

1903.
March 9.

SĀMARANAYAKA v. SIDEMBREM CHETTY.

D. C., Chilaw, 2,228.

Civil Procedure Code, s. 247—Mortgage bond by executrix—Judgment against her—Seizure of lands in her possession—Claim to such lands by devisees under the will of deceased testator—Dismissal of such claim—Action against writ-holder for release of lands—What to prove in the case—Nature of possession of executrix.

A, as executrix of her husband's estate, granted a mortgage bond to B, who obtained judgment thereon and seized certain lands in her possession. C claimed them as devisee under the will of A's husband. His claim being rejected, he sued B, without joining A, for a declaration that the mortgage bond granted by A was not made for the purpose of paying the debts of the testator, and that the lands claimed were therefore not liable for seizure or sale under B's judgment.

Held that, in an action raised under section 247 of the Civil Procedure Code, the plaintiff must prove that he was in possession of the property at the time of seizure, or that it was in possession of the execution-debtor at such time in trust for the plaintiff; that the possession of the executrix was not as a trustee for the plaintiff, but only for the purpose of administering the testator's estate; and that therefore the plaintiff's action for an order on the Fiscal to release the seizure was not maintainable.

Held also, that the plaintiff was not at liberty in this action to prove behind the back of the executrix that she mortgaged the estate for her own benefit, and not for the purpose of paying the debts of the testator.

ACTION raised under section 247 of the Civil Procedure Code. The facts of the case are fully set out in the judgment of the Chief Justice.

Bawa (with *Prins*), for appellant.

Dornhorst, K.C., for respondent.

9th March, 1903. LAYARD, C.J.—

The admitted facts of this case are as follows:—

An action was instituted by the first defendants against Dona Marihamy, as widow and executrix of the last will of the late Don Elaris, notary, upon a mortgage dated 27th August, 1895, executed by her as executrix of the estate of her testator, and in execution of a decree obtained in that case certain lands in her possession as such executrix were seized, upon which plaintiffs and second defendant claimed them. The claim was inquired into in a claim case and an order was made dismissing the claim with costs.

The plaintiffs then brought this action under section 247 of the Civil Procedure Code, in which they seek that it should be declared that the mortgage granted by the executrix was not made for the purpose of paying the debts of the testator, and the properties

claimed are consequently not liable for sale under the judgment obtained by the first defendant; and they further pray for a declaration that they are entitled to have the property released from seizure and for an order on the Fiscal to release the same accordingly.

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It is admitted by appellant's counsel that the executrix, who is no party to this action, is in the actual possession of her testator's property, and that she has power to mortgage such property to pay the debts of the testator.

In an action under section 247 the plaintiffs must prove that they were in possession of the property at the time of seizure, or that it was in possession of the execution-debtor at such time in trust for the plaintiffs, and that therefore the Court ought not to have refused to release the property.

Now, admittedly in this case the property was in the possession of the execution-debtor. It is not suggested that the executrix had assented to the devise and that the devisees are in possession of the lands devised to them. The executrix is in possession not as a trustee for the plaintiffs: she is there in her capacity of executrix and for the purposes of administration. She has the power of selling or mortgaging the property of her testator, not merely for the payment of the debts of the testator; she may have incurred expenses of administration, and she may have had to raise money by mortgage of the testator's property, and these are matters for which it is essential that she should retain the power of dealing with the assets of her testator.

The appellant's counsel, however, argues that he is at liberty in this action under section 247 to establish behind the back of the executrix that she mortgaged the estate, not for the purpose of paying the debts of the testator, but for her own benefit. It would be unjust, both on the first defendant and on the executrix that the nature of the transaction between them should be gone into behind the back of the executrix. Say it was held in this case that the executrix had wrongfully executed this mortgage and the estate was not liable. This judgment would not be binding on her, and when the first defendant sued her personally she might be able to establish that the debt was either a debt of the testator or was incurred in the expenses of administration of his estate. The result would be, the first defendant would lose his money altogether.

The plaintiff's action is unsustainable under section 247, because the executrix is in possession and her possession is not merely on account of or in trust for the plaintiffs; she is in possession for the purpose of administering of the testator's estate.

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The appellant's counsel suggests that, if the District Judge's judgment is affirmed, the order refusing to release the seizure will be conclusive as to the appellants' rights to the land claimed. It appears to me that it is only conclusive as to their rights of possession at the time of seizure. However that may be, respondent's counsel has expressly requested that in affirming the judgment of the Court below we should reserve to appellants liberty to establish in another action their rights to the lands the subject of this suit. The judgment of the District Judge is affirmed, reserving to the appellants the right to bring a fresh action, if so advised, to establish their title to the land the subject of this suit.

MONCREIFF, J.—I am of the same opinion.