

1948

*Present: Cannon and Canekeratne JJ.*

AHAMADO MUHEYADIN, Appellant, and THAMBIAPPAH,  
Respondent.

75—D. C. Batticaloa, 153.

*Mortgage—Hypothecary action—Death of mortgagor—Appointment of legal representative under Mortgage Ordinance—Tender of evidence that value of mortgaged property does not exceed Rs. 2,500—Condition precedent—Mortgage Ordinance (Cap. 74), s. 7.*

A condition precedent to the appointment of a person to represent the estate of a deceased mortgagor under section 7 of the Mortgage Ordinance (Cap. 74) is that evidence should be tendered that the value of the mortgaged property does not exceed two thousand five hundred rupees. Failure to comply with this condition would render the order of court appointing a legal representative void *ab initio* and the consequent sale and other proceedings a nullity as against the deceased's estate.

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

*H. V. Perera, K.C.* (with him *E. B. Wikremanayake* and *G. Thomas*),  
for the plaintiff, appellant.

*N. Nadarajah, K.C.* (with him *S. Nadesan*), for the defendant,  
respondent.

*Cur. adv. vult.*

August 20, 1945. CANNON J.

This appeal depends upon a question of jurisdiction. The parties are the administrator *cum testamento annexo* (who has been erroneously described in the proceedings as executor) of one Marikkar, deceased, and the mortgagee of the land of the deceased who subsequently bought the mortgaged land under a decree of the Court. The mortgage was for a loan of Rs. 3,000 to the deceased and his wife. The history of the transaction is that, after the mortgagor Marikar died the mortgagee put the

bond in suit and, before the action, made an application for the appointment of a legal representative of the deceased's estate for the purpose of the action under the Mortgage Ordinance, section 7. At that time representation had not been granted in respect of the estate. The Court appointed as legal representative the widow and children of the deceased, and in the subsequent action decreed a sale of the mortgaged property which was bought by the mortgagee.

The action appealed from is one which the administrator of the estate asked for a declaration of title to the lands of the deceased purchased by the mortgagee, his cause of action being an allegation that the mortgagee got the legal representative appointed without showing the Court that the mortgaged property did not exceed Rs. 2,500 as required by the Mortgage Ordinance, section 7 (2). The District Judge held that the plaintiff had not proved his case and dismissed the action. In this appeal against such dismissal it is not seriously contested that the value of the property was more than Rs. 2,500. The argument has centred round the questions (1) whether there was such evidence before the District Judge as the Mortgage Ordinance requires and (2) whether, if his decision was wrong, the District Judge nevertheless had jurisdiction to order the appointment of a legal representative for the purposes of the action. This point of jurisdiction is important because if the Court had no jurisdiction its order was void *ab initio* and the consequent sale and other proceedings a nullity as against the deceased's estate. The evidence of value tendered to support the application for a legal representative to be appointed to defend the action was to the effect that the net value of the deceased's estate was less than Rs. 2,500. There was no evidence before the Judge as to what the value of the mortgaged property was. His order was therefore wrong, and the final question for consideration is whether it was made without jurisdiction. Mr. Perera for the appellant contends that the Court could not by its wrong decision give itself jurisdiction. The question of jurisdiction arose in an English case—*The Queen v. The Commissioner of Income Tax*<sup>1</sup> and both sides rely upon what was said by the Master of the Rolls, Lord Esher. It was a case in which the Commissioners for Special Purposes refused to act on certificates for repayment of tax issued by the Commissioners for General Purposes, on the ground that the latter Commissioners had no jurisdiction to issue such certificates because certain facts had not been "proved to their satisfaction", as required by the English Statute. At page 319 Lord Esher says—

" I have been laying down what in my opinion is the general rule of conduct for those charged with that inquiry, but the question arises who are to make that inquiry? In the first instance obviously the Commissioners for General Purposes. They have to determine that question and they must determine it, as it seems to me, according to the rule I have laid down. But when they have determined it, can their decision be questioned afterwards? It will be said on the one side that their jurisdiction depends on the decision of that question

<sup>1</sup> (1888) 21 Q. B. D. 313.

and, applying a well known formula, that they cannot give themselves jurisdiction by a wrong decision on the facts. I have considered that formula with great care and, though it is correct enough for certain purposes, I think its application is often misleading. When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; "

It will be seen that the Master of the Rolls divided the question of jurisdiction into two categories. Mr. Perera contends that this case comes within category (1) and Mr. Nadarajah for the respondent suggests that it comes under category (2). I think that it comes under category (1). By the Mortgage Ordinance it was a condition precedent to such an application being entertained that evidence should be tendered that the value of the mortgaged property did not exceed Rs. 2,500. This state of facts was not shown to the Court. It was a preliminary and essential application before the action on the mortgage bond could be formulated as unless and until the Court nominated some one to represent the deceased's estate, there could be no defendant to the action. It was a question of fact, and the Judge's decision on it could not bind a stranger to the action which the present appellant was. *Vide* 20 N. L. R. 372. In the absence of evidence of the value of the mortgaged property the Court had no jurisdiction to appoint a person to represent the deceased mortgagor and therefore his estate was in law not represented in the action on the bond.

For these reasons I would allow the appeal with costs, set aside the order of the District Judge and direct judgment to be entered for the plaintiff as prayed for.

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The judgment in the action and the subsequent order for sale remains binding on A. M. Asiathumma who was herself a mortgagor since she was made party to the proceedings.

CANEKRATNE J.—I agree.

*Appeal allowed.*

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