1957 *Present :* Basnayake, C.J., and Pulle, J.

VALLIYAMMAI ACHI, Appellant, *and* THE SECRETARY OF THE DISTRICT COURT OF COLOMBO (Administrator *de bonis non* of the Estate of Hadjie Ibrahim Bin Ahamed) *et al.*, Respondents

S. C. 572—D. C. Colombo, 419/Z

Administration of estates—Mortgage bond executed by executor—Subsequent release of the hypothecated property from the mortgage—Money decree obtained by the mortgagee—Execution thereof—Right of mortgagee to follow up property other than that which had been hypothecated.

When an executor of a last will executes a mortgage bond hypothecating certain property belonging to the estate of the testator and uses the borrowed sum of money for the purpose of the administration of the testator's estate, the mortgagee is entitled to release *bona fide* the mortgaged property and, after obtaining only a money decree in respect of the mortgage debt, to follow up in execution other property which has been transferred from the testator's estate.

Albert Perera v. Marimuttu Canniah (1944) 45 N. L. R. 337, followed.

Thecioris Fernando v. Roslin Fernando (1901) 2 Browne 277, doubted.

APPEAL from a judgment of the District Court, Colombo.

On May 21, 1935, the executor of a last will mortgaged, with the approval of the Court, certain property of the testator's estate and used the money so raised for the purpose of discharging a part of the liabilities of the estate. The mortgagee subsequently put the bond in suit but, pending the action, released from the mortgage the hypothecated property and obtained only a money decreee.

The question for decision in the present appeal was whether, for the purpose of satisfying the money decree, the mortgagee was entitled to follow up property of the testator's estate other than the mortgaged property. The property which was sought to be seized and sold had been devised to the executor, who gifted it subsequently to his son. The latter gifted the property to his sister Zabeediya in consideration of her marriage with one Mohamed Salih. In 1952 Zabeediya and her husband sold the property to their children who were the 2nd and 3rd defendants in the present case.

H. V. Perera, Q.C., with *S. Ambalavanar* and *H. C. Kirthisinghe*, for the plaintiff-appellant.

S. Nadesan, Q.C., with *C. Ranganathan, V. K. Palasuntheram* and *P. Naguleswaram*, for the 2nd to 4th defendants-respondents.

Cur. adv. vult.

2—J. N. B 20619—1,995 (1/60)

December 4, 1957. PULLE, J.—

The subject matter of the action out of which this appeal arises is a valuable property situated in Keyzer Street, Colombo. It formed once part of the estate of one Ibrahim Bin Ahamed (referred to hereinafter as the testator) who died leaving a last will and certain codicils by which he devised this property to his son Ahmed Bin Ibrahim, appointing him as the executor. The will was admitted to probate in 1934 and on 13th December, 1938, Ahmed Bin Ibrahim in his capacity as executor conveyed the property to himself and on the same day he gifted it to his son through whom the title devolved eventually on the 2nd and 3rd defendants in the present case. In execution of a decree entered in case No. 2565/MB in favour of the plaintiff, who is the appellant, the property was seized in execution and was successfully claimed by the 2nd and 3rd defendants. On 22nd May, 1953, the plaintiff filed the present action in which she sought a declaration under section 247 of the Civil Procedure Code to the effect that the property was liable to be sold in execution of the decree in case No. 2565/MB. The action was dismissed with costs and the plaintiff appeals. The question which arises for determination is whether having regard to the events, set out more fully hereinafter, which led up to the seizure of the property, the learned trial Judge was wrong in holding that the property was not liable to be seized and sold. Admittedly, the debt in respect of which the decree in favour of the appellant was entered in case No. 2565/MB was incurred by the executor for the purpose of the administration of the testator's estate. He executed a mortage bond hypothecating four immovable properties. Of these two were released before action No. 2565/MB was filed and the remaining two in the course of that action. Eventually what was entered in that action was not a hypothecary decree but only a decree for the payment of money. Stated more specifically the question for decision is whether, for the purpose of satisfying the money decree, the plaintiff was entitled to follow up property which had passed from the testator's estate to the 2nd and 3rd defendants.

The issues raised at the trial covered a wide range of facts and, as some of these issues were not the subject of the arguments in appeal, I shall be content to restrict myself to those matters which were debated before us.

