

1920.*Present: Bertram C.J. and De Sampayo J.*

NANAYAKKARA v. JUAN APPU.

78—D. C. (Inty.) Colombo, 49,403.

*Administrator personally liable for costs—Action by proctor against administrator for costs—Land belonging to administrator and other heirs cannot be seized under writ against administrator.*

The fact that a judgment-debtor has a right of indemnity against a third party does not entitle a judgment-creditor to sell the property of that third party under a judgment against his debtor.

Where a proctor obtained judgment against an administrator personally for cost due to him, the fact that the administrator had a right of indemnity against the other heirs would not entitle the selling of property belonging to the other heirs on the decree against the administrator.

BERTRAM C.J.—I have no doubt that if the Judge had before him all the parties, and if there were money at his disposal for the purpose, he would make a direct order rendering the assets of the persons, who were bound to indemnify the administrator, liable directly. But that is not the case here.

THE facts appear from the judgment of the District Judge (P. E. Pieris, Esq.):—

This is an action to partition a land of about 20 acres shown in the plan Z. The original owner was a certain Luke de Silva. Those claiming under him in the case are content to waive 3 acres of the land in favour of the original defendants. At Luke's death in 1907 his estate was administered by his brother Paul. He brought the action in 31,745 of this Court as administrator. Subsequently, because he failed to pay his proctor's fees, the proctor brought the action C. R. 34,441 against Paul. Though in the caption he was only described by his personal name, it is obvious from the plaint that the proctor sued him in his character of administrator. The decree in the case described Paul as "the said defendant," and ordered him to pay a sum of money to the proctor. Thereupon, the proctor took out writ, seized his land, and the Fiscal put up for sale "the right, title, and interest of" Paul, whose name was given in the conveyance P 1, and who was further described there as "the defendant in the said case." Plaintiff's claim is founded on P 1. In the meantime Luke's widow had conveyed her moiety by D 1 to first added defendant, and the latter have raised an issue as to the effect of the Fiscal's conveyance. What was conveyed on P 1? It seems clear that our law is that when an administrator brings an action in his representative capacity he is personally liable in costs, unless the Court order otherwise. In this case in the action brought by Paul no costs of the other side were ordered, but it is hardly open to doubt that the fees payable by him to his own proctor will fall into the same category. The contract of the proctor was with the administrator. It would seem clear from the English authorities which have been

cited that the liability on the contract, so far as the proctor was concerned, lay on the administrator personally. No doubt it was open to the administrator under proper circumstances to make the payment out of the estate funds. But that is not the same as saying that it was open to the proctor to sue the estate for a debt contracted, not by the deceased, but by the administrator. I think that all the plaintiff can claim under the Fiscal's transfer is only the personal interest which Paul had in the land.

The evidence which has been placed before me as to the devolution of title on the death of Luke is misleading, as I find from the deeds filed that his mother survived him. The plaintiff is given an opportunity to place more reliable evidence before me on August 14. On his failure his action will be dismissed. For the present he will pay the costs of the first date of trial.

*A. St. V. Jayawardene* (with him *E. G. P. Jayatileke* and *Nagalingam*), for the appellant.

*Samarawickreme* (with him *J. W. de Silva* and *Canakarathne*), for the respondent.

January 13, 1920. BERTRAM C.J.—

This seems to me a very clear case. The question arises in a partition action. It appears that one Paul de Silva, one of the six brothers and sisters of Luke de Silva, who died intestate, acted as the administrator of his estate. He took action with regard to the land now in question, but failed to pay the costs of his proctor in that action. The proctor thereupon instituted against him a suit for his costs and obtained judgment. The proctor sued the administrator personally, although in the plaint he mentioned that the defendant was the administrator of the estate, and that he acted at the request of the defendant as such administrator. The decree was entered against the defendant personally. Execution was taken out in pursuance of that decree, and in the Fiscal's sale that followed it was expressly stated that it was the interest of the defendant that was being sold. The defendant, as a matter of fact, had a special interest as heir of the deceased.

It is now contended that what was really being sold was, not the interest of the defendant in that action as heir, but the interest of the whole estate, that is to say, the interest of the defendant and all the other heirs, on the ground that the defendant in that action was administrator. I do not think that that proposition is in the least tenable. The position is clearly explained in the case of *Nugara v. Palaniappa Chetty*.<sup>1</sup> It is there said that an executor and administrator who is on the record as plaintiff or defendant is liable personally for costs in the same way as any other person. The question whether he is entitled ultimately to recover the amount of the costs which is ordered to pay from the estate is a totally different matter. As between the parties to the action, an executor

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or administrator is individually responsible for the costs which he is ordered to pay. It does not matter in the least that in the plaint it was stated that the defendant in the action in which execution was levied was acting as administrator, because the law is that when he is so acting he is personally liable. How, then, on a judgment against a person on which he is personally liable, and on which nobody else, in the first instance, is liable, can execution be levied against the property of other persons who are not parties to the judgment?

It is perfectly true that the execution-debtor had in this case a right of indemnity against the other heirs. But that does not affect the matter. The fact that a judgment-debtor has a right of indemnity against a third party does not entitle a judgment-creditor to sell the property of that third party under a judgment against his debtor. An order of Court is clearly always necessary where it is sought to make the assets of such a third party available.

Mr. Jayawardene cited to us the case of *In re Raybould*,<sup>1</sup> and relied upon the following passage: "When once a trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or the assets, as the case may be, just as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do, instead of having to go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate. I have the parties interested in defending the trust estate before me, and I have also the trustee, and he claims indemnity, and, assuming that a proper case for indemnifying him is made by the evidence, I think his claim should be allowed."

I have no doubt that also in our Courts, if the Judge had before him all the parties, and if there were money at his disposal for the purpose, he would make a direct order rendering the assets of the persons, who were bound to indemnify the administrator, liable directly. But that case is not this case. We are not considering whether the Court in such a case is in a position to make such an order. We are considering the question. What was sold at the Fiscal's sale? In my opinion what passed by the Fiscal's sale was what is stated to have passed in the Fiscal's transfer, that is to say, the interest of Paul de Zilva and nobody else.

I am of opinion, therefore, that the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1900) 1 Ch. 119.