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Present: Shaw J. and De Sampayo J.

FERNANDO *v.* UNNANSE.

3—D. C. Anuradhapura, 742.

Agreement between A and B—Death of the executor of A's estate without suing on agreement—Action by the administrator of the estate of A's executor on the agreement—Action must be brought by administrator de bonis non *of A's estate.*

By a notarial agreement A put the defendant in possession of certain property, on the condition that the defendant should deliver to him ten half-yearly instalments, and further pay a sum of Rs. 15,000, and agreed to transfer the fields to the defendant at the expiration of five years if he fulfilled the condition.

A died leaving his widow B sole heir and executrix under his last will. B obtained probate, and before the estate was fully administered she herself died intestate. The plaintiff obtained letters of administration to the estate of his mother B, and brought this action against the defendant on the agreement.

Held, that the plaintiff as administrator of B's estate could not sue on the agreement, and that only an administrator *de bonis non* of the estate of A himself could bring the action.

THE facts are set out in the judgment of de Sampayo J.

Bawa, K.C. (with him *Balasingham* and *Hayley*), for defendant, appellant.—The District Judge was wrong in refusing to frame the issues suggested by the defendant. The issue: Whether the lands in question were inventoried as forming part of the estate of W. D. A. Fernando, and whether probate-duty was paid, affects the right of the plaintiff to sue. See *Silva v. Weerasuriya*.[1]

The plaintiff is administrator of the executrix of W. D. A. Fernando. The contract sued upon is one between W. D. A Fernando and the defendant. The plaintiff cannot sue on it. Only an administrator *de bonis non* can sue. See *Williams on Executors, vol. 1. (10th ed.), 604.* The fact that the plaintiff is also sole heir of Mary Fernando and her husband W. D. A. Fernando does not give him a legal status to sue.

The legal title to the lands in question may be in the plaintiff, as held in *Silva v. Silva*,[2] but that does not enable him to sue for the land or on the contract. Under section 547 of the Civil Procedure Code the widow (Mary Fernando) herself cannot sue. How can the administrator of Mary Fernando's estate sue ?

[1] *(1906) 10 N. L. R. 73.*

[2] *(1907) 10 N. L. R. 234.*

The right of a Ceylon executor or administrator extends to lands as well as personal effects.

Counsel referred to *4 N. L. R. 201; 14 Halsbury 141, 195; 1 Lor. 201; 10 N. L. R. 73.*

J. S. Jayawardene, for the plaintiff, respondent.—The objection is a purely technical one. The plaintiff is sole heir. The last will of W. D. A. Fernando has been proved, and letters of probate were issued to his widow (Mary Fernando). Letters of administration were issued to the plaintiff in respect of the estate of his mother, Mary Fernando. The title to the lands vests in the plaintiff. There is nothing in section 547 to prevent the plaintiff from suing, as the provisions of that section have been complied with by the grant of probate and letters.

All the heirs of an intestate can sue on a contract of this nature. See judgment of Lawrie J. in *Thomipillai v. Naganather;* [1] see also *Loku Appu v. Banda.*[2] In any case, the plaintiff may be given an opportunity to be appointed executor of W. D. A. Fernando's estate.

Cur. adv. vult.

April 19, 1918. SHAW J.—

This is an appeal from certain interlocutory orders made by the Judge. The only points pressed upon the appeal were, first, that the Judge was wrong in refusing to frame certain issues suggested by the defendant; and second, that he was wrong in his decision of a preliminary issue that the plaintiff had a right to maintain the action.

The second point is one of some importance, and raises a question on which there appears to be no direct authority in this Colony.

The action is brought by the administrator of one Mary Fernando, and the principal claim made is for damages for breach of an agreement contained in an indenture dated August 15, 1912, made between the defendant and one W. D. A. Fernando.

W. D. A. Fernando died on March 9, 1915, and probate of his will was granted to Mary Fernando, his widow and executrix, on July 27, 1915. Under the terms of the will Mary Fernando was sole heir.

The indenture of August 15, 1912, was in effect an agreement for the sale by W. D. A. Fernando to the defendant of certain property in consideration of the payment by the defendant of 10,000 bushels of paddy in ten half-yearly instalments, or its value at Re. 1.50 a bushel, and a further payment of Rs. 15,000 at the end of five years. The indenture also contained provisions as to the rights of parties should either of them fail to carry out the terms of the agreement.

[1] *(1885) 7 S. C. C. 23.*

[2] *(1884) 7 S. C. C. 23.*

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The objection taken to the plaintiff maintaining the present action is that he is not the legal representative of W. D. A. Fernando, who alone has a right to sue on the agreement. The Judge has held that the plaintiff being sole heir and administrator of Mary Fernando, who inherited by will from W. D. A. Fernando, is entitled to maintain the action.

That an administrator of an executor does not represent the original testator, and cannot in his capacity of such administrator sue in respect of debts due to the original testator, is undoubted law (see *Williams on Executors, 10th edition, page 180*, and authorities there cited). It is contended, however, that the plaintiff in the present action can sue because he represents Mary Fernando, who is W. D. A. Fernando's sole heir.

