

GL 1 600  
21, 1961

IN THE PRIVY COUNCIL

No. 3 of 1960

UNIVERSITY OF Ceylon

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

BETWEEN

INSTITUTE OF LAW  
LEGAL SERVICES

1. AHMED REFAI BIN ADHEM SALIH of "Salonica",  
Galle Road, Colpetty

63689

2. ZUBAIRE SALIH BIN ADHEM SALIH of "Salonica",  
Galle Road, Colpetty

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3. ADHEM BIN MOHAMED SALIH of "Salonica",  
Galle Road, Colpetty

2nd, 3rd and 4th Defendants-Appellants

- and -

VALLIYAMMAI ATCHI of No. 247, Sea Street, Colombo  
Plaintiff-Respondent

THE SECRETARY OF THE DISTRICT COURT OF COLOMBO,  
Administrator de Bonis Non of the Estate and  
Effects of Hadjie Ibrahim Bin Ahamed, deceased  
1st Defendant-Respondent

C A S E F O R 2 N D , 3 R D A N D 4 T H D E F E N D A N T S - A P P E L L A N T S

RECORD

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1. This is an appeal by the 2nd, 3rd and 4th  
Defendants-Appellants from the Judgment and Decree pp.54-61  
of the Supreme Court dated the 4th December, 1957  
whereby the Supreme Court allowed with costs the  
appeal of the Plaintiff-Respondent and set aside the  
judgment and decree of the District Court of  
Colombo dated the 5th July, 1954 which had dis- p.43 l.35-  
missed with costs the Plaintiff-Respondent's p.51 l.28  
action.

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2. The action from which this appeal arises p.7 l.15-  
was instituted in the District Court of Colombo on p.10 l.10  
22nd May, 1953 by the Plaintiff-Respondent, as the  
executrix of the last Will and estate of K.M.N.S.P.  
Natchiappa Chettiyar, deceased, against 1st  
Defendant-Respondent, the Secretary of the District  
Court of Colombo as the Administrator de Bonis Non  
of the Estate of one Hadjie Ibrahim Bin Ahamed,  
deceased, and against the 2nd and 3rd Defendants-  
Appellants who, being minors were represented in  
the action by their guardian-ad-litem, the 4th  
Defendant-Appellant. The action was one instituted

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RECORD

under section 247 of the Civil Procedure Code (Chap. 86 Vol. 2 Legislative Enactments 1938 Revision) for a declaration that the land and premises described in the schedule to the plaint is liable to be sold in execution of a decree of the District Court of Colombo dated the 7th December, 1951 obtained by the Plaintiff-Respondent in Case No. 2565/M.B.

3. The circumstances leading to the institution of the said 247 action may be briefly summarised:-

- p.69 1.1 -  
p.86 1.2
- (a) One Hadjie Bin Ahamed died on the 9th May, 1931 leaving a Last Will and Testament No. 3117 dated the 8th April, 1919 (Exhibit P1A) under which the subject-matter of the action was specially devised to his son Ahmed Bin Ibrahim, the executor named in the Will. 10
- p.199 1.1 -  
p.200 1.5
- (b) The said Last Will and Testament was admitted to Probate in Testamentary Case No. 5686 of the District Court of Colombo and in the course of administering the Testator's Estate, Ahmed Bin Ibrahim, as executor, with the sanction of the District Court, hypothecated four properties (the subject matter of the action not being one) by Mortgage Bond No. 2402 dated the 21st May, 1935 (Exhibit P4) executed in favour of one Natchiappa Chettiyar as security for a loan of Rs. 30,000/- taken in the capacity of executor. 20
- p.204 1.31 -  
p.205 1.18
- p.86 1.6 -  
p.89 1.15
- (c) On the 13th December, 1938, by which time the testamentary proceedings had almost come to an end, Ahmed Bin Ibrahim as executor conveyed to himself the subject matter of the present action and on the next day gifted it to his son who in 1941 gifted it to his sister Zabiiediya on the occasion of her marriage. Zabiiediya, in 1953, conveyed it to her two children, the 2nd and 3rd Defendants-Appellants. 30
- p.89 1.15 -  
p.92 1.8
- p.92 1.10 -  
p.94 1.15
- p.130 1.30 -  
p.133 1.40
- p.249  
11.11-18
- (d) Ahmed Bin Ibrahim, by paying the mortgagee Rs. 5000/- obtained on some date prior to his death the release from mortgage of two out of the four properties hypothecated by Bond No. 2402.
- p.206  
11.32-34
- (e) Ahmed Bin Ibrahim, the executor, died on the 5th November, 1940 without having fully administered the Estate and, on the 27th November, 1943, the Attorney of the Plaintiff-Respondent (Natchiappa the creditor, having died on the 30th December, 1938) moved the District Court for the appointment of an administrator de bonis non and, upon this and other applications made at the instance of the Plaintiff-Respondent, different persons 40
- p,207  
11.10-14
- p.206 1.15-  
p.208 1.10

