

1927.

Present: Fisher C.J., Garvin J., and Driberg A.J.

KANDIAH *et al.* v. THAVAR *et al.*

429—D. C. Jaffna, 20,649.

Hypothecary action—Person appointed to represent estate of deceased mortgagor—Execution against other property—Civil Procedure Code, s. 642.

Where, in an action to realize a mortgage, a person is appointed to represent the estate of a deceased mortgagor under the proviso to section 642 of the Civil Procedure Code, the plaintiff may levy execution against other property of the estate if the amount of the decree is not realized by the sale of the mortgaged property.

*Soysa v. Jayawardene*¹ over-ruled.

THIS was an action for the partition of a land in which the dispute was with reference to the one-fourth share of one Velar Alvapillai. The fourth defendant claimed the share by inheritance from Velar Alvapillai, and the third defendant claimed it on purchase by him at a sale in execution of a decree obtained against a person, appointed to represent the estate of the deceased Velar, under the proviso to section 642 of the Civil Procedure Code. Velar had mortgaged certain other property, and after his death the mortgagee sued on his bond. Under the decree the mortgaged property was sold, and as it did not realize the amount of the decree, the one-fourth share of Velar in this land was sold in execution and bought by the third defendant.

The learned District Judge held that no title passed to the third defendant on the ground that in an action against a representative appointed under the proviso to section 642 of the Civil Procedure Code the mortgaged property only could be sold.

Balasingham, for third defendant, appellant.—A representative of the estate appointed under section 642 represents the estate “for all the purposes of the action”; and a decree obtained against such representative “shall bind the estate of the deceased mortgagor in the same manner in all respects as if a duly constituted administrator of the deceased mortgagor had been a party to the action.” Clearly, then, not only the mortgaged property but the whole estate of the deceased mortgagor will be liable in satisfaction of the debt. There is only one action available now to a mortgagee upon his mortgage. Therefore, if he is restricted to the mortgaged property only for the realization of his debt, it may happen that

¹ (1914) 17 N. L. R. 218.

in the event of a deficit after discussing the mortgaged property the mortgagee will have to lose the balance. The decree in a mortgage action is a money decree as well as a hypothecary decree. The hypothecary decree declares the mortgaged property specially bound and executable for the satisfaction of the claim; but it does not in any way limit the operation of the money decree.

The correctness of *Mohamadu Lebbe v. Umma Natchia*¹ and of *Soysa v. Jayawardene (supra)* has been doubted in *Cassim v Babunhamy*.²

Joseph, for fourth defendant, respondent—Chapter XLVI. of the Code refers to actions to realize moneys due or secured upon mortgages. Obviously it refers to moneys that can be realized only by the conversion of the security into money. Section 642 of the Code provides a speedy and inexpensive method to a mortgagee who would be content to risk the satisfaction of his claim within the limits of the security. If the mortgagee desires to have a decree which would enable him to reach properties other than the mortgaged property he should have letters of administration taken out. It may be fair that to the extent of the realization of the mortgagee's debt out of the security only he should have the special advantage given to him by section 642. But for the recovery of any balance after the sale of the security there is no reason why he should be in a better position than an ordinary unsecured creditor.

August 11, 1927. FISHER C.J.—

This is an appeal by a defendant in a partition action, who based his claim to a one-fourth share of the property, which is the subject-matter of the action, upon a Fiscal's conveyance, against a decision of the District Judge of Jaffna disallowing the claim.

The share in question was part of the estate of a deceased mortgagor which had been sold under a writ of execution issued in an action in which the mortgagee was the plaintiff and a person appointed by the Court under the proviso to section 642 of the Civil Procedure Code "to represent the estate of the deceased mortgagor for all the purposes of the action" was the defendant. The writ was issued in order to realize the balance which still remained due in respect of the mortgage debt after sale under the decree of the mortgaged property.

It was contended before the District Judge that the appellant acquired no title by the Fiscal's conveyance, and the District Judge, being bound by two cases referred to by Schneider J. in *Cassim v. Babunhamy (supra)*, allowed the contention.