According to the affidavit P 3A of 9th April, 1935, filed by the executor (i.e., by the testator's son, Ibrahim Bin Ahmed) large sums of money were due on debts contracted by the testator. These amounted to Rs. 350,294/87 and the estate duty payable was Rs. 57,000. Prior to his death the testator had hypothecated by a bond eight properties as security for a loan. The executor had to find Rs. 105,000 to satisfy a decree entered on this bond by which all the properties were declared bound and executable. He sought the permission of court in the probate suit No. 5686 to sell four of the properties for Rs. 75,000 and to mortgage the remaining four to raise the balance sum of Rs. 30,000. The arrangement between the decree holder and the executor was that the former would, on payment of the debt due to him, release all the properties from the mortgage.

On permission being granted the executor raised Rs. 30,000 from one Natchiappa Chettiyar on mortgage bond P4 dated 21st May, 1935, by which he hypothecated the four properties which are described in the schedule to the bond. The appellant is the executrix of the last will of Natchiappa Chettiyar.

The executor, Ahmed Bin Ibrahim, died in 1940 without fully administering the estate of the testator. No steps were taken by any of the beneficiaries under the testator's will to appoint a successor to the executor as the legal representative. In 1943, however, the appellant applied to have the Secretary of the District Court appointed as administrator *de bonis non*. The application was granted and then there was a succession of court secretaries who could, for the purpose of this appeal, be regarded as having held, by virtue of their appointments, the office of administrator *cum testamento annexo*.

We come now to the proceedings (case No. 2565/MB) which resulted in the seizure of the property which is the subject matter of the appeal. It was filed by the appellant on 21st November, 1949, in her capacity as executrix of the last will of her husband, the mortgagee on P4. The defendant was the " Secretary of the District Court of Colombo, as Administrator *de bonis non* of the estate and effects of Hadjie Ibrahim Bin Ahmed, deceased ". It was stated in the plaint P9, among other things, that the executor paid to the mortgagee Rs. 5,000 on account of the principal amount due on the bond and that in consideration of that payment the mortgagee released from the mortgage the lands numbered 3 and 4 in the schedule to the bond. The plaintiff asked in her prayer that the lands numbered 1 and 2 in the schedule be declared bound and executable for the amount due on the bond and for other reliefs usually granted in an action of this character. No answer was filed by the official administrator but an intervention was sought by two sons of the testator who were interested as devisees in the lands numbered 1 and 2. It is not necessary to narrate in detail the steps taken in the action by the intervenients except to state that on 24th October, 1951, an agreement was entered into by the appellant and the intervenients by which the lands numbered 1 and 2 were released from the mortgage. The claim for payment of balance principal and interest was not contested and on 7th December, 1951, a formal decree was entered ordering the defendant to pay to the plaintiff Rs. 45,431 and an additional sum as interest. I should add that it was part of the agreement to release lands 1 and 2 that they should not on any account be seized and sold in execution of the decree.

In proceedings taken to execute the decree against the estate of the testator the property which is the subject matter of the present action was seized, as stated earlier in the judgment, and a claim thereto by the 2nd and 3rd defendants was upheld.

The judgment under appeal deals with various grounds urged by the contesting defendants at the trial in support of the submission that the decree entered in case No. 2565/MB was, owing to certain irregularities,

invalid. The trial Judge, besides holding with the appellant that on their merits these grounds could not be sustained, disposed of the argument directed against the validity of the decree on the broad proposition that it is not competent for the parties in one suit to shew irregularity or error of judgment or of law in another suit. Fraud and collusion on the part of the appellant and the official administrator was negatived. He felt constrained, however, to give judgment against the appellant for the only reason that in the course of case No. 2565/MB she consented to release the lands numbered 1 and 2. On a consideration of the authorities cited he was of the opinion that if the debt sued in that case was unsecured, the 2nd and 3rd defendants would have had no defence to the appellant's claim that the property in suit was liable to be seized and sold to satisfy the judgment debt. But as the appellant had deliberately released the two valuable lands numbered 1 and 2 and precluded herself from levying execution against them she ought not to be allowed to seize and sell a property specially devised to the executor and the title to which had devolved on the 2nd and 3rd defendants.

The learned trial Judge relied on the case of *Albert Perera v. Marimuttu Canniah* [1] for the view which he has expressed that had the debt been an unsecured one he would have had no difficulty in holding with the appellant. It was submitted at the argument before us that this case was conclusive against the 2nd and 3rd defendants and that the circumstance that in the course of action No. 2565/MB the lands numbered 1 and 2 had been released did not affect the appellant's undoubted right to obtain a money decree on the mortgage bond and to exercise the right of seizing and selling the property in question which formed part of the estate of the testator. That a creditor of the testator, as opposed to a creditor of the executor can in certain circumstances exercise such a right is not challenged. The authorities reviewed in *Albert Perera v. Marimuttu Canniah* [1] establish that position. De Kretser, J., said at p. 338 of a creditor,

"In the deceased's lifetime he could levy against any of his properties and there is no reason why his rights should diminish because of the deceased's death."

