1962 *Present :* H. N. G. Fernando, J., and L. B. de Silva, J.

T. B. DISSANAYAKE and 2 others, Appellants, *and*
LEELAWATHIE KUMARIHAMY and 2 others, Respondents

S.C. 68 (Inty.) of 1960—D.C. Kandy, 5764/L

Action by heirs to set aside a deed of gift executed by a deceased person—Letters of administration not issued—Maintainability of action—Civil Procedure Code, s. 547.

Without obtaining letters of administration, the heirs of a deceased person instituted action to have a deed of gift, which had been executed by the deceased, set aside on the grounds that (*a*) it was a forgery, (*b*) the deceased did not understand the nature and consequences of her act, (*c*) it was executed by her under undue influence. If the property gifted by the deed was included in the estate of the deceased, the estate of the deceased would have required administration. Plaintiffs, however, did not raise any issue claiming declaration of title to the property gifted by the deed.

Held, that the provisions of section 547 of the Civil Procedure Code could not debar the plaintiffs from maintaining the action. The action was not one for the "recovery" of any property belonging to the deceased.

APPEAL from an order of the District Court, Kandy.

H. V. Perera, Q.C., with *T. B. Dissanayake*, for the Plaintiffs-Appellants.

C. R. Gunaratne, with *R. Manikkavasagar*, for the Defendants-Respondents.

Cur. adv. vult.

November 30, 1962. L. B. DE SILVA, J.—

The plaintiffs-appellants filed this action as heirs of the deceased Loku Kumarihamy to have the deed 7892 dated 18/2/1959 alleged to have been executed by the deceased, set aside and annulled on the following grounds :—

(*a*) It was a forgery.

(*b*) The deceased did not understand the nature and consequences of her act.

(*c*) It was executed by her under undue influence.

They claimed a declaration of title to 3/7th shares of the property purported to be gifted by the said deed and for damages against the 1st & 2nd defendants till possession was yielded.

The defendants averred that the plaintiffs cannot maintain this action without obtaining letters of Administration to the estate of the deceased as required by section 547 of the Civil Procedure Code. Parties admitted that if the property in question was included in the estate of the deceased, she left an estate that required administration.

To get over this objection, the plaintiffs withdrew their claim to a declaration of title and for damages when the Issues were raised. The learned District Judge heard the parties on this preliminary issue and on the authority of the judgment of Drieberg, J. in *Kandiah v. Karthigesu* [1], upheld the objection and laid the case by till a Grant of Letters was made.

The plaintiffs contend in this Appeal that their action as amended, is not for the recovery of any property that belonged to the deceased.

In the case of *Weerasooriya v. Weerasooriya* [2], Hutchinson, C.J. stated, " The learned District Judge says that in this action they are not seeking to recover the property. They could not in this action claim to recover it, because the half of it is much beyond the value of Rs. 1,000/-, and no administration has been taken out to Nonababa. What they are seeking is to set aside a deed of gift ; if it is done, then, after an administrator is appointed, they or the administrator may be able to recover the property ; but if they fail in this action, there is perhaps nothing to administer. That view is in accordance with the decision in *Lewishamy v. De Silva* [3], and the ruling of the District Judge on the first issue was

[1] *(1929) 31 N. L. R. 172 at p. 175.* [2] *(1910) 13 N. L. R. 376 at p. 378.*
[3] *(1906) 3 Balasingham 43.*

right." That was an action by the heirs of the deceased who was married in community and whose husband had gifted the communal property, to set aside the gift on the ground that it was a fraud on the deceased.

In the case of *Lewishamy v. De Silva*[1] cited above, Middleton, J. said "As matters stand at present the property is vested in the donees and does not form part of the estate of the deceased intestate. The action is not brought to recover the property, but to set aside the deed, and when the deed is set aside an action for its recovery will lie".

In dealing with *Lewishamy v. De Silva*, Drieberg, J. appears at p. 175 to have made a mistake when he stated that the half share which the widow claimed from the donees of the deceased husband, never belonged to her husband nor did it form part of his estate but on the deed being set aside the half share would have vested in her of her own right and not by virtue of the title derived from her husband. Drieberg, J. appears to have thought that the property in question belonged to the community. But in that case the parties were not married in community of property.

At page 45 in 3 Balasingham Reports, Middleton, J. says "In the present case, the plaintiff has no rights under a community but only a right to a half share of the property left by her husband at his death, should he die intestate. The widow's right if any to the property in that case, was by inheritance from the deceased husband". With reference to *Weerasooriya v. Weerasooriya*, Drieberg, J. stated that till the deed was set aside, the title to the ½ share claimed by the children of the widow remained in the transferees and it was not at the date of the action "property belonging to or included in the estate or effects of the wife".

With reference to the claim in *Kandiah v. Karthigesu*, Drieberg, J. said, "The prayer is for a declaration that the signature to the discharge (of the Mortgage bond) and to the transfer be declared forgeries in order, so it was alleged, in paragraph 8, that the estate of Kanapathipillai and Mootathamby might be administered and distributed among the heirs.

"The action is therefore, one for property included in the estates of these persons. . . .

"But it is well settled in later cases that where a person desires to prove title to property derived from a person who has died intestate, he must prove either that the intestate estate is under Rs. 1,000/- in value, or if it is over Rs. 1,000/- in value, that administration has been taken out. (See Bonser C.J. in *Fernando v. Dotchi*[2])."

We do not feel justified in giving to section 547 of the Civil Procedure Code a wider meaning than the words ordinarily mean. There is no ambiguity in the words used in the section. The plaintiffs do not, after they restricted their claim at the trial, ask for any declaration of title to property derived from the deceased. They are only claiming a declaration that the deed in question was not executed by the deceased

[1] *(1908) 3 Balasingham Reports 43.* [2] *(1901) 5 N. L. R. 15.*

or was not her act and deed or that it was executed under undue influence. If they succeed in this action, it will be necessary for them to file another action to recover the property from the defendants unless the defendants voluntarily give them possession of their shares in it.

If it becomes necessary for the plaintiffs to file a further action for declaration of title to the property as heirs of the deceased or to recover possession of it in that capacity, section 547 of the Civil Procedure Code will come into operation and administration of the deceased's estate will become necessary.

We, therefore, set aside the Order of the learned District Judge laying by the case till Letters of Administration are taken to the estate of the deceased Dingiri Amma *alias* Loku Kumarihamy and direct that the case do proceed to trial.

We set aside the District Judge's Order for Costs in favour of the defendants. The Costs of the proceedings of 19/7/60 will be costs in the cause. The Appellants are entitled to the Costs of this Appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.