¹ (1896) 1 N. L. R. 346.

² (1924) 25 N. L. R. 504.

1927.
 FISHER C.J.
 Kandiah v.
 Thavar

The question which arises in this appeal is whether the Fiscal had any power to sell the share claimed by the appellant in view of the fact that the mortgaged property had been sold under the decree.

It is contended that the words " for the purposes of the action " in section 642 limit the defendant in such an action to representing the estate of the deceased mortgagor for the purpose only of the realization of the debt by sale of the property which is subject to the mortgage, and that when that property has been sold, even though the amount of the mortgage debt is not thereby realized, he is *functus officio* so far as representing the estate of the deceased mortgagor is concerned. The two cases which the learned District Judge followed support that view.

The first of these cases is *Mohamadu Lebbe v. Umma Natchia (supra)*. The facts in this case were that the plaintiff obtained a decree in an action in which the defendant had been appointed defendant under the proviso to section 642 and certain lands had been declared by the judgment to be subject to the mortgage and bound and executable for the mortgage debt. The Fiscal seized lands which were not subject to the mortgage together with the lands which were mentioned in the decree, and the defendant claimed exemption for the former and for one piece of the latter. The claim was allowed, and the plaintiff brought an action under section 247 of the Civil Procedure Code, which was dismissed. On appeal the Supreme Court held that the piece of land covered by the mortgage could be sold, but that the other property was exempt. The question of making good the deficiency did not arise in that case, but the judgment is a clear decision in favour of the limited aspect of the scope of an action under the proviso to section 642.

The second case is *Soysa r. Jayawardene (supra)*, in which the case of *Mohamadu Lebbe v. Umma Natchia (supra)* was followed, and the proposition which it laid down was again enunciated.

In *Cassim v. Babunhamy (supra)* -Schneider J., while he felt himself bound to follow these two cases, expressed his dissent from the proposition which they laid down.

In my opinion that proposition cannot be sustained, and I entirely agree with the views expressed by Schneider J. in his closely reasoned judgment. I do not think there can be any doubt but that the policy of the proviso was to give facilities for the disposal of such claims against the estate of a deceased mortgagor by providing for the proceeding in which it could be effected. To limit the operation of the proviso to the liquidation of the mortgage debt to the extent only of the amount realized by the sale of the mortgaged property would not be in accordance with or give effect to such a policy. The intention of the Legislature, moreover, is in my opinion clearly indicated by the concluding

words of the section: " And the order so made and an order consequent thereon shall bind the estate of the deceased mortgagor in the same manner in all respects as if a duly constituted administrator of the deceased mortgagor had been a party to the action. "

1927.
FISHER C.J.
Kandiah v.
Thavar

In my opinion these words clearly indicate that execution in these cases is not limited to sale of the mortgaged property, but that the plaintiff may have recourse to the estate of the deceased mortgagor for the purpose of making good any balance of the mortgage debt remaining due after the sale of the mortgaged property.

I would therefore set aside the order of the District Judge and hold that the Fiscal's conveyance to the appellant is valid, and that it should be declared that the defendant is entitled to an undivided one-fourth share of the land.

The order appealed from must therefore be set aside, with the direction and order as to costs indicated in the judgment of my brother Drieberg.

DRIEBERG A.J.—

This is an action for the partition of a land called Peruthalawattei; the only question arising on the appeal is regarding the one-fourth share of Velar Alvapillai. The respondents claim this share by inheritance from Velar Alvapillai, and the third defendant-appellant claims it on a purchase by him at a sale in execution of a decree for which he obtained a Fiscal's transfer, 3D2, of May 13, 1908.

Alvapillai had mortgaged certain other property, and after his death the mortgagor sued on his bond. The mortgaged property being less than Rs. 1,000 in value a person was appointed under the provisions of the proviso to section 642 of the Civil Procedure Code to represent the estate of Alvapillai; under the decree so obtained the mortgaged property was sold, and as it did not realize the amount of the decree the undivided one-fourth share of Alvapillai was sold in execution and bought by the third defendant-appellant, who obtained the Fiscal's conveyance 3D2.

