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Present: Lascelles C.J. and De Sampayo A.J.

SOYSA *v.* JAYAWARDENE.

75—D. C. Kalutara, 5,136.

Action on a mortgage bond—Representative of deceased mortgagor appointed under section 642 of the Civil Procedure Code—May property other than mortgaged property be sold in execution ?

A judgment on a mortgage bond obtained against a person appointed to represent the estate of the deceased mortgagor under the provisions of section 642 of the Civil Procedure Code cannot be executed by seizure and sale of property of the mortgagor other than those specially mortgaged.

THE facts are set out in the judgment.

Allan Drieberg, for the plaintiff, appellant.—The second defendant was duly appointed a representative of the estate of the deceased under section 642 of the Civil Procedure Code. A decree obtained against the representative binds the estate of the deceased " for all the purposes of the action. " In *Punchi Kira v. Sangu* [1] Bonser C.J. says (at page 46), where a representative is appointed, " any decree made in the hypothecary action is to bind the mortgagor's estate in the same manner as, and in all respects as, if a duly constituted administrator of the deceased mortgagor were a party." The decision of Bonser C.J. is later than that of Lawrie J. in *Mohamadu Lebbe v. Umma Nachia.* [2] The opinion of Lawrie J. is only *obiter*. Counsel also referred to *Silva v. Fernando.* [3] The decree in a hypothecary action includes a money decree, and it is binding on the estate of the deceased. All the property of the deceased is liable to be sold under the decree if the mortgaged property is insufficient.

All the property of an intestate vests on his death in his heirs, subject to the administrator's right to follow it for purposes of administration. *Silva v. Silva.* [4] The creditor can seize the property of the intestate though the heir may have sold or alienated it. *Gopalsamy v. Ramasamy Pulle.* [5] What an administrator can follow a creditor can follow.

Counsel also referred to *Segoe Mohideen v. Ismail Lebbe Maricar,* [6] *Pasupathy Chettiar v. Candar Pandary.* [7]

Wadsworth (with *B. F. de Silva* and *Cooray*), for the first defendant, respondent.—*Mohamadu Lebbe v. Umma Natchia* [2] is a direct authority in favour of the respondent.

[1] *(1900) 4 N. L. R. 42.*
[2] *(1896) 1 N. L. R. 346.*
[3] *(1897) 3 N. L. R. 15.*
[4] *(1907) 10 N. L. R. 234.*
[5] *(1911) 14 N. L. R. 238.*
[6] *(1906) 10 N. L. R. 97.*
[7] *(1889) 8 S. C. C. 205.*

If the intestate had parted with the property to first defendant during his lifetime, the creditor could not reach it unless he brings a Paulian action. The creditor cannot follow the property merely because the sale to first defendant was by the heirs. He should bring a Paulian action to follow the property in the hands of first defendant.

Drieberg, in reply.

Cur. adv. vult.

April 2, 1914. LASCELLES C.J.—

This is an appeal in an action under section 247 of the Civil Procedure Code by the plaintiff, who was an unsuccessful writ-holder in the claim proceedings.

The material facts are the following. One Alexander Siriwardene died possessed of considerable property, leaving a son, Fredrick Alwis Siriwardene, who died pending the administration of his father's estate. Fredrick Alwis Siriwardene left a widow, the second defendant, and two minor children. On June 8, 1909, the administrator of Alexander's estate conveyed half of one-tenth of certain property to the second defendant, and a like share to the minor children.

Fredrick Alwis Siriwardene at his death was indebted on a mortgage bond to the plaintiff, who on July 21, 1911, obtained judgment against Fredrick's estate; for the purpose of that action the second defendant was appointed under the proviso to section 642 of the Civil Procedure Code to represent Frederick's estate.

In March, 1912, the second defendant, as curatrix of her children's estate, and with the consent of the Court, conveyed the share of the minors in certain lands to the first defendant. There were other dealings with the property, but for the purposes of the appeal we are only concerned with the property conveyed to the first defendant.

The plaintiff, having obtained a decree in the mortgage action, discussed the property comprised in the bond; and when this proved insufficient to satisfy the decree, proceeded to seize, amongst other property, the property conveyed as above mentioned to the first defendant. The present appeal is from the judgment of the District Judge that this property is not liable to seizure and sale to satisfy the balance of the judgment debt.

On appeal the question of registration, on which the judgment of the Court below proceeded, was not relied on. Nor was it suggested that the transfer to the first defendant was in fraud of creditors.

The appellant's principal contention was that the second defendant, having been appointed under section 642 to represent the estate of Fredrick Alwis Siriwardene, the entirety of the estate, and not merely the land named in the decree, was bound by the decree in the mortgage action. It is, I think, impossible to accept the contention that a person appointed under the proviso to section 642

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to represent the estate of the deceased mortgagor for the purposes of the mortgage action is in the same position as a person appointed to administer the estate.

