[FULL BENCH.] 1917.

Present : Ennis J., Shaw J., and De Sampayo J.

THAMBAIYAR *et al.* *v.* PARAMUSAMY AIYAR *et al.*

448—C. R. Point Pedro, 16,983.

Mortgage—Mortgaged property under Rs. 1,000 in value—Estate of deceased mortgagor under Rs. 1,000—Action against heirs of mortgagor—Action bad—Civil Procedure Code, ss. 640 to 642.

An action to realize a mortgage cannot be brought without making the personal representative of a deceased mortgagor a party, even when the estate of the mortgagor is under Rs. 1,000 in value. The mortgagee must, when the property mortgaged is under Rs. 1,000, get a person specially appointed to represent the estate of the deceased mortgagor, if no administrator or executor has been appointed.

THIS case was referred to a Bench of three Judges by the following judgment of Ennis J. (February 20, 1917):—

This was an action on a mortgage bond. The plaintiffs made all the heirs of the deceased mortgagor defendants in the action. It is admitted that the estate of the deceased mortgagor was under Rs. 1,000 in value. The learned Commissioner has dismissed the action on a preliminary issue, holding that it could not be maintained, as no legal representative of the estate of the deceased mortgagor had been appointed under section 642 of the Civil Procedure Code. In the case of *Silva v. Fernando* [1] it was held that a mortgagee may sue the heirs. In *Punchi Kira v. Sangu* [2] it was held, on the contrary, that an executor or administrator must be made a party for the case to be properly constituted. The latter proposition was again enunciated in *Bastian Pillai v. Anapillai.*[3] The point turns on the construction to be placed on section 642 of the Civil Procedure Code. Under that section, where the hypothecated property exceeds Rs. 1,000 in value, a mortgagee must apply for the appointment of an administrator to the estate of the deceased mortgagor. When the property is under Rs. 1,000 in value, the Court may, on the application of the mortgagee, and on its appearing to the Court necessary or desirable, appoint some person to represent the estate for the purpose of the action. It seems to me that this latter provision is a privilege given to a mortgagee, and I find it difficult to believe it was meant to debar a mortgagee from the proceeding

[1] *(1897) 3 N. L. R. 15.* [2] *(1900) 4 N. L. R. 42.*

[3] *(1901) 5 N. L. R. 31.*

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against the owners of the property, when the property is under Rs. 1,000 in value, without the appointment of a person to represent the estate. It seems rather to provide a way by which a mortgagee could bind the estate of the deceased by his decree, and not merely have satisfaction from the morgaged property. In view of the reported decisions, I think the point should go before a Full Bench, and accordingly refer it to a Court of three Judges.

Arulanandan, for appellant.—The proviso to section 642 of the Civil Procedure Code confers a special privilege on the mortgagee, if the property mortgaged is under the value of Rs. 1,000. The granting of a privilege should not be construed as taking away the right of proceeding against the heirs in possession. Even after the passing of the Civil Procedure Code the Supreme Court has recognized the right of a mortgagee to proceed against the heirs of a deceased mortgagor who have adiated the inheritance. See *Saram v. Perera* [1] and *Tikiri Banda v. Mudalihamy*. [2] The words in section 641 are "shall be entitled"; it will be doing violence to the language of the section to construe it as "shall sue." Such a construction may lead to highly inconvenient results. A mortgage may run on for over a century, and the property may have passed into other hands, and yet, if the mortgagor is dead, his executor or administrator has to be sued. The executor may have closed the estate, and he may be dead. In such a case, no mortgage action can be brought. Such could never have been the intention of the Legislature.

Wadsworth, for respondent.—The case is covered by authority. Since the decision of *Punchi Kira v. Sangu* [3] it has been the invariable practice to sue the executor or administrator or the legal representative appointed under section 642.

[*Morgan de Saram*, as *amicus curiæ*, referred to the amendment to section 70 of the Courts Ordinance consequent on the decision reported in *1 Bal. 51*.]

Arulanandan, in reply.

Cur. adv. vult.

