.C.J., Porter J., and Jayewardene A.J.

HASSAN *v.* SILVA.

383—D. C. Matara, 177.

Executor de son tort—*Application for probate by executor named in the will—Order* nisi *made absolute—Action against executor—No probate issued—Administration* cum testamento annexo *issued to another—Is decree obtained by executor binding on estate ?*

In March, 1917, I applied for probate of the last will of N, and order *nisi* was made absolute in June, 1918. The defendant, in August, 1917, sued I as executor, on a mortgage bond granted by N. I admitted the debt, and decree was entered in December, 1917. The mortgaged property was sold in July, 1918, and bought by defendant in August, 1918. I, purporting to act as executor, moved to set aside the sale, and subsequently withdrew his application, and Fiscal's transfer was issued to defendant in November, 1918. I took no steps to have probate issued to him, and plaintiff obtained letters of administration *cum testamento annexo*, and brought this action to oust the defendant from the possession of the property on the ground that the decree against I was ineffectual to bind the estate.

Held, on the facts that I had intermeddled with the estate and that the decree was therefore valid.

This case was referred to a Bench of more than two Judges by Schneider J. by the following order :—

SCHNEIDER J.—

One Neina Marikar died leaving a last will, application for probate of which was made by one Idroos Marikar as executor ; the order *nisi* granting him probate was made absolute on June 25, 1918.

The defendant, appellant, to whom Neina Marikar was indebted on a mortgage bond dated December 6, 1909, sued Idroos Marikar, the executor named in the will, in realization of his mortgage, and obtained decree in his favour on December 5, 1917. The property mortgaged was sold on July 27, 1918, and the Fiscal executed a transfer of the property in favour of the defendant, appellant, who was the purchaser, in November, 1918.

Idroos Marikar took no steps to have probate issued to him. The plaintiff in the present action obtained letters of administration *cum testamento annexo*, and sought, in this action, to oust the defendant from the possession of the property. The defendant set up his title under the Fiscal's transfer, the validity of which was questioned by the plaintiff, on the ground that the decree against Idroos Marikar was ineffectual, inasmuch as probate had not been issued to him at any time.

The learned District Judge held in favour of the plaintiff's contention. The defendant appealed, and Mr. Samarawickreme, on his behalf, cited the decision in *133—D. C. (F.) Matara, 9,845 (supra)*, as supporting his

contention that the order of June 25, declaring Idroos Marikar executor, and that probate should be issued to him, was effectual to render the decree binding upon the estate of Neina Marikar. He also pointed to the provision in section 8 of Ordinance No. 7 of 1840 and of section 41 of the Evidence Ordinance, 1895, as supporting his contention that the case of *Mohideen Hadjiar v. Pitchey* (*supra*) decided by the Privy Council was not applicable to the present case, inasmuch as that was a decision upon facts which had existed before the enactment of the Civil Procedure Code and of the Evidence Ordinance.

In view of Mr. Samarawickreme's contention and the conflict of the decisions, and the practical importance of the point raised by Mr. Samarawickreme, it seems to us that the appeal should be listed before a Bench of more than two Judges.

PORTER J.—I agree.

E. J. Samarawickreme (with him *Navaratnam*), for defendant, appellant.—The appellant's title to the land in question is founded on a Fiscal's transfer, the validity of which is questioned, on the ground that the decree, in execution whereof the Fiscal's sale took place, was obtained before probate had been granted to the executor. This contention, no doubt, would prevail, if the principle enunciated and followed by the Privy Council in *Mohideen Hadjiar v. Pitchey*,[1] can be said to be sound, and not capable of modification. Before the sale and the execution of the Fiscal's conveyance the will had been proved, and the decree granting probate had been made absolute. Thus, in conformity with the requirements of section 8 of Ordinance No. 7 of 1840, the status of the executor had been confirmed. The mere omission to take out probate cannot render the status, to which the executor had been declared entitled, non-existent. Further, the Privy Council decision was in 1894, and is inapplicable to the present case in view of the statutory provision contained in section 41 of Ordinance No. 14 of 1895, declaring a judgment, or order, or decree conclusive proof of the executor's legal character. Apart from this, the conduct of the executor named in the will supports the inference that he had constituted himself *de facto* executor; therefore the mortgage decree is binding on the estate.

Counsel cited *No. 133, S. C. Minutes, November 13, 1922—D. C. Matara, No. 9,845.*

E. W. Jayewardene, K.C. (with him *M. B. A. Cader*), for the respondent, was called upon to argue on the facts as to whether Idroos had intermeddled with the estate.

