

1944

Present: Howard C.J. and de Kretser J.

ALBERT PERERA, Appellant, and MARIMUTTU CANNIAH,
Respondent

265—D. C. Badulla, 7,378.

Administration—Right of creditor to follow property sold by heir—Other assets available—Roman-Dutch law.

The creditor of an estate may follow property sold by an heir even when there are other assets in the estate.

Where the proceeds of property sold by an heir are not applied towards the payment of debts a creditor may follow the property in the hands of the purchaser.

A PPEAL from a judgment of the District Judge of Badulla.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the plaintiff, appellant.—A creditor can, even when there are other assets, follow any particular property belonging to the estate of his deceased debtor when it has been transferred by an heir and the proceeds of the sale had not been utilized for the purposes of administration. He can seize any property he likes. The case of *Tillekeratne v. Wijewardene*¹ is directly in point. The dictum in *Suriyagoda v. William Appuhamy*² expressing a conflicting view is merely *obiter*. In *Muttiah Chetty v. Ukkurala Korala*³ the validity of sale of property by the heirs of a deceased person is fully discussed. In the present case the purchase price of the property in question was not expended for purposes of administration.

N. E. Weerasooria, K.C. (with him *C. Renganathan, S. R. Wijayatilake*) for the defendants, respondents.—On the question of fact there is evidence that there are other properties, in the hands of the executor, belonging to the estate of the deceased. According to *Pasupathy Chettiar v. Cantar Pandary*⁴, when a *bona fide* alienation has been made by an heir, a legal representative who seeks to reach that property for payment of debts has to make a *prima facie* case showing that it is necessary to resort to that particular piece of property. There is no difference in principle between the position of a legal representative and that of a creditor. See *Muttiah Chetty v. Ukkurala Korala* (*supra*). *Pasupathy Chettiar v. Cantar Pandary* (*supra*) which was a Full Bench decision, was not considered in *Tilakaratne v. Wijewardene* (*supra*). The legal position is correctly stated in *Suriyagoda v. William Appuhamy* (*supra*), and the appellant in the present case cannot succeed as long as there are other assets available for seizure.

Sections 96, 65 and 66 of the Trusts Ordinance (Cap. 72) are applicable to the facts of this case. We are *bona fide* purchasers for consideration from a transferee of the executor.

H. V. Perera, K.C., in reply—*Pasupathy Chettiar v. Cantar Pandary* (*supra*) would be applicable only where an *executor* seeks to single out a

¹ (1937) 2 C. L. J. R. 89.

² (1941) 43 N. L. R. 89.

³ (1925) 27 N. L. R. 336.

⁴ (1889) 8 S. C. C. 205.

particular devisee. But a creditor, unlike an executor, owes no duties of a fiduciary nature to the devisees. A creditor's position is different from that of an executor.

Section 98, and not section 96, of the Trusts Ordinance is applicable. According to that section the burden was on the defendants to prove affirmatively that they were *bona fide* purchasers for consideration.

Cur. adv. vult.

May 29, 1944. DE KRETZER J.—

This case may be looked at from two points of view, viz., the law and the facts, but as it has been argued mainly on a point of law it is useful to deal with that first, and to deal with it without reference to the facts. The question is whether the creditor of an estate may follow property sold by an heir even when assets remain in the estate. We were not referred to the English law and no doubt for the very good reason that it differs from our law in some respects.

In dealing with the question it is useful to get our ideas clear on certain points and the most important is whether the position of an executor and a creditor are on the same footing in all respects, as it has been urged they are on the strength of some cases where their positions were so similar as to be conterminous regarding rights. What is the position of an executor? What are his duties and rights under our law? He must—

- (a) as regards the Crown, pay duty;
- (b) as regards the Court, administer faithfully and collect the debts due to and pay the debts owing by the deceased and render an accounting;
- (c) as regards the heirs or legatees, conserve their interests to the best of his ability;
- (d) as regards creditors, pay them or see them paid.

A creditor has none of these duties. He has a right to be paid. In the deceased's lifetime he could levy against any of his properties and there is no reason why his rights should diminish because of the deceased's death. In other words his position is totally different from that of an executor.

