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Present : Schneider J.

CASSIM *v.* BABUNHAMY.

347—C. R. Matara, 12,698.

Mortgage action—Property mortgaged below Rs. 1,000—Representative appointed under section 642 of the Civil Procedure Code—May property other than mortgaged property be sold ?

Query, whether in execution of a decree entered against a representative appointed under the proviso to section 642 of the Civil Procedure Code other lands belonging to the estate of a deceased mortgagor than the land mortgaged could be sold so as to pass good title.

SCHNEIDER J.—I am bound by *Mohamadu Lebbe v. Umma Natchia*[1] and *Soysa v. Jayawardene*[2] . . . . I venture to say that I am unable to agree with them.

PLAINTIFF sued defendant to vindicate title to defendant's residing land in the following circumstances :—

Defendant's father, Mathes, had mortgaged certain property with a man of Weligama, the administratrix of whose estate sued the defendant on the bond as legal representative of his father whose sole heir he was. Decree was entered against defendant without qualification. The mortgaged property was sold, and thereafter writ was issued against defendant, who had been noticed to show cause against the reissue of the writ and had failed to show cause. The residing land was sold without protest, and plaintiff, a perfect outsider, purchased it, and was formally placed in possession. The question for the decision of the Court was whether plaintiff was entitled to the land in these circumstances. The learned Commissioner of Requests dismissed plaintiff's action.

Cooray, for the plaintiff, appellant.

E. C. de Soysa, for the defendant, respondent.

February 28, 1924. SCHNEIDER J.—

This appeal was presented to me as involving one question, namely, whether in execution of a decree entered against a representative appointed under the proviso to section 642 of the Civil Procedure Code other lands belonging to the estate of a deceased mortgagor than the land mortgaged could be sold so as to pass good title. The plaintiff-appellant's contention was that the answer to this question should be in the affirmative. The learned Commissioner of Requests held against him, and he has appealed. I was referred to four cases, namely, (1) *Mohamadu Lebbe v. Umma Natchia* (*supra*)

[1] (*1896*) *1 N. L. R. 346.* [2] (*1914*) *17 N. L. R. 218.*

(2) *Soysa v. Jayawardene* (*supra*), (3) *Thambaiyar v. Aiyar*,[1] and (4) *Peiris v. Eparanjina*.[2]

The last two of these cases are of no assistance, and may be disposed of with a word. In *Peiris v. Eparanjina* (*supra*) I agreed with the judgment of my brother De Sampayo. The substantive ground upon which it was decided was that the appointment of the representative under section 642 was irregularly made, and was therefore ineffectual. The rest of the observations made by my brother are mere *obiter dicta*. The case of *Thambaiyar v. Aiyar* (*supra*) was cited to show that Shaw J. had expressed doubt in the soundness of the two earlier decisions cited to me. The question now under consideration did not arise in that case. His observation too was, therefore, in the nature of an *obiter dictum*.

One fact in the present case differentiates it from both of the two other cases cited. In this case the property, other than the mortgaged property, which was seized and sold, belonged to the estate of the deceased mortgagor, and even at the date of the sale was in possession of his sole heir, whereas in *Mohamadu Lebbe v. Umma Natchia* (*supra*) the property not mortgaged was claimed adversely to the estate of the deceased mortgagor by the representative, and in *Soysa v. Jayawardene* (*supra*) the property other than the mortgaged property, had been alienated by the heirs before the date when execution was levied. But it is obvious, nevertheless, that both those cases were decided upon the principle that execution upon such a decree cannot be levied upon any property other than the property mortgaged.

Both are judgments of a Court constituted of two Judges. I am therefore bound by them, and must follow them. As the amount involved is small, and as there were no contrary decisions to justify the plaintiff in taking any risks, it seems to me that it is no hardship to him that I should decide his appeal according to the law laid down in those cases instead of referring the question involved for a decision by a Bench of Judges which could overrule those cases, although my view of the law is opposed to the law laid down in those cases. I venture to say that I find I am unable to agree with those cases.

The judgment in *Mohamadu Lebbe v. Umma Natchia* (*supra*), if I may say so with all respect to the learned Judges who decided it, is not convincing. Neither of the Judges, who decided it, discuss the provisions of section 642. Lawrie J. thought as the representative did not represent the whole estate of the deceased, lands other than those mortgaged could not be touched—that to render such lands liable the " general legal representative " should be a party to the action.

In *Soysa v. Jayawardene* (*supra*) the reasoning appears to be that the effect of the words " for all the purposes of the action " in

[1] (*1917*) *19 N. L. R. 389.* [2] (*1922*) *23 N. L. R. 485.*

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the proviso to section 642 was to limit execution to the property mortgaged as the action contemplated was "the pure and simple hypothecary action." With all my respect for the learning of those Judges, I cannot think that their interpretation of those words is correct. It seems to me that they might have decided otherwise had they considered the history of the legislation on the point and the latter part of the proviso itself. They make no special reference to it.

