

MOHAMADO ABDULLA v. KULUDIN NACHIYA et al.

48—D. C. Galle, 20,966.

*Mortgage action—Death of mortgagor—Action to obtain money decree—
Prescription—Civil Procedure Code, ss. 640-642.*

Where a mortgage bond is put in suit, after the death of the mortgagor, for the purpose of obtaining a money decree only, it is not necessary to make the legal representative of the mortgagor a party defendant in terms of section 642 of the Civil Procedure Code.

Such an action is not prescribed if it is brought within ten years.

A PPEAL from a judgment of the District Judge of Colombo.

Soertsz, for plaintiff, appellant.

H. V. Perera, for third and fifth defendants, respondents.

October 24, 1924. BERTRAM C.J.—

This is an appeal brought against the judgment of the District Court in favour of the third and fifth respondents. The action was brought on a mortgage bond. The mortgagor was dead. His widow, the first defendant, was sued together with her children, no application having been made under section 642 to appoint an administrator. The object of the action was not to obtain a hypothecary decree, but merely to obtain a money decree. It was supposed, therefore, that section 642 did not apply in the case. When the case came before the District Court no evidence was taken on a question of importance, namely, whether the persons sued had adiated the inheritance. The learned Judge deals with two points in his judgment. The first was whether it was competent to the plaintiff to sue the defendants at all; the second was whether the claim had been prescribed. The second is the more important. The question was whether the action being an action on the bond instituted for the purpose of obtaining only a money decree came within section 6 or section 7 of the Prescription Ordinance, No. 22 of 1871. The learned Judge came to the conclusion that the action came within section 7. Here, I think, his decision cannot be supported.

This is clearly an action upon a bond conditioned for the payment of money. It is not necessary in this case to go into questions discussed in the old case of *Tissera v. Tissera*,¹ and recently further discussed by Ennis J. and De Sampayo J. in *Don Siman v. Silva*.²

¹ (1896) 2 N. L. R. 238.

² (1915) 1 C. W. R. 71.

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A bond conditioned for the payment of money clearly means an instrument by which one person binds himself to another for the purpose of securing the payment of money. The mortgage bond in this case is clearly an instrument of that character, and the claim is not prescribed if it is brought within ten years.

With regard to the first point, it seems to us that, where a mortgagee sues solely for the purpose of obtaining a money decree, sections 640-642 do not apply to him. Section 640 declares that every mortgagee or person entitled to bring any action for the realization of moneys secured to him under a mortgage shall sue, &c. The person there referred to is a person who brings an action to realize the money due by the sale of the security. This I think is clear if we look at section 645. It may be observed that Shaw J. expressed an opinion to the same effect in *Thambaiyar v. Perumpasampy Iyar*.¹ This, however, does not carry the point home. The third and fifth respondents are parties to this appeal, and Mr. Perera points out on their behalf that there is no evidence whatever that they have adiated inheritance, and Mr. Soertsz cannot now sustain his plea which was apparently put forward in the action that such persons may be sued on the chance of their adiating in the future. As regards these parties, therefore, the appeal must be dismissed.

The first defendant against whom Mr. Soertsz would be content with a judgment was in default in the Court below. It does not appear that she has been made a party to this appeal. Mr. Soertsz, however, suggests that it is possible on further investigations that it may be found that she was a party. We say nothing for the present on that question. The appeal must be dismissed, with costs, as against the third and fifth respondents. But the plaintiff may have liberty to make a further application in the case if it should be discovered that the first defendant was actually made a party to the appeal.

GARVIN J.—I agree.

Appeal dismissed.

¹ (1917) 19 N. L. R., p. 385 365 at p. 387.