RECORD

appointed from time to time to the post of Secretary of the District Court of Colombo purported to act as administrators de bonis non of the Estate of Hadjie Ibrahim Bin Ahmed. pp.210-221  
pp.230-239

- 10 (f) On the 21st November, 1949 the Plaintiff-Respondent as executrix of the Estate of Natchiappa Chettiyar, filed mortgage action 2565/M.B. in the District Court of Colombo on the said Mortgage Bond No. 2404 against the Secretary of the District Court, nominee officii, as administrator de bonis non of the Estate of Hadjie Ibrahim Bin Ahmed. One Palliyaguru the then Secretary of the District Court, who had been substituted in the place of his predecessor in office but to whom no letters of administration had been issued and in respect of whose appointment no order nisi as contemplated by the Civil Procedure Code had been made, filed Proxy as the Defendant in the action. p.252 1.7 -  
p.253 1.20
- 20 (g) Two persons, to whom two of the hypothecated properties had been devised by the Last Will of Hadjie Ibrahim Bin Ahmed, intervened in the mortgage action and on the 24th October, 1951, by an agreement recorded in Court as between the Plaintiff-Respondent and the said two persons, the Plaintiff-Respondent agreed that no hypothecary decree would be entered in respect of the two properties and that in no event would the two properties be taken in execution of the decree. As the two other properties hypothecated by the Mortgage Bond No. 2402 had already been released during the life-time of the executor Ahmed Bin Ibrahim, the decree entered in the Mortgage Action on the 7th December, 1951 (Exhibit P.14) was a money decree for the amount due on the Bond, p.253 1.21 -  
p.254 1.23  
p.258 1.18 -  
p.259 1.5
- 30 (h) On a writ issued for the execution of the decree of the 7th December, 1951, the subject-matter of the action in which this appeal arises was seized and the 2nd and 3rd Defendant-Appellants with the 4th Defendant-Appellant as their next friend preferred a claim to the property and applied to the District Court to have the property released from seizure under section 341 of the Civil Procedure Code. The claim was upheld and the property released from seizure by the order of the District Court dated the 18th p.261 1.21 -  
p.262 1.42  
p.263  
p.246 11.1-18
- 40

RECORD

p.247  
11.16-19 May, 1953. Thereupon, the Plaintiff-Respondent filed the action from which this appeal arises.

p.18 l.28-  
p.21 -1.30 4. In their answer filed on the 25th September, 1953, the Defendant-Appellants prayed for the dismissal of the action upon the following grounds:-

(a) that the property in respect of which the action was brought belonged to the 2nd and 3rd Defendants-Appellants;

(b) that the estate of the deceased Hadjie Ibrahim Bin Ahamed, against which the said decree had been obtained by the Plaintiff-Respondent was not validly represented in the action No. 2565/MB in which the decree was entered;

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(c) that although the Plaintiff-Respondent instituted the above action as a hypothecary action, the above action ceased to be such upon the withdrawal or waiver by the Plaintiff of hypothecary reliefs and that in the circumstances and/or otherwise the entering of a decree absolute in the first instance ex parte was irregular and void in law;

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(d) that the said decree was entered irregularly and without a valid and proper ex parte hearing, and was therefore entered without jurisdiction;

(e) that the decree was entered per incuriam on a prescribed bond or debt;

(f) that the Plaintiff-Respondent was not entitled in any event to have the said property sold in execution of the said decree without excusing the properties specifically mortgaged;

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(g) that the Plaintiff-Respondent's claim, if any, was prescribed;

(h) that the decree sought to be executed was obtained by fraud and collusion.

p.24 l.8 -  
p.25 l.25 5. The Parties went to trial on 19 issues covering the grounds taken in the answer and the District Judge, by his judgment and order dated the 5th July, 1954, dismissed the Plaintiff-Respondent's action with costs, holding in favour of the Defendant-Appellants on the ground that it was not open to the mortgagee to release the mortgaged property and

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thereafter discuss property which the Testator had specifically devised and without recourse to which the mortgage debt could be satisfied, and holding against them on the other defences set up in the answer.