At the date of the passing of our Civil Procedure Code of 1889, two actions were competent to a mortgagee. One *in rem* to realize the property mortgaged, which must necessarily be brought against the person who was in actual possession of the property at the time. The other *in personam* against the mortgagor upon the principal obligation of debt. It was lawful for him to combine the two actions or to pursue his remedies separately. The provisions of the Civil Procedure Code disclose that it was a distinct policy of the Code to prevent a multiplicity of actions. The provisions of sections 33, 34, and 35, for instance, show this. Section 35 (*c*) expressly permits a mortgagee to unite in one action claims to enforce "any of his remedies under the mortgage." When the Code comes to make provisions regarding mortgage actions in chapter XLVI., it expressly directs that the mortgagor must be made a party to every mortgage action, whether he is or he is not in possession of the mortgaged property (section 640). This introduced an alteration of the previous law. That alteration created the necessity of providing for the possibility of the mortgagor being dead at the date of the institution of the action. In an earlier chapter it was made compulsory that the estates of deceased persons amounting to or exceeding Rs. 1,000 in value should be administered. If the property mortgaged was not below Rs. 1,000 in value, it follows that the estate to which it belonged was one which it was compulsory should be administered; the Code, therefore, directed that where the property mortgaged was of that value, the executor or administrator of the deceased mortgagor was to be sued, and threw the burden on the mortgagee to take the necessary steps for that purpose, if there was no such representative in existence.

There then remained the cases where the property mortgaged was below Rs. 1,000 in value. The property mortgaged might be the only property belonging to the estate, in which case the estate being below Rs. 1,000 in value, the law did not compel its administration. Or there might be other property belonging to the deceased, which might make the value of the estate Rs. 1,000 or more. In either case it would be inequitable to drive a mortgagee to the expense of taking out administration to the whole estate, because his interest was confined to the recovering of his debt. The Code, therefore, provided a special procedure in the case of such mortgages. The mortgagee was to obtain the appointment by the Court of a person

" to represent the estate of the deceased mortgagor for all the purposes of the action." Section 642 then proceeds to say what the effect of such an appointment is " The order so made and any 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."

It seems to me that it is not correct to say that the action contemplated in chapter XLVI. is a pure hypothecary action. If by those words it is meant to describe the action mentioned in section 642 as the mortgagee's action *in rem*, the description will be opposed to the plain meaning of the words of the action which disclose that the action should in every case be the combination of the action *in personam* and *in rem*, because it requires the mortgagor to be made a party although he is not in possession. But if, on the other hand, by those words were meant that the action was confined to the object of realizing the mortgaged property after the death of the mortgagor, what necessity is there to make his representative a party to the action if the property is in the possession of third parties. The pure action *in rem* was only resorted to where after the mortgagor had been sued and decree obtained, it was discovered that the property mortgaged was in the possession of persons not parties to the action.

In every mortgage action the prayer is for a decree for the sum due, for a declaration that the property is bound and executable, and for an order that if the whole of the amount decreed be not satisfied by the sale of the mortgaged property, that the balance be recovered by execution on other property. This form of prayer is given in the appendix to the Code under the form of the plaint in a mortgage action. That being so, it seems to me reasonable to suppose that the words " for all purposes of the action," if not expressly intended, are yet wide enough to cover those cases where execution has also to be levied upon property other than the property specially mortgaged. They are words of limitation, but they must be interpreted by the light of the intention, as a whole, of the legislation on the subject, and the last clause of the proviso itself. The order of appointment of the representative is to bind not the property mortgaged but the estate of the deceased mortgagor, not in any limited manner but " in the same manner in all respects as if a duly constituted administrator had been a party to the action." I cannot conceive of words which can more plainly or effectively indicate that the decree will bind the estate of the deceased mortgagor not only as regards the mortgaged property, but other property as well. If the mortgagor had been sued, not only the property mortgaged, but his other property also would be liable to execution, why then should the mortgagee's right be less extensive or in any manner curtailed when he sues his duly constituted representative " for all purposes of the action "—a representative

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who represents him in the action in all respects as "a duly appointed administrator of his estate." I can see no inconvenience which can result from the special representative being so regarded, when the language of the section plainly permits it; but, on the other hand, it does not seem an unreasonable thing to expose a mortgagee to the risk, which will exist in almost every case, of not being able to recover the whole of the sum for which he obtains a decree, because the mortgaged property did not realize sufficient, while the heirs of the deceased succeed to his property free of a liability under which that property was during the deceased's life-time. It is therefore with some reluctance that I dismiss the appeal, with costs.

Appeal dismissed.