March 8, 1917. ENNIS J.—

The amendment of section 70 of the Courts Ordinance introduced by Ordinance No. 13 of 1904 indicates the intention of the Legislature with regard to the construction of sections 640, 641, and 642 of the Civil Procedure Code. It is consonant with the construction put on those sections by Bonser C.J. in *Punchi Kira v. Sangu*. [3] I accordingly agree with my brothers that the appeal should be dismissed with costs.

[1] *1 Br. 117.* [2] *1 Br. 121.* [3] *(1900) 4 N. L. R. 42.*

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Sinniar Chelliar, by mortgage bond dated September 9, 1909, mortgaged certain property to one Gnanasekera Aiyar for Rs. 150. Chelliar died intestate some six or seven years ago, leaving a widow, the first defendant, and three sons, the second, third, and fourth defendants, as his heirs. No administration was taken out in respect of his estate, and his heirs are in possession.

On August 16, 1916, the second plaintiff, claiming to be an heir of the mortgagee Gnanasekera Aiyar, and her husband, the first plaintiff, filed an application in the Court of Requests for the purpose of getting the first defendant appointed to represent the estate of the deceased mortgagor Chelliar under the proviso contained in section 642 of the Civil Procedure Code, with a view to suing such representative on the mortgage bond.

Finding it impracticable to get a representative appointed prior to September 9, 1916, at which date the debt on the mortgage bond would have become barred by prescription, the plaintiffs discontinued the application, and on September 7, 1916, brought the present action on the bond against all the heirs, asking for payment of the debt and interest and for an hypothecary decree.

The Commissioner of Requests has dismissed the action on the ground that it is improperly constituted, no administrator of the mortgagor having been appointed, or any person appointed to represent the estate under the proviso to section 642. The plaintiffs appeal.

It is difficult to arrive at a satisfactory construction of sections 640-642 of the Code, or one that does not give rise to obvious difficulties. On the whole, I have come to the conclusion that the construction placed upon this by Bonser C.J. in *Punchi Kira v. Sangu* [1] is the correct one. As pointed out in the judgment in that case, there were, prior to the passing of the Code, two actions available to a mortgagee for the realization of the moneys secured to him upon a mortgage, viz., a personal action on the bond against the mortgagor or the person representing his estate, and an hypothecary action against the land, which actions might have been brought either separately or together. The object of the Legislature appears to have been to provide that the actions should in future always be brought together, probably with the view of avoiding multiplicity of actions.

Section 640 provides that every mortgagee or person entitled to bring any action for the realization of moneys secured to him upon a mortgage shall sue the mortgagee as defendant. This cannot mean that he shall do so when he wishes to recover merely on the covenant to pay the money, for that was an obvious right existing before, but it means that he must sue the mortgagor as well whenever he brings the hypothecary action. Nor does it appear to me

[1] *(1900) 4 N. L. R. 42.*

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that it can mean that he must in such case sue the mortgagor alone in such an action without joining the person in possession of the mortgaged property and who is principally interested in the result of the suit, for such a construction would be contrary to natural justice.

Then, section 641 provides that "in every such case," namely, in any action for realization of money secured on a mortgage where the mortgagor is dead, the mortgagee "shall be entitled" to sue the executor or administrator of the deceased mortgagor.

At first sight this would appear to be entirely optional, and not to take away the previous right in the creditor to proceed against the land alone by the hypothecary action, should he desire to do so, but if so, as Chief Justice Bonser pointed out, why the section at all? Why pass a special provision to affirm an obvious right the creditor had to sue the estate of his debtor on his bond? And the early part of section 642 seems to show that it is intended that the representative must be a party for it provides that "in every such case," *i.e.*, in every case of an action for the realization of money secured on a mortgage where no executor has been appointed or no administration taken out, "it shall be obligatory" on the mortgagee or person bringing the action to apply to the Court to appoint an administrator to the estate of the deceased mortgagor before proceeding with the action.

This obviously means that such administrator, when appointed, shall be made a defendant, otherwise the appointment of the administrator would be a useless formality. If, therefore, an administrator must be appointed and sued, if one has not already been appointed, it seems obvious that, in the case mentioned in section 641, when an executor or administrator has already been appointed, it is intended that, although the words used are in form optional, the executor or administrator must in all cases be sued. Probably what the Legislature meant was that section 640 having provided that the mortgagor must be sued, it gave the mortgagee an option of suing his representative if he is dead, and so prevent the action failing altogether.