It has been held in the Full Court case, *Silva v. Silva*,[1] reviewing the earlier decisions, that in Ceylon property, movable and immovable, passes on the death of a person to the heirs by operation of law, and, subject to the right of the legal representative to deal with the property for the purpose of administration, they have full power to deal with the property without the concurrence of the personal representative.

The effect of the decision appears to me to be, as stated by Hutchinson C.J. in *Silva v. Silva*,[1] that an executor or administrator in Ceylon has the same power as regards the immovables as an English personal representative had previously as regards chattels, or, as it was put in the judgment of the Privy Council in *Gavin v. Hadden*,[2] an executor in Ceylon has the same power as an English executor, with the addition that it extends over all real estate, just as in England it extends over chattels personal.

The power of the heir to deal with the property without the concurrence of the personal representative does not seem to me, however, to at all necessarily import a power in the heir to sue upon contracts made by, or to recover by action debts due to, the deceased, and no case has been cited to us in which an heir has successfully sued in such an action where an executor or administrator has been appointed, or where it was necessary to take out probate or letters of administration under our law. The cases of *Loku Appu v. Banda* [3] and *Thomipillai v. Naganather* [4] were both cases of small estates, to which personal representation was unnecessary under the existing law, and in which probate would not now be necessary under the provisions of chapter XXXVIII. of the Civil Procedure Code. So far at any rate as regards debt due to, or contracts entered into by, the deceased, I agree with the opinion expressed by Bonser C.J. in *Fernando v. Fernando*,[5] that the effect of the provisions in the Civil Procedure Code is that the executor or

[1] *(1907) 10 N. L. R. 234.*
[2] *(1871) 8 Moore's P. C. Cases 90.*
[3] *(1884) 7 S. C. C. 3.*
[4] *(1885) 7 S. C. C. 23.*
[5] *(1900) 4 N. L. R. 201.*

administrator is the only person who can sue in respect of an estate amounting to Rs. 1,000 and upwards. The result is that, in my view, the only person who can succeed in such a claim as that under consideration is the personal representative of W. D. A. Fernando.

The point in the present case is a purely technical one, for the plaintiff, being the administrator of the sole heir, is clearly entitled to be appointed administrator *de bonis non* of W. D. A. Fernando's estate. Under the circumstances of the present case, I would direct the proceedings in the action should be suspended, to enable the plaintiff to regularize his position by obtaining a grant from the proper Court.

With regard to the other point in the appeal, the additional issues suggested by the defendant were not seriously opposed on the hearing of the appeal, and I see no reason why they should not be adopted.

The appellant is entitled to the costs of the appeal and the argument in the Court below.

DE SAMPAYO J.—

The facts leading up to this case may be shortly stated as follows. One W. D. Andris Fernando was the owner of two paddy fields, over 90 acres in extent, situated at Anuradhapura. On August 15, 1912, Andris Fernando and the defendant, who is the chief priest of Ruwanwelisaya Dagoba, entered into a notarial agreement, whereby Andris Fernando put the defendant in possession of the fields on the terms that the defendant should deliver to him 10,000 bushels of paddy within five years, in equal half-yearly instalments, or pay their value at the rate of Re. 1.50 per bushel, and should also pay to him a further sum of Rs. 15,000, and that, in considera- on May 29, 1916. The plaintiff, who appears to be a son of Andris Fernando should at expiration of the five years transfer the fields to the defendant. Andris Fernando died on March 9, 1915, having executed a last will jointly with his wife Mary Fernando, whereby they appointed the survivor the sole heir and executor. Mary Fernando, who survived her husband, obtained probate of the will, and before the estate was fully administered she herself died intestate on May 29, 1916. The plaintiff, who appears to be a son of Andris Fernando, obtained letters of administration to the estate of his mother, Mary Fernando. The plaintiff as such administrator brought this action against the defendant on the said agreement, alleging that the defendant had failed to deliver any paddy or to pay any money as agreed, save a sum of Rs. 600, and praying for cancellation of the agreement, for ejectment of the defendant from the fields, and for judgment for Rs. 27,000 as damages, and Rs. 460 a month as further damages from the date of the action till restoration into possession. Among other defences, the defendant pleaded,

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as a matter of law, that the averments in the plaint did not disclose any right in the plaintiff to maintain the action. At the trial this plea resolved itself into an objection, that the plaintiff as administrator of the estate of Mary Fernando could not sue on the defendant's agreement with Andris Fernando, and that only an administrator *de bonis non* of the estate of Andris Fernando himself could bring such an action. It was also objected that the fields in question had not been inventoried in Andris Fernando's testamentary case and probate duty thereon paid, and an issue on that point was suggested on behalf of the defendant. The District Judge overruled the legal objection as to the plaintiff's right to sue, and refused to accept the issue with regard to the non-payment of sufficient probate duty, and the defendant has appealed from these orders.

