1951 *Present :* **Gratiaen J. and Pulle J.**

APPUHAMY, Appellant, *and* EDWIN, Respondent

S. C. 224—D. C. Badulla, 8,865

Administration of estates—Executor de son tort—*Money decree obtained against him—Extent of his liability—Right of creditor to follow property sold by heir.*

Property of a deceased person's estate is not liable to be sold in execution of a money decree obtained against an *executor de son tort* when such property has already been sold earlier by him, as heir, to a third party unless steps are first taken in proper proceedings, instituted against that third party, to have the property declared bound and executable for the recovery of the judgment debt.

APPEAL from a judgment of the District Court, Badulla.

S. J. V. Chelvanayakam, K.C., with *C. Chellappah*, for the 2nd defendant appellant.

Cyril E. S. Perera, with *W. D. Gunasekera*, for the plaintiff respondent.

Cur. adv. vult.

May 18, 1951. GRATIAEN J.—

A man named Pabalis Appuhamy owned certain undivided interests in the property which is the subject-matter of the present dispute. Pabalis Appuhamy died in 1936 leaving a last will appointing his son Simon to be the executor of his estate, and under this will his undivided interests in this property passed to Simon. The validity of the will was challenged by other members of Pabalis Appuhamy's family, but it was finally upheld after a protracted litigation. Probate was then granted to Simon, but the precise date on which this took place was not proved at the present trial. It is clear from the evidence, however, that before probate was issued Simon had sold his interests in the land on 4th March, 1938, to a man named Charles. The conveyance recites that title to the property had passed by inheritance from Pabalis. The genuineness of this transaction has been questioned by the plaintiff, but no specific issue was raised on the point, and it would be quite improper for us to assume for the purposes of this appeal that Charles was not a *bona fide* purchaser for value. Later, on 20th September, 1941, Charles sold his interests in the land to the appellant.

On 3rd July, 1942, the 1st defendant in this action, who himself owned an undivided interest in the land, instituted proceedings under the Partition Ordinance in respect of the entire property. The appellant was joined in the action as the owner by purchase of Pabalis Appuhamy's original interests, and a decree for sale of the property was duly entered. The appellant purchased the entire property at the auction conducted among the co-owners for a sum which greatly exceeded the " upset price " fixed by the Court. It is common ground that by virtue of the provisions of Section 9 of the Partition Ordinance the title which now passed to the appellant was unimpeachable. In fact, it is on the basis of this grievance that the present action was instituted. The plaintiff's complaint was that his title, which was allegedly superior to that of the appellant, had been wiped out by the decree (and subsequent sale) in favour of the appellant in the partition action. The plaintiff's alleged cause of action is that the 1st defendant (who was the plaintiff in the earlier action) and the appellant had conspired together to defeat his rights in the property, and were therefore liable to compensate him in damages for the loss sustained by him.

It will be convenient if at this stage I set out the basis on which the plaintiff claims that his title had been superior to that of the appellant until it was wiped out by the decree in the partition proceedings which had been instituted and concluded without notice to him. He says that in 1937,

D. A. Perera, a creditor of Pabalis Appuhamy's estate, had sued Simon in D. C. Badulla 6,436 for the recovery of a debt. The earlier litigation in which Simon's claim to probate as the executor named in Pabalis' last will had at that time not yet terminated, and D. A. Perera had therefore advisedly sued Simon in D. C. 6,436 not *qua* executor but as *executor de son tort* who had intermeddled with the estate. D. A. Perera was in fact a son-in-law of Pabalis Appuhamy and was, in association with others, actively engaged in contesting the last will under which Simon claimed to be both executor and sole heir. Indeed, a characteristic which the members of the family seemed to have shared in a marked degree was a passion for litigation. Simon contested the claim against him in D. C. 6,436 with his customary enthusiasm, but on 3rd August, 1937, a money decree was entered against him, as *executor de son tort*, in favour of D. A. Perera for Rs. 1,235.24. Simon appealed to this Court but his appeal was dismissed on 21st February, 1938. Execution proceedings were taken out—it is not clear precisely when—against Simon for the recovery of this judgment debt, and on 8th March, 1938 (the date is important) the Fiscal of the Uva Province purported to execute the writ by selling Simon's interests in the property which is now in dispute. The present plaintiff was the purchaser at this execution sale. As I have already stated, Simon had already sold these interests to the appellant's predecessor Charles.

The argument on behalf of the plaintiff is that, notwithstanding the earlier sale to Charles, he had become the lawful owner of Simon's interests in the property by purchase at the execution sale, and that the 1st defendant (*i.e.*, the plaintiff in the partition action) " acting in fraud and in collusion with (the appellant) and acting wrongfully failed and neglected to disclose in the said partition case the plaintiff as a party entitled to any share whatsoever in the said land and during the partition case proceedings, intending or knowing it likely that prejudice would be caused to the plaintiff and to enrich the appellant, both of them wilfully suppressed or omitted to produce the relevant deeds and documents which would have disclosed the plaintiff's interests and the title in the land." In other words, the plaintiff's case is that he was in these circumstances entitled to maintain against the 1st defendant an action for damages which was expressly reserved to him by the proviso to Section 9 of the Partition Ordinance, and that the appellant, as a joint-tortfeasor, was equally liable in damages because he had played an active part in the conspiracy to defeat the plaintiff's rights.

At the conclusion of the trial in the Court below the learned District Judge entered judgment in favour of the plaintiff against the 1st defendant and the appellant jointly and severally for the sum of Rs. 6,665 as damages. The appellant has appealed to this Court from the judgment in so far as it affects him.