If the proposition be correct that if, for example, the executor had for purposes of paying the debts of the estate borrowed money on a promissory note and the appellant had obtained thereon a money decree, the 2nd and 3rd defendants could not have resisted the sale of the property seized to satisfy the decree, there was no reason why she should be denied the same right of execution on a money decree obtained on a bond. Learned counsel who appeared for the 2nd and 3rd defendants evidently appreciated the force of this argument and submitted to us that the proposition on which it is based is erroneous. His main contention was that the bond did not as between the estate and the mortgagee create the relationship of debtor and creditor and the rights acquired by the mortgagee under it were to sell only the properties hypothecated or to proceed against the executor personally or against his legal

[1] *(1944) 45 N. L. R. 337.*

representative. Mr. Nadesan also referred to certain transactions relating to the property in suit subsequent to the mortgage which in his submission rendered it inequitable that it should be made liable for the debt.

Reliance was placed on the following passage in volume 16 (3rd ed.) of Halsbury's Laws of England, p. 368, para. 713 :

> " The remedy of a creditor for a debt contracted after the death is against the personal representative and not against the estate ; but the creditor is in equity entitled to stand in the place of the personal representative and to claim the benefit of his right to an indemnity. "

The passage quoted occurs under the heading " Power to carry on the Business of the Deceased " and an authority relied on is *Farhall v. Farhall*[1]. In this case Mellish, L.J., stated the proposition as follows :—

> " It appears to me to be settled law that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator. "

In this case the London and County Bank claimed to prove against the estate of one Richard Farhall the sum of £987 being part of the money lent to his widow in her capacity of executrix. Admittedly a large part of the money which was borrowed by the executrix from the Bank on the security of deeds relating to the testator's estates had been misapplied by her. On the facts the position here is different. The money was raised with the express approval of the court and there cannot be any doubt that the entirety of the amount was used to discharge a part of the liabilities of the estate. In the mortgage bond it is recited that the sum of Rs. 30,000 was borrowed by the obligor in his capacity " as the Executor of the Last Will and Testament and Estate of Hadjie Bin Ahmed ". It also recited " And for further securing unto the said obligee his heirs executors administrators and assignees the payment of all moneys payable under by virtue or in respect of these presents I the said Obligor do hereby with the leave of court granted to me on the tenth day of April, 1935, in the said Testamentary Proceedings No. 5686 of the said District Court of Colombo specially mortgage and hypothecate to . . . . etc. "

It seems to me to be unreal to attempt to maintain that in the transaction that resulted in the execution of the mortgage bond the executor incurred only a personal liability which exposed his properties to be sold up in the event of the mortgagee obtaining a money decree. Did the executor in the transaction in question indubitably represent the estate ? If the answer is in the affirmative, I fail to see any convincing reason why the estate should not be liable in the first instance to satisfy a debt incurred for the purpose of getting rid of some of its liabilities. Natchiappa Chetty by lending Rs. 30,000 acquired in full measure the rights of a mortgagee who could in one and the same action obtain both a money and hypothecary decree. Provided he did not act fraudulently or collusively with any one benefiting under the testator he was perfectly

[1] *(1871) 7 Ch. App. 123.*

free to release from the mortgage any of the properties hypothecated and to content himself with only a money decree. It seems incongruous that if the mortgagee had obtained both a money and hypothecary decree, it should be deemed that the money decree is one enforceable against the executor personally while the hypothecary decree should bind the estate. In the case of *Iragunather et al. v. Ammal*[1] which was concerned with a promissory note granted by an executor to raise money for the purpose of administering the estate of the testator, Fernando, A.J., said at p. 550

> ". . . it seems clear to my mind that an executor has full power to contract a debt for the purposes of administration in such a manner as to exclude personal liability, and when he has done so, the estate is liable to pay the debt incurred by him.
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> "Counsel for the respondent suggested that the proper course for a creditor on a note like this was first to sue the executor himself and that the executor having paid the debt may be able to have recourse against the assets of the estate. I cannot understand why the law should require this circuitous process where the executor who represents the estate of the deceased has incurred a debt in the course of administration."