The limited purpose for which the special representative is appointed under section 642 is clearly expressed in the section. He is appointed for the purpose of the action, that is, the action to enforce the mortgage bond. He does not possess the general powers and duties of an administrator as regards the payment of the debts of the intestate. The case of *Mohamadu Lebbe v. Umma Natchia* [1] is a clear authority that in circumstances similar to those of the present case no other land can be seized than that named in the decree as executable. The decision in *Punchi Kira v. Sangu* [2] is relied on by the appellant, but I do not think that it decides more than that the mortgagor, whether he is in possession or not, must be joined as a party in the hypothecary action. We were also referred to *Silva v. Silva* [3] *and Gopalsamy v. Ramasamy Pulle,* [4] but I cannot see that the effect of either of these authorities is to throw any doubt on the principle laid down in *Mahamadu Lebbe v. Umma Natchia.* [1]

I cannot see that the rights of the plaintiff as against the property not comprised in the mortgage are more extensive than they would have been if Fredrick Alwis Siriwardene had been living at the time of the mortgage action.

In that case the plaintiff could not have reached the property now in question, unless he was able in a Paulian action to set aside the transfer to the first defendant.

In my opinion the appeal fails, and should be dismissed with costs

DE SAMPAYO A.J.—

I am of the same opinion. The main question for consideration is whether a judgment on a mortgage bond obtained against a person appointed to represent the estate of the deceased mortgagor under the provisions of section 642 of the Civil Procedure Code can be executed by seizure and sale of property of the mortgagor other than those specially mortgaged. I have no doubt that this question should be answered in the negative. The mortgage sections of the Code provide, in the first place, that an action to realize money due on a mortgage should be brought against the mortgagor whether he is still owner of the property or not, or, if the mortgagor is dead, against the executor or administrator of his estate ; and in the next place, that in the event of the mortgage property being under the value of Rs. 1,000, some person may be specially appointed to represent the estate of the deceased mortgagor for all the purposes of the action. It is clear to my mind that this last proviso in

[1] *(1896) 1 N. L. R. 346.*
[2] *(1900) 4 N. L. R. 42.*
[3] *(1907) 10 N. L. R. 234.*
[4] *(1911) 14 N. L. R. 238.*

section 642 of the Code was intended to enable a mortgage of property of small value, if he is content to pay himself out of the mortgaged property, to sell such property against the special representative thereunder appointed instead of driving him to the expensive course of having an administrator appointed as provided in the main part of the section. This was also the view taken in *Mohamadu Lebbe v. Umma Natchia* [1] and in *Silva v. Fernando.* [2] Counsel for the plaintiff, however, emphasized the words " for all the purposes of the action, " and relied on a passage in *Punchi Kira v. Sangu,* [3] in which Bonser C.J., referring to the proviso in section 642 said, " any decree made in the hypothecary action (against the special representative) is to bind the mortgagor's estate in the same manner and in all respects as if a duly constituted administrator of the deceased mortgagor were a party." The question of sale of the property other than the mortgaged property was neither involved or considered in that case, the whole judgment of the learned Chief Justice being directed to an exposition of the alteration made by the Code in the constitution of a hypothecary action and to the consideration of the necessary parties to such an action since the Code. Moreover, the remark above quoted amounts to no more than that as effective a hypothecary decree can be obtained against the special representative as against an administrator, and as under a hypothecary decree pure and simple only the mortgaged property can be sold, the judgment in the case cited appears not only to be consistent with but to bear out the view above expressed. The expression " for all the purposes of the action " in section 642 has no larger application, and obviously refers to the action contemplated by the section, viz., the hypothecary action. In this connection counsel pointed out that the decree in a hypothecary action includes a money decree, and submitted that it could be executed against any property of the deceased. The first part of this proposition is undoubtedly true, but the decree must in all cases necessarily state the sum of money, in default of payment of which the mortgaged property is ordered to be sold, in order that the defendant, whoever he may be, may have the opportunity to redeem the property by paying the money. The character of a mortgage decree has therefore no special significance in this connection. As to the form of plaint in a mortgage action given in the schedule to the Code, which counsel also referred to, it is true that, though these forms of plaints are in no way authorized by the Code, the mortgage decree adopted in practice is taken from the prayer of the above form of plaint, and has been approved as good and sufficient. But I should say that the part of the decree which orders that, if the proceeds sale of the mortgaged property shall not be sufficient to pay the amount of the decree in full, " the defendant to pay to the

[1] *(1896) 1 N. L. R. 346*

[2] *(1897) 3 N. L. R. 15.*

[3] *(1900) 4 N. L. R. 42.*

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plaintiff the amount of the deficiency," was proper only where the mortgagor himself or his legal representative is the defendant, but in my opinion it is wholly inapplicable where the defendant is the special representative appointed under the proviso in section 642 for the purpose of realizing the mortgaged property. The other decisions cited as to the power of an administrator to sell over again property already alienated by the heirs have no bearing on the present question. I may, however, refer to *Gopalasamy v. Ramasamy Pulle*, [1] which was relied on in support of the present appeal. There van Langenberg J. observed that the liability of the alienated property to be sold for the purposes of administration included the right of a creditor to follow the property for the payment of his debt. This undoubtedly is so, but the creditor must surely proceed by means of a duly constituted action, and the plaintiff is thus brought back to the original question involved in this appeal.

I agree that the appeal fails, and should be dismissed with costs.

Appeal dismissed.