We have had the advantage of a much fuller argument on the questions of law arising for consideration on this appeal than the learned District Judge seems to have enjoyed. Mr. Chelvanayagam contends as a matter of law that the plaintiff's action fails at the outset because in truth no title passed to him at the execution sale which took place on the 8th March, 1938, and because he was vested with no interests in the property which

could properly have been recognised in the subsequent partition action even if he had been joined as a party to those proceedings. It is clear that if this contention be sound, the judgment appealed from must be set aside as far as the claim against the appellant is concerned even if the allegation of a conspiracy against the plaintiff be established. The 1st defendant is apparently content to accept liability under the decree. He has not appealed, and his liability to pay damages to the plaintiff would therefore be unaffected.

It is first necessary to consider what rights passed to the judgment-creditor in D. C. Badulla 6,436 under the decree entered in his favour against Simon as *executor de son tort* of his father's estate. This decree was one for the payment of a sum of money *simpliciter*, and did not purport to declare any specific asset bound and executable for the recovery of the judgment debt. The foundation of the action, and the basis of the decree, must necessarily have been that the value of the assets of the estate with which Simon had intermeddled (less any sums which he may properly have expended for purposes of administration) was not less than Rs. 1,235.24. The decree entered against him as *executor de son tort* therefore fixed him with *personal* liability to pay the judgment debt, and the creditor was entitled to recover this amount by the seizure and sale in proper execution proceedings of *either* Simon's personal assets *or* such assets belonging to the deceased's estate *as were in his possession at the date of the seizure*. The creditor could not further demand, by virtue of his money decree, a judicial sale of any property belonging to the deceased's estate which were not proved to have been in the possession of the *executor de son tort* at the time of seizure. Still less could he claim the right automatically to seize and sell any part of the estate which had already been sold to a third party *unless steps were first taken in proper proceedings*, instituted against that third party, to have the property declared bound and executable for the recovery of the judgment debt. That, I think, is the effect of the decision of this Court in *Mytton v. Narchia* [1]; *Kankanama v. Usifu* [2]; *Prins v. Pieris*,[3] and *Appuhamy v. Banda* [4] (although in the last of these judgments Ennis J. considered that in the facts of the particular case certain irregularities in procedure had been sufficiently waived by the objecting party). In *Appuhamy v. Cole* [5] Sampayo J. held that property belonging to the deceased's estate was not liable to be seized in execution of a money decree against an *executor de son tort* because it was not in the latter's possession at the date of seizure. Applying these principles to the present dispute, I take the view that the title which passed to Charles under his purchase on 4th March, 1938, was not automatically wiped out at the execution sale which took place at a later date. The property was not available in his possession for seizure in execution proceedings against him at the relevant time. I certainly accept as settled law the proposition that transfers of property, pending administration, by the heirs of an estate are *in certain circumstances* liable to be defeated at the instance of an unsatisfied creditor of the estate (*vide* the authorities

[1] *(1881) 4 S. C. C. 23.*
[2] *(1886) 7 S. C. C. 180.*
[3] *(1901) 4 N. L. R. 353.*
[4] *(1922) 24 N. L. R. 217.*
[5] *(1920) 8 C. W. R. 28.*

cited by Soertsz J. in *Suriyagoda v. Appuhamy* [1]) but this does not mean that the " defeasible title " which passes to a third party can be wiped out until a court of competent jurisdiction expressly declares the property liable to be sold at the instance of the judgment-creditor. It seems to me that the correct procedure which a creditor should adopt to obtain such a declaration is indicated in *Muttiah Chetty v. Ukkurala* [2]. The decision of de Kretser J. relied on by Mr. Cyril Perera in *Perera v. Canniah* [3] does not deal with this particular aspect of the problem, and there is no reference in the latter judgment to the steps taken by the creditor to follow the property in the hands of a purchaser. I find however from a note of the argument in that case that Counsel who appeared for the creditor relied on *Muttiah Chetty v. Ukkurala* (supra) in support of his submissions which were upheld by the Court.

It is important to remember that if the judgment-creditor in D. C. Badulla 6,436 had sought, in proper proceedings to which Charles had been made a party, to have the property declared liable to seizure and sale in execution of his money decree against Simon, the validity of his claim would have depended upon a number of factors. Had it been proved, for instance, that Simon's sale to Charles was not a genuine transaction but merely a fraudulent device to defeat Simon's creditors, the claim would no doubt have succeeded. Had it been proved, on the other hand, that Charles was a *bona fide* purchaser for value, and that the proceeds of the sale had been completely or partially expended for administration purposes, different considerations would have applied. I mention these hypothetical situations merely to emphasise the point that a creditor's claim to follow the property into the hands of a third party must be investigated in a regular action *inter partes* and on proper issues. It is certainly not referable to some automatic right which the law confers on judgment creditors. There is a fundamental distinction between a title which is *liable to be defeated* in certain contingencies and a title which must necessarily rank below the vested rights of some other claimant. In my opinion the title which Charles acquired on 4th March, 1938, and later sold to the appellant in 1941, was and continued to be superior to those which the plaintiff purported to acquire on 8th March, 1938. When therefore the partition proceedings commenced in 1942 the plaintiff had no vested rights in the property which were capable of recognition by the Court. I would therefore hold that the plaintiff's claim against the appellant failed at the outset, and it is therefore unnecessary to consider the other interesting questions of law which Mr. Chelvanayagam raised before us.

I would set aside the judgment appealed from in so far as it affects the appellant, and enter decree dismissing the plaintiff's action against the appellant with costs both here and in the Court below.

PULLE J.—I agree.

Appeal allowed.

[1] *(1941) 43 N. L. R. 89.*

[2] *(1925) 27 N. L. R. 336.*

[3] *(1944) 45 N. L. R. 337.*