Section 642 then goes on with a proviso applying to cases where there is no executor or administrator, and the value of the property mortgaged is under Rs. 1,000, and provides that in such cases the Court may, on the application of the mortgagee or other person entitled to bring the action, "before action brought" appoint some person to represent the estate of the deceased mortgagor. Here, again, the words used are optional, but the option is that of the Court, not that of the mortgagee or person bringing the action, and the Court may, if it thinks proper, refuse to appoint a person to represent the estate, and leave the mortgagee to apply in the usual way for the appointment of an administrator, under the earlier part of the section, before bringing his action.

The effect of the sections is, therefore, in my opinion, that the mortgagor or some one representing his estate must always be a defendant in an action for the realization of the moneys secured on a mortgage, and it follows that the present action is improperly constituted, and the appeal fails.

The construction of the sections arrived at above appears to me to be the only one practicable, but it leads to results that the Legislature can hardly have intended. A mortgage may continue as a charge on the property, and interest may be paid on it for fifty or a hundred years after the death of the mortgagor, and frequently in England it does so, the owner of the security being quite satisfied with the charge on the land. It seems a useless proceeding to seek out and sue the representatives of the mortgagor, who may have long since parted with all interest in the land and have no assets of the mortgagors estate in their hands, but it seems to follow from the sections that they must be sued, and the only way to obviate the difficulty is by amendment of the sections by the Legislature.

Another point was touched upon in the argument of the appeal, namely, whether after a person has been appointed under the proviso to section 642 to represent the estate and judgment obtained, execution can issue to discuss other land belonging to the estate of the mortgagor upon failure of the land mortgaged to meet the entire claim.

It has been held in *Soysa v. Jayawardene*,[1] following *Mohamadu Lebbe v. Umma Natchia*,[2] that it cannot. These cases appear to me to be open to doubt; but it is unnecessary to decide the point for the purposes of this appeal, and I think it is better to reserve the point for discussion in some future case where it distinctly arises.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

The question for decision in this case is whether, since the Civil Procedure Code came into operation, an action to realize a mortgage could be brought against the heirs of the deceased mortgagor who adiated the inheritance. Under the Roman-Dutch law the heirs in possession of a debtor's property may be sued for the recovery of the debt by sale of the property in their hands, and the hypothecary action on a mortgage of immovable property may also be brought against the heirs if they are in possession of the mortgaged property, or, indeed, against any person in possession to whom the mortgaged property has passed; but what is the effect of the provisions of sections 640, 641, and 642 of the Civil Procedure Code on the Roman-Dutch procedure with regard to a mortgage action? There is no difficulty as to the necessary parties when the mortgagor is alive, for section 640 expressly enacts that the mortgagee shall sue the mortgagor as defendant, whether the mortgagor is or is not in possession. If the mortgagor is not in possession, and the property

