

1946

*Present : Keuneman and Cannon JJ.*

CHANDRAWATHIE *et al.*, Appellants, and PEERIS  
APPUHAMY, Respondent.

313—*D. C. Tangalla, 5,205.*

*Mortgage—Hypothecary action—Death of mortgagor—Appointment of legal representative under Mortgage Ordinance—Evidence of value of mortgage property—Condition precedent—Mortgage Ordinance (Cap. 74), s. 7.*

Where the only evidence for the appointment of a legal representative under section 7 of the Mortgage Ordinance was that the deceased mortgagor died leaving an estate under Rs. 2,500 in value—

*Held*, that in the absence of specific evidence that the mortgaged property was under Rs. 2,500 in value the appointment of the legal representative and the Fiscal's sale, thereafter, of the mortgaged property were of no avail.

*Ahamado Muheyadin v. Thambiappah (1945) 46 N. L. R. 370* followed.

**A** PPEAL from a judgment of the District Judge of Tangalla.

*C. E. S. Perera* (with him *E. A. G. de Silva*), for the plaintiffs, appellants.

*C. V. Ranawake*, for the defendant, respondent.

*Cur. adv. vult.*

March 5, 1946. KEUNEMAN J.—

Plaintiffs claimed the premises in question alleging that Babahamy was the original owner and that he transferred to Davith Appu by P1 of 1932 who in his turn transferred to the plaintiffs by P2 of 1935. The defendant admitted that Babahamy was the original owner but claimed that by D1 of 1927 Babahamy executed a usufructuary mortgage in favour of Carolis Appu who assigned by D2 of 1942 to the defendant, Defendant put the bond in suit in D. C. Tangalla 4,953 after the death

of Babahamy against his legal representative appointed under the provisions of the Mortgage Ordinance, obtained decree and had the premises sold, and purchased the premises himself upon Fiscal's Transfer D4 of 1945.

The point taken in appeal is that the District Judge had no jurisdiction to appoint a legal representative of the deceased Babahamy and to try the case (D. C. Tangalla, 4,953) because there was no evidence that the mortgaged property was under Rs. 2,500 in value. The only evidence was that Babahamy died leaving an estate under Rs. 2,500 in value. This is correct and a good argument, and we follow the decision in *Ahamado Muheyadin v. Thambiappah*<sup>1</sup> which is exactly in point. The Fiscal's Transfer D4 was accordingly of no avail and no title passed to the defendant thereunder.

The appeal is allowed and the first, second and third plaintiffs are declared entitled to the premises described in the plaint, but the title will be subject to the mortgage rights, if any, of the defendant under bond No. 1,565 of July 14, 1927 (D1) and the assignment D2, No. 18604 of January 26, 1942.

As regards costs, in view of the fact that the present argument was not raised in the original court, the plaintiffs will only be entitled to one-third of the costs of appeal and of the lower court.

CANNON J.—I agree.

*Appeal allowed.*

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