It has been laid down in a number of cases, and the position is not contested, that he may follow property alienated by an heir, who takes only a defeasible title. In those cases the question raised in this case was not raised and it is possible that in them no assets remained in the estate. On the specific question before us there is a direct authority—*Tillekeratne v. Wijewardene*¹ and a statement *obiter* by Soertsz J. in *Suriyagoda v. William Appuhamy*² to which in particular our attention was directed. Soertsz J. said "It is well settled law that transfers by the heirs of an estate are subject to the debts of that estate if, without recourse to the lands transferred, the debts cannot be satisfied". He relied on *Fernando v. Perera*³, *Ekanayaka v. Appu*⁴, *Silva v. Silva*⁵, *Gopalasamy v. Ramasamy Pulle*⁶ and *Muttiah Chetty v. Ukkurala*⁷ as authority.

¹ 2 C. L. J. 89.

² 43 N. L. R. 89.

³ 8 S. C. C. 54.

⁴ 3 N. L. R. 350.

⁵ 10 N. L. R. 234.

⁶ 14 N. L. R. 238.

⁷ 27 N. L. R. 336.

This statement of the law, so far as it goes, is correct. But I venture to doubt—

- (a) whether it is a correct summary of the decision; and
- (b) whether it necessarily follows that if there are assets in the estate then the creditor cannot follow the lands transferred by the heirs.

The cases referred to did not say so and the mere fact that when there are no assets the lands transferred may be followed does not compel one to say that when there are assets they may not be followed. Earlier in his judgment Soertsz J. had said "The learned Judge stated the law in regard to the matter too widely when he declared that even when there are lands undisposed of the entire estate is subject to the debts of the deceased and the creditor is entitled to proceed against any of them. But Counsel attacked the finding on other grounds as well." Soertsz J. decided the case on other grounds. His attention does not seem to have been drawn to the case of *Tillekeratne v. Wijewardene*¹ where Hearne J. (with whom Fernando A.J. agreed) had this specific question before him and answered it in the creditor's favour. He said there was no authority to the contrary, and Mr. H. V. Perera who appeared for the appellant is not likely to have failed to quote all authorities and use all arguments possible. So far as the proposition with which we are concerned goes a direct authority exists, which we ought to follow unless we can see good reason to the contrary. I can see none. Suppose there are three heirs or three legatees and one of them only sold his rights, so leaving the other rights still as assets of the estate, is it open to the heir who sold and the transferee to compel the creditor to go against the rights of the other two? It seems manifestly unfair and one cannot see on what principle of law such a compulsion would be based.

Where the administrator seeks to follow property alienated by an heir and he does have assets left, the Court would naturally not disturb the heir's alienation unless it were really necessary. But that is where an administrator is concerned and as I have tried to show his rights and duties are different from those of a creditor. An administrator is faced with the position that he can only sell if it is necessary for purposes of administration. A creditor has no such limitation. We have cases of an administrator being restrained in *Ahamat v. Cassim*², *Wijeratna v. Don Davit Abeyweera*³, *Ferdinandis v. Fernando*⁴, *Fernando v. Perera*⁵, *Silva v. Silva*⁶ and *Pasupathy Chettiar v. Cantar Pandary*⁷.

The cases which I have examined seem to lead to the following propositions:—

- (1) An heir has title and may pass title but it is a defeasible title;
- (2) An administrator may follow property alienated by an heir but he should show that it is necessary to do so;
- (3) A purchaser may show that the money he paid went in payment of the debts of the deceased. In other words, that the heirs did part of the work of administration and sold in the course of such administration;

¹ (1937) 2 C. L. J. 89.

² 1 S. C. C. 36.

³ 5 S. C. C. 70.

⁴ 5 S. C. C. 162.

⁵ 8 S. C. C. 54.

⁶ 10 N. L. R. 234.

⁷ 8 S. C. C. 205.

- (4) The burden is on the purchaser to see that the money is properly applied;
- (5) Where it is properly applied a creditor cannot follow the property—not apparently on a specified ground in Equity but on the ground that the heirs have done part of the administrator's work.
- (6) Where it is not properly applied a creditor's rights are not limited.

Applying these principles to the undisputed facts of the present case it is proved and admitted that plaintiff's debt is unsatisfied; also that the purchase money did not go in payment of this debt and the evidence is that no other debt ever existed. The plaintiff's action succeeds and the decree is set aside, the appeal being allowed with costs in this Court and the Court of trial.

HOWARD C.J.—I agree.

Appeal allowed.