[1] *(1914) 17 N. L. R. 218.* [2] *(1895) 1 N. L. R. 346.*

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has passed to a third party, there is nothing to prevent the mortgagee from joining such third party, and, indeed, it is necessary for him to do so in order to obtain a binding mortgage decree against him. Section 641 next provides that where the mortgagor is dead, the mortgagee " shall be entitled to sue the executor or administrator of such deceased mortgagor." The phrase " shall be entitled " is rather unhappy, for it goes without saying that a mortgagee is entitled to sue the legal representatives of his deceased mortgagor, and the language of this section has led to the argument that the mortgagee may sue the legal representative if he pleases, but that he is not obliged to do so, and may sue the heirs. But, however badly worded the section may be, I do not think it is intended to give the mortgagee a choice. Permissive words, such as " may," " shall have power," " it shall be lawful," are often construed as having a compulsory force See *Maxwell on Statutes (4th edition), page 360*, where this subject is discussed. The words " shall be entitled " in the context empowers the mortgagee to sue the mortgagor's legal representative instead of the mortgagor, who, if alive, must, according to the provision immediately preceding, be made a party to the action, and this alternative provision, in my opinion, is also obligatory. This is rendered clear by the provision in section 642, which makes it obligatory on the mortgagee, when the mortgaged property is above Rs. 1,000 in value, to have an administrator appointed if there is none already. The proviso to section 642 enables the mortgagee to take the less onerous course of applying for the appointment of a special representative where the mortgaged property is less than Rs. 1,000 in value. The proviso no doubt says that the Court " may " make such an appointment if it appears to the Court necessary or expedient. As explained by Bonser C.J. in *Punchi Kira v. Sangu*,[1] the discretion thus given to the Court does not mean that the appointment of a representative may be dispensed with, but that the Court may allow it or insist on the appointment of an administrator. The decision just referred to contains a full exposition of the change introduced by sections 640, 641, and 642 of the Civil Procedure Code with regard to procedure in mortgage actions. It was preceded by *Pattiman v. Kanapati Pulle*,[2] decided by Bonser C.J. to the same effect. In the still earlier case of *Soysa v. Alwis*,[3] Withers J., referring to these sections, said: " If the mortgaged property of a person dying intestate amounts to Rs. 1,000, the mortgagee cannot bring a hypothecary action unless he has procured the appointment of an administrator . . . . If the mortgaged property is under the value of Rs. 1,000, the mortgagee who desires to enforce his hypothec may apply to the Court to appoint some person to represent the estate of the deceased for all the purposes of the action." Then followed *Bastian Pillai v.*

[1] *(1900) 4 N. L. R. 42.*

[2] *(1898) 1 Br. 119.*

[3] *(1895) 1 N. L. R. 225.*

Anapillai,[1] in which the same rule was re-enforced. In *Samarasinghe v. Kurukulasuriya* [2] it was held that a mortgage decree obtained against the executor of a deceased mortgagor was binding on the heirs, and that no new action against them was necessary for the purpose of selling the mortgaged property. As against these decisions two cases have been cited. The first of them is *De Saram v. Perera*,[3] in which it appears that the mortgagor had divested himself of the property before his death, and it was held that so far as the hypothecary action was concerned it could be brought against the present owner of the property. This, therefore, is not a very strong authority. The other case is *Tikiri Banda v. Mudalihamy*,[4] which approved of an hypothecary action against certain persons who were heirs of the deceased mortgagor; but the ground of the decision is thus stated: "However, this action may be supported as an hypothecary action on the mortgage, to which those in possession of the mortgaged land are made defendants, not to make them personally liable on the bond, but to have it declared that the land is liable to be sold." Both these decisions were disapproved of in *Pattiman v. Kanapati Pulle*.[5] In this conflict of decisions, I for my part think that the first group of cases above referred to are more in accordance with the obvious intention of the Code, and I may add that the practice of our Courts has since been in conformity with the ruling therein made. The case *Re Mather Saibu Rawter*,[6] which illustrates this practice, is rather interesting. There the mortgagor transferred the property, went abroad, and died without leaving any property in the Island. The mortgagee applied to the Supreme Court, under section 70 of the Courts Ordinance, to confer sole testamentary jurisdiction on the District Court of Colombo with the view of having an administrator appointed in compliance with section 642 of the Civil Procedure Code. The Supreme Court refused the application on the ground that it had no jurisdiction to make an order where the deceased left no property in the Island. In consequence of that decision the Ordinance No. 12 of 1904 amended section 70 of the Courts Ordinance by adding a proviso empowering the Supreme Court to confer sole testamentary jurisdiction where it is necessary, for the purpose of the mortgage sections of the Code, to appoint an administrator, notwithstanding that the deceased left no property in the Island. This, I think, is a recognition of the practice settled by the decisions above referred to. I think that, even if the decisions are not sound, as I think they are, the practice should not now be disturbed.

I would dismiss the appeal, with costs.

Appeal dismissed.

[1] *(1901) 5 N. L. R. 31.*
[2] *(1900) 5 N. L. R. 172.*
[3] *1 Br. 117.*
[4] *1 Br. 121.*
[5] *(1898) 1 Br. 119.*
[6] *(1904) 1 Bal. 51.*