October 24, 1923. ENNIS A.C.J.—

This was an action for a declaration of title to certain shares and planting interests in a land. The property in dispute originally belonged to one Neina Marikar, who mortgaged it by the document

[1] *3 S. C. R. 105 and A. C. H. L. (1894) 437.*

1923.

ENNIS A.C.J.

Hassan v. Silva

No. 9,273 of December 6, 1909, to the defendant. It also appears that the defendant held a lease of the land. Neina Marikar died leaving a will, under which he appointed one Idroos Marikar executor, and he devised this property to his wife. On August 13, 1917, the defendant filed action No. 7,917 against Idroos Marikar on the bond. The caption of that action did not specify that Idroos Marikar was sued as executor, but the facts was stated in the body of the plaint. The plaintiff in that action failed at first to serve summons on Idroos Marikar, and there is a note in the journal to that action which is filed as D 2 in the case, that the defendant had evaded service by concealing himself. However, summons was subsequently served and the defendant appeared. He admitted the debt and said that he had not received letters of administration, whereupon the case was postponed for a later date. At the adjourned date there is a note : " Defendant present—absent when case was called." The learned Judge then gave judgment for the plaintiff on the ground that the defendant was unduly delaying matters. The plaintiff in that case then proceeded to the execution of his decree, and the property in question was sold on July 27, 1918, and bought by the plaintiff in that action, who is the defendant in this. On August 28, 1918, Idroos Lebbe petitioned the Court stating that he was the executor of the estate of Neina Marikar, and prayed for a notice on the respondent to show cause why the sale under the writ should not be set aside. On September 23 Idroos Marikar moved to withdraw his application to set aside the sale. On November 8, 1918, the Fiscal's transfer conveyed the property to the present defendant. It appears that Idroos Marikar applied for probate of the will of Neina Marikar in March, 1917, and obtained an order *nisi*. That order was made absolute on June 25, 1918. Idroos Marikar appears to have taken no further steps to take out probate, except to pay Rs. 90 as part payment of the duty payable. Thereafter the widow of Neina Marikar intervened, and administration of Neina Marikar's estate was ultimately granted to her son, the present plaintiff, who took out letters of administration with the will annexed. The learned Judge held that Idroos Marikar had not intermeddled with the estate of Neina Marikar, and, following the decision of *Mohideen Hadjiar v. Pitchey* (*supra*), further held that the estate of Neina Marikar was not bound by the decree in the mortgage action, because Idroos Marikar had not actually taken out probate. The learned Judge then gave judgment in favour of the plaintiff, and the defendant appeals.

The appeal came before my brothers Porter and Schneider, who referred it to a Full Court for the reasons given in the order of reference. On the hearing before us, it became more and more apparent when we listened to Mr. Samarawickreme, for the appellant, that the question in this case was one of fact. It is clear that an

executor obtains his authority to act from the will, but he must do something to show that he has accepted office, and in the absence of any intermeddling with the estate, the taking out of probate is deemed to be the act which shows that he has accepted the office. This was the basis of the decision in *Mohideen Hadjiar v. Pitchey* (*supra*). There are, however, other ways by which an executor can evince an intention to accept an office, for instance, any act of intermeddling or any specific act of his which allowed another to assume that he had undertaken the office of executor. In the present case, it seems that although Idroos Marikar was unwilling to be served with summons in the mortgage action, he nevertheless appeared and admitted the debt, and after the expiry of the time given him to take out probate he failed to appear before the Court, so that judgment was given against him because the Court held that he was merely delaying the action of the mortgagee. We have to consider whether this action of Idroos Marikar in admitting the debt was an act which showed that he had accepted the office of executor. In my opinion, his subsequent conduct after the decree in applying to the Court to set aside the sale on the ground that the lands did not fetch what they were reasonably worth showed that he had accepted the office as executor. Moreover, his petition to the Court on that occasion disclosed the fact that he acted as the executor of Neina Marikar. In these circumstances, I am of opinion that Idroos Marikar must be taken to have accepted the office of executor, and that the estate was bound by the result of his acts. The mere fact that he was not subsequently made executor, but was allowed to renounce, cannot affect the defendant's rights in this matter. It is possible that the Court ought not to have accepted his refusal to act as executor and not to have allowed him to renounce, but should have directed him to administer the estate. Such a consideration, however, has no bearing on the present case. In view of this finding of fact, there is no occasion to consider any of the legal arguments which were urged as they would be purely academic in the circumstances.

I would accordingly allow the appeal with costs, and dismiss the plaintiff's action with costs.

PORTER J.—I agree.

JAYEWARDENE A.J.—I agree.

Appeal allowed.