

Present : De Sampayo and Schneider JJ.

1922.

PEIRIS v. EPERANJINA et al.

318—D. C. Negombo, 14,599.

Mortgage—Action against special representative appointed under section 642, Civil Procedure Code—Sale of other than mortgaged property under decree invalid.

Under a decree against a special representative appointed under section 642 of the Civil Procedure Code only the mortgaged property could be sold, and the sale of other than mortgaged property is invalid as against the heirs of the deceased mortgagor.

THE facts appear from the judgment.

Croos-Dabrera, for appellant.

Zoysa, for respondent.

February 21, 1922. DE SAMPAYO J.—

The point submitted for consideration is whether under a decree against a special representative appointed under section 642 of the Civil Procedure Code the property of the deceased mortgagor other than the mortgaged property can be validly sold and good title passed to the purchaser. There are two cases which, I think, are authorities. The first of them is *Mohamadu Lebbe v. Umma Natchia*,¹ in which Lawrie J. expressed the opinion that under a decree passed in an action by a mortgagor against a special representative of a deceased mortgagee no other land could be seized in execution than those named in the decree as executable. That case was followed in *Soyza v. Jayawardene*,² in which the question was discussed in all its bearings, and the Court came to the conclusion that the sale of other than mortgaged property was invalid as against the heirs of the deceased mortgagor. Mr. Dabrera, however, pointed out that in a still later judgment the correctness of those decisions was doubted by at least one Judge (*Thambaiyar v. Paramasamy Aiyar*³). That was a Full Bench case, but the point for decision was not the same as in this case, but incidentally Shaw J. referred to the point now under consideration. But the learned Judge in the very same passage expressly abstained from deciding that question one way or the other. As things stand we are bound to follow the two older decisions, and to hold that the appointment of a special representative under section 642 is to enable the mortgagee to seize and sell the mortgaged property and no more. The facts of this case appear to make the plaintiff's action still less sustainable.

¹ (1895) 1 N. L. R. 246.

² (1915) 17 N. L. R. 218.

³ (1917) 19 N. L. R. 389.

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The plaintiff being the mortgagee of certain lands of one Peduru Fernando would appear to have brought an action on the mortgage against Peduru Fernando and realized the mortgaged property, but there being still a deficiency, it would seem the plaintiff had a representative appointed under section 642 for Peduru Fernando, who had, apparently, in the meantime died. Under writ issued against that representative the property now in question, which had not formed part of the mortgaged property, was sold and bought by the plaintiff. The heirs of the deceased mortgagor having disputed the plaintiff's title, the present action was brought. The burden of proof of title was on the plaintiff, and it must be held that he failed to discharge it.

I think the action was properly dismissed, and the judgment of the District Judge should, therefore, be affirmed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