The respondents contended that the sale was bad, and that no title passed to the appellant on the ground that in an action against a representative appointed under the proviso to section 642 the mortgaged property only could be sold; the learned District Judge, following the ruling in *Mohamadu Lebbe v. Umma Natchia* (*supra*) and *Soysa v. Jayawardene* (*supra*), upheld the contention, and dismissed the claim of the third defendant-appellant to this one-fourth share. The appeal from this finding was argued before my brothers Garvin and Dalton, and by them reserved for a bench of three Judges.

1927.
 DRIEBERG
 A.J.
 Kasidial v.
 Thavar

The proceedings in the mortgage action against the person appointed to represent the estate of Alvapillai are not before us. Counsel, however, agreed that the mortgage decree was in the usual form, following the prayer in such an action given in form 106 of schedule II. of the Civil Procedure Code, and such a decree directs that if the proceeds of sale of the mortgaged property are insufficient for payment of the amount of the decree the defendant should pay the amount of the deficiency with interest until realization.

This question arose again in the case of *Cassim v. Babunhamy* (*supra*), in which Schneider J., sitting alone, followed these two cases, but examined them closely and stated that he was unable to agree with them.

I am in complete agreement with the reasons given by Schneider J. for his opinion that in an action against a person appointed under the provisions of section 642 the plaintiff can levy execution against other property of the estate if the amount of the decree is not realized by the sale of the mortgaged property.

The reasons underlying the decisions in *Mohamadu Lebbe v. Umma Natchia* (*supra*) and *Soysa v. Jayawardene* (*supra*) are that the person appointed does not represent the whole estate of the deceased and that he is not in the same position as an administrator; now it is true that the person appointed has not all the general powers of an administrator, but it is not necessary for this purpose to claim for him such a status. Section 642 does not make the person appointed the representative of the estate for all purposes, but only for all the purposes of the action, and there is nothing in the section to indicate that so far as that purpose and its fulfilment are concerned there is any limitation on his representative capacity; on the contrary, it is expressly stated that his position as a defendant, so far as the action is concerned, is such that any order made in the action would bind the estate in the same manner in all respects as if the action had been brought against a duly appointed administrator.

If an action on the bond had been brought against the administrator of the estate, a decree could have been entered for the sale of the property mortgaged and for the recovery of any deficiency by execution levied on other property. Bonsor C.J. in *Punchi Kira v. Sangu*¹ and Schneider J. in *Cassim v. Babunhamy* (*supra*) have explained how the Civil Procedure Code now compels a mortgage creditor to combine in one proceeding his action *in rem* and his action *in personam* against the mortgagor upon the principal obligation of debt. This action is rightly described in chapter XLVI. of the Code as one to realize moneys due or secured upon a mortgage. If, therefore, the claim to recover a deficiency by sale of unsecured property be a proper one in a mortgage action

¹ (1900) 4 N. L. R. 42.

brought against an administrator, it is not easy to see why such a claim is bad if brought against a specially appointed representative who for all the purposes of the action represents the estate so that it can be bound in the same manner in all respects as if the person appointed were a duly appointed administrator.

1927.
DRIEBERG
A.J.
Kandiah v.
Thavar

I therefore hold that the defendant-appellant acquired title under the Fiscal conveyance No. 10,786 of May 13, 1908, to the undivided one-fourth share of Velar Alvapillai.

The learned District Judge made the order rejecting the defendant-appellant's claim on September 1, 1926, and fixed a date for trial on the other issues; in the meantime the defendant-appellant appealed and further proceedings were stayed. I would therefore set aside the order of September 15, 1926, and direct that the further proceedings for the partition should continue on the footing that the third defendant-appellant is entitled to the share claimed by him.

The respondents will pay the defendant-appellant the costs of this appeal and of so much of the trial as was occasioned by the contest on this point.

GARVIN J.—

I have had the advantage of seeing the judgments of my Lord the Chief Justice and my brother Drieberg. I am in entire agreement with them, and see no need to add anything to what they have said.

Appeal allowed.