In my opinion, the contention that the plaintiff has not the requisite capacity to maintain this action is entitled to prevail. The claim founded on the agreement is a chose in action belonging to the estate of Andris Fernando, and can only be enforced by his legal representative. If Mary Fernando had herself made a will and appointed an executor thereof, such executor would under the law have the right to administer the original estate, and might properly have brought an action to enforce the agreement. But the plaintiff, as her administrator, is not in the same position. It is, however, contended that by virtue of the joint will the claim on the agreement became Mary Fernando's own property, and that she could have sued in her personal capacity, and so could her administrator, and reliance is placed on *Silva v. Silva.*[1] In my opinion that decision is not an authority for the contention on behalf of the plaintiff. What is there decided is that the property of a deceased person descends by operation of law to his heirs independently of any administrator, and that they having legal title may transfer such property without any concurrence or assent of the administrator, subject only to the right of the administrator to deal with the property for purposes of administration. The heirs referred to are heirs *ab intestato*, and I doubt whether the reasoning applies to a mere devisee or legatee. In any event, it seems to me that, though rights of action are a species of property, the decision is not intended to go so far as to hold where the deceased leaves a will, or his estate is of such a character as to require administration, the heirs themselves can sue to enforce mere choses in action. Whatever rights they may have to property in possession, I do not think they have a similar right to things which have still to be reduced into possession by action. By the English law of executors and administrators, which generally prevails in Ceylon, the right to bring such actions is vested in the executor or administrator alone. See *Williams on Executors.*[2] It is true that the right to sue on

[1] *(1907) 10 N. L. R. 234.*

[2] *10th ed., Vol. 1, p. 604 et seq.*

covenants real in many cases descends to the heirs of the convenantee to the exclusion of the executor. *Ibid., p. 619.* But in Ceylon there is no distinction between real and personal property, and with us the power of an executor or administrator extends to both species of property. Moreover, the agreement with which the present case is concerned is in no sense a covenant real. The Civil Procedure Code, so far as it contains provisions relevant to this matter, appears to me to be on a line with the English law. Section 547 declares that "no action shall be maintainable for the recovery of any property, movable or immovable, in Ceylon, belonging to or included in the estate or effects of any person dying testate or intestate in or out of Ceylon ....., unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executor or administrator of such testator or intestate." I cannot agree to the construction sought to be placed on this provision, viz., that, provided grant of probate or letters has been issued to some one, the heirs may sue to recover property which was never reduced to possession by the executor or administrator. It seems to me that in such cases no one but the executor or administrator can maintain an action. The inconvenience of any other course is obvious. The executor or administrator admittedly may sue, and it can never be intended that the heirs may also sue at the same time on the same cause of action. Moreover, the third party is entitled to discharge his obligation by payment before action, and should not be put to the necessity of finding out who the heirs are, or of paying over again to the executor or administrator if he has paid to the wrong persons as heirs. Again, the executor or administrator may require the money realized for purposes of administration, and the payment to the heirs instead of himself may effectually defeat those purposes, and may, in addition, expose him to personal liability to the creditors of the estate. The very object of appointing a legal representative is that there may be one recognized person who is entrusted with the duty as well as the power of collecting assets, paying debts, and necessary expenses, and distributing the estate in the course of the administration. He is liable to account for assets and disbursements, and is responsible to the Court as well as to the parties interested for his proceedings. The realization of assets by the heirs for distribution among themselves according to their own will and pleasure and without any responsibility is not only highly inconvenient, but is, in my opinion, disallowed by law. I think, therefore, that the objection to the maintenance of this action by the plaintiff, who does not represent the estate of Andris Fernando, is sound.

As regards the other objection, founded on the alleged deficiency of probate duty, I think the issue suggested should have been accepted, and the facts relating thereto should have been ascertained. Although the District Judge refused to state an issue, he has in fact

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decided it in favour of the plaintiff, because it appears that the inventory includes an item of Rs. 17,500 as due by the defendant. This sum is said to be the claim against the defendant on the agreement in question. This may be so, but the amount of money sought to be recovered in the present action is much higher, even apart from the value of the lands, the possession of which is also claimed. It seems to me that there should have been some inquiry upon a properly framed issue as to whether the probate granted to Mary Fernando was duly stamped.

In the circumstances of the case, however, neither of these objections should result in an entire dismissal of the action. This Court has frequently given an opportunity to a plaintiff to obtain probate or letters of administration, and regularize his position when the action has been brought without the fulfilment of that preliminary condition, and I think that course may be adopted in this case. At the same time, the plaintiff may be allowed to supply the additional stamps for the probate, if it be found that the probate is now insufficiently stamped. I would set aside the orders appealed from and send the case back, with the direction that the trial of the case should be suspended until the plaintiff obtains administration *de bonis non* to the estate of Andris Fernando within such time as the District Judge may think fit to allow, and that an issue as to the due stamping of the probate issued to Mary Fernando should also be accepted and tried, and if it be decided in the negative, the plaintiff should be given a similar opportunity to have the omission rectified. I would allow the defendant the costs of appeal and of the argument in the Court below.

Appeal allowed.