This view suggests that where an executor has raised and applied monies for the benefit of the testator's estate the creditor who lent the monies has direct access to the assets of the estate and that a judgment against the executor is a judgment, so to speak, against the estate. The seizure and sale of a particular asset would work no greater hardship than in a case where the legal representative himself is compelled to sell an asset to discharge a debt due by the estate, because he who takes an asset belonging to an estate also takes the risk that until the estate has been fully administered he may have to part with it.

There is no hypothecary decree in the present case. Hence there is no room to apply the principles laid down in cases like *Wijesekere v. Rawal*[2]. In *Albert Perera v. Marimuttu Canniah* (*supra*) this court said,

> "Suppose there are three heirs or three legatees and one of them sold his rights, so leaving the other rights still as assets of the estate, is it open to the heir who sold and the transferee to compel the creditor to go against the rights of the other two? It seems manifestly unfair and one cannot see on what principle of law such a compulsion could be used."

On this point the court did not follow an opinion expressed in the judgment of Soertsz, J., in *Suriyagoda v. William Appuhamy*[3] that a condition that must be satisfied is that without recourse to the property transferred the debt cannot be satisfied.

Learned counsel for the 2nd and 3rd defendants drew our attention to the case of *Theodoris Fernando v. W. L. Roslin Fernando et al.*[4] and submitted that even on the footing that the decree in favour of the

[1] *(1937) 40 N. L. R. 549.*
[2] *(1917) 20 N. L. R. 126.*
[3] *(1941) 43 N. L. R. 89.*
[4] *(1901) 2 Browne's Reports 277.*

appellant could be enforced by the seizure and sale of the properties of the testator and not against the executor personally, the transactions by which title to the property in suit was transmitted to the 2nd and 3rd defendants precluded its seizure. As stated earlier, the executor on 13th December, 1938, after executing a conveyance of the property in his favour as the devisee under the will gifted it on the same day to his son Mohamed Ghouse Bin Ahmed—(2 D30). The latter by 2 D32 of 21st December, 1941, gifted the same to his sister Zabeediya in consideration of her marriage with one Mohamed Salih. By deed 2 D33 of 9th May, 1952, Zabeediya and her husband conveyed the property to their children the 2nd and 3rd defendants by way of sale for a consideration of Rs. 10,000. In *Theodoris Fernando v. W. L. Roslin Fernando et al.* (*supra*) the property of a testator was transferred shortly after his death by the executrix to their daughter on the day of her marriage in pursuance of a trust alleged to have been created by the will under which the property was to be given to the daughter on a division of the estate or at marriage. It was held that the transfer was made in consideration of marriage and that it was not liable to be seized and sold for a judgment debt obtained against the executrix in her representative character, inasmuch as the rest of the estate was sufficient to meet the claim. I may say that I cannot reconcile this decision with the case of *Albert Perera v. Marimuttu Canniah* (*supra*) which has been cited earlier. I prefer to follow the latter. It throws an undue burden on a creditor who has obtained a decree to enter on an investigation on the financial position of the estate, and further to determine which of the immovable assets inventorized have been the subject of transfers. He would further have to investigate whether valuable consideration had been paid to the transferors without perhaps receiving the slightest assistance from the terms of the transfer. In the present suit the conveyance in the first instance by the executor-devisee to his son, 2 D30 of 13th December, 1938, was a gift pure and simple and I am inclined to doubt that the case of *Theodoris Fernando v. W. L. Roslin Fernando et al.* (*supra*) assuming it to state the legal principle correctly, can protect the property from seizure.

The mortgage bond was executed in 1935. It is put in suit in 1949 and in the course of the proceedings the appellant agrees with two intervenients to release the only security then left, namely, the lands numbered 1 and 2. Probably, in the belief that the lands originally mortgaged were more than adequate security for the debt of Rs. 30,000 and interest the executor conveyed the property in suit to his son who in turn gave it as dowry to the executor's daughter, and from the daughter it passed to her two children. Fourteen years after the execution of 2 D30 the property is seized. In 1938 Natchiappa Chetty himself lent money to Mohamed Ghouse on the security of the very property in suit and the mortgage was redeemed in 1949. Despite these facts I regret I can lay hold of no principle by which judgment can be given in favour of the 2nd and 3rd defendants. I would accordingly allow the appeal with costs, here and below.

BASNAYAKE, C.J.—I agree.

Appeal allowed.