6. The Plaintiff-Respondent appealed and the Supreme Court (Basnayake C.J. and Pulle J.) by its judgment and decree dated the 4th December, 1957 allowed the appeal with costs.

pp.54-61

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7. In his judgment Pulle J. (with whom Basnayake C.J. agreed) dealt with the ground on which the learned District Judge had held in favour of the Defendant-Appellants and also with a new point urged before the Supreme Court, namely, that the Mortgage Bond No. 2402 gave the mortgagee the right to proceed against the lands mortgaged thereby and in the alternative to proceed personally against the executor but not against the Estate of the Testator. Pulle J. following the case of Albert

pp.54-60

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Perera v. Marimuttu Caniah (45 New Law Reports 337) held that the subject matter of the action was liable to be seized and sold in execution of the mortgage decree P14 and in doing so declined to follow the case of Theodoris Fernando v. W.L. Rosalind Fernando

p.57 11.4-20

(1901 2 Browne's Reports 277) and the opinion expressed by Soertsz J. in Suriyagoda v. William Appuhamy

p.59 1.29-

p.60 1.6

p.59 11.25-

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(43 New Law Reports 89). Pulle J. also expressed the view that the case of Wijesekera v. Rawal (20 New Law Reports 126) had no application because there was no mortgage decree in the case under consideration. In the second matter dealt with by him Pulle J. took the view that the case of Farhall v. Farhall (1871 7 Ch. All. 123) did not apply because in the case under consideration there had been no misapplication of the moneys borrowed by the executor.

p.59 11.16-

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p.58 11.7-10

8. It is respectfully submitted -

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(a) that the learned District Judge was right in his view that the creditor could not abandon the security and then seek to seize unsecured property in execution of a money decree for the repayment of the debt.

(b) that the learned District Judge was wrong in holding that the decree P14 bound the estate of Hadjie Ibrahim Bin Ahmed and that the case of Samarasekera v. The Secretary District Court

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Matara (51 N.L.R. 90) which the learned District Judge followed was wrongly decided and should be reviewed. It is respectfully submitted that the English law of Corporations is applicable in Ceylon and that in accordance with that law the Secretary of the District Court cannot be regarded as a corporation.

- (c) that upon the Plaintiff-Respondent releasing the lands from hypothecation the action became an action for a simple money decree and that the Decree Absolute entered in the circumstances is void and bad in law and not a mere irregularity. 10
- (d) that Supreme Court was wrong in holding that the principles laid down in Wijesekera v. Rawal (20 New Law Reports 126) had no application. It is submitted that the principle of Roman Dutch law adopted by Sampayo J. in that case is applicable irrespective of the fact that a mortgagee voluntarily abandons the security specially hypothecated and obtains a simple money decree. 20
- (e) that the Supreme Court has erred in not differentiating between a debt incurred by a Testator on the one hand and a Mortgage Bond entered into by an executor on the other.
- (f) that the dictum of Soertsz J. is right; and that the learned District Judge was right in taking the view that the principle is a fortiori applicable to the facts of the present case. 30
- (g) that it would be inequitable to allow a creditor who has voluntarily abandoned the mortgage sanctioned by Court in administration proceedings to go against property specially devised thirteen years after the executor's conveyance to the devisee and ten years after the property had been conveyed as a gift in consideration of marriage and that the order of the District Court rejecting the creditor's claim can also be justified by the rules of equity recognised by the English Courts and applicable in Ceylon. 40

9. The Defendants-Appellants respectfully submit that this appeal should be allowed with costs throughout for the following among other

R E A S O N S

1. BECAUSE the decree P14 was obtained without the Estate of Hadjie Ibrahim Bin Ahmed being legally represented in the action.
2. BECAUSE the decree P14 is a nullity for the reason that essential procedure has not been followed.
3. BECAUSE the principle of the Roman Dutch Law adopted in Wijesekera v. Rawal (20 N.L.R.126) is right and is applicable to the facts of the present case.
4. BECAUSE the opinion of Soertsz J. in Suriyajoda v. William Appuhamy (43 N.L.R. 89) is right.
5. BECAUSE the learned District Judge was right in applying the principle in the said dictum of Soertsz J. to the facts of this case.
6. BECAUSE the order of the District Court is supported by the English rules of equity applicable in Ceylon.
7. BECAUSE the judgment of the Supreme Court appealed from is erroneous and should be reversed.

WALTER JAYAWARDENA

No. 3 of 1960

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

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B E T W E E N:

1. AHMED REFAI BIN ADHEM SALIH of  
"Salonica", Galle Road, Colpetty
2. ZUBAIRE SALIH BIN ADHEM SALIH of  
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3. ADHEM BIN MOHAMED SALIH of  
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2nd, 3rd and 4th Defendants-  
Appellants

- and -

VALLIYAMMAI ATCHI of No. 247, Sea  
Street, Colombo Plaintiff-  
Respondent

THE SECRETARY OF THE DISTRICT  
COURT OF COLOMBO, Administrator  
de Bonis Non of the Estate and  
Effects of Hadjie Ibrahim Bin  
Ahamed, deceased 1st Defendant-  
Respondent

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CASE FOR 2ND, 3RD and 4TH  
DEFENDANTS--APPELLANTS

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