Privy Council Appeal No. 3 of 1960

Ahmed Refai Bin Adham Salih and others - - - - *Appellants*

v.

Valliyammai Atchi and another - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY, 1961

Present at the Hearing:

LORD RADCLIFFE.
LORD DENNING.
LORD HODSON.
LORD GUEST.
MR. L. M. D. DE SILVA.

[*Delivered by* LORD RADCLIFFE]

This appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated 4th December, 1957, involves two points of law. One is a question of procedure relating to the status of a Secretary of a District Court when he is appointed Administrator *cum testamento annexo* under S. 520 of the Civil Procedure Code. The other is a question of substantive law as to the equitable defences available to persons claiming through a testamentary devisee when their land is sought to be taken in execution by an unsatisfied creditor of the estate. The circumstances in which these two questions arose must first be briefly related.

The testator whose will and estate are involved was one Hadjie Ibrahim Bin Ahamed who died on 9th May, 1931, having specifically devised the land which is the subject matter of the present action to his son Ahmed Bin Ibrahim. The latter was also appointed executor of the will and in due course took out probate in the District Court of Colombo.

At the date of the testator's death eight properties belonging to him were charged to a creditor as security for sums owing to him. In 1935 the executor obtained the Court's sanction to his selling four of these properties and borrowing on the security of the other four. With the monies so realised, the existing creditor was paid off and a new mortgage was created upon the four retained properties. This was a mortgage for the sum of Rs. 30,000 in favour of the lender, Km. N. Sp. Natchiappa Chettiar, whose executrix is the first respondent Valliyammai Atchi. The land now in dispute (hereinafter referred to as " the disputed land ") was not one of these four properties.

Ahmed Bin Ibrahim died on 5th November, 1940, without having fully administered his father's estate. Before his death he had, however, done two things that are material to this case. He obtained a release from the mortgage of two of the four properties in consideration of Rs. 5,000 which he paid to the mortgagee in reduction of the mortgage debt out of the assets of the estate; and on the 13th December, 1938, at a time when, as found by the District Judge in his Judgment in this action, the administration was nearly at an end and when he was making similar assents in favour of other specific devisees, he conveyed the disputed land to himself, executor to

devisee, and on the same day transferred it by way of gift to his son Mohamed Ghouse bin Ahmed. Prima facie therefore it had ceased to be assets of the estate by the year 1938.

On the 27th November, 1943, the first respondent, acting as executrix of the unpaid mortgage creditor, moved the District Court of Colombo for the appointment of the Secretary of the Court as administrator *de bonis non* of the testator and on the 26th May, 1944, an order was made appointing Mr. Culanthaivalu, the then Secretary, Official Administrator of the estate and declaring him entitled to Letters of Administration accordingly. These Letters were issued to him on the 12th October, 1944. There will have to be more detailed reference later to the various proceedings connected with the appointment of the Secretary or Secretaries of the Court to the administration of the estate; but for the moment it is sufficient to notice that by the year 1948 Mr. Culanthaivalu had retired from the post of Secretary without completing administration and a Mr. Peiris, the new Secretary, was appointed administrator in his place, and that when Mr. Peiris in his turn retired he was succeeded as Secretary by a Mr. Palliyaguru. On the 7th July, 1949, an order was made in the administration proceedings relating to the testator's estate by which Mr. Palliyaguru was directed to be substituted for Mr. Peiris, but no Letters of Administration were issued to Mr. Palliyaguru.

It was not until matters had reached this state that the present action was begun. On the 21st November, 1949, the first respondent filed her plaint naming the " Secretary of the District Court, Colombo " as defendant, praying enforcement of the mortgage bond by payment of the sum of Rs. 45,431 and further sums of interest and, failing due payment, sale of the mortgaged properties under order of the Court. Mr. Palliyaguru appeared to but did not defend the action: on the other hand, two persons, Ahmed Bin Hassen and Mohammed Bin Hassen, who claimed to be specific devisees under the testator's will of the two mortgaged properties, intervened asking to be added as parties and allowed to defend. The upshot of this was that the first respondent came to terms with them and on the 24th October, 1951, an agreement was recorded in the proceedings under which the first respondent agreed to release the properties from the mortgage, not to ask for any hypothecary decree in respect of them and in no event to go against those properties for execution of the decree she was proposing to obtain. In exchange the interveners undertook what prima facie seems to be the smaller sacrifice of withdrawing any objection to decree being entered against the administrator, on the first respondent satisfying the Court as to the amount due on the mortgage.

No explanation was ever given in the course of these proceedings as to why the first respondent entered into such an unusual transaction, which denuded the estate she represented of the security which it had held for sixteen years, or why the second respondent, as administrator, expressed no views about a transaction to which he could hardly have been indifferent. According to the evidence given at the trial, each of the two properties was worth about Rs. 50,000, so the holder of the mortgage bond had been amply secured at the date of the release.

However that may be, the action went ahead on this basis, the first respondent filed an affidavit proving her debt as claimed, the second respondent did not appear, and on the 7th December, 1951, the District Court made an order sanctioning the agreed release of the two properties as well as the earlier release of the two other properties originally subject to the mortgage and decreed that the second respondent should pay to the first the sum of Rs. 45,431, together with interest on Rs. 23,522/97 at the rate of 8 per centum per annum from 22nd November, 1949, to the date of the order and thereafter on the aggregate amount of the decree at 5 per centum per annum until payment in full.

The next thing that happened was the issue of a writ of execution addressed to the Fiscal of the Western Province directing him to levy upon the " houses, lands, goods, debts and credits " of the administrator for satisfaction of the decree debt. It is not now necessary to enquire whether this could in any event extend to assets that had long passed out of the estate. It did at any

rate result in the seizure of the disputed land and this brought the present appellants into the affair, for the first and second appellants were then in possession of it by virtue of a transfer made to them by their mother, Zubaida, who herself had received it in 1941 as a provision made on her marriage by her brother Mohamed Ghouse. The third appellant appeared as their guardian *ad litem*. They applied to the Court to have the property released from seizure and their claim was upheld. Thereupon the first respondent started the present proceedings praying that the disputed property should be declared liable to be sold in execution of the money decree which had been made against the estate on the 7th December, 1951. The action was dismissed by the District Court (G. M. de Silva, D.J.) on the 5th July, 1954, the learned Judge holding that " the plaintiff, having released the mortgage property, cannot now seek to sell the land seized which has vested in the third and fourth defendants ". This judgment was reversed on appeal by the Supreme Court (Basnayake, C. J. and Pulle, J.) on the 4th December, 1957, the learned Judges holding that nothing had occurred to prevent the first respondent from executing her decree against the appellants' property.

In the course of the argument before the Board the point was made by the appellants' counsel that these proceedings, which were said to be proceedings under S. 247 of the Civil Procedure Code, were not within the range of action covered by that section, having regard to the fact that the property had already passed out of the estate and that if the action was to be treated as a mere pendant to the execution proceedings the appellants found themselves involved in an action in which a monetary decree had already passed, in their absence, against the estate, although they themselves would have desired to challenge the making of the decree itself. This point does not seem to have been raised in the Courts in Ceylon and it is not noticed in any of the judgments given there. As the question it raises is essentially one as to the correct procedure under the local rules and their Lordships have no assistance on the point from the Judges familiar with the practice, they do not propose to deal with it in this appeal. They will assume, without deciding, that the first respondent's action is not defective on that account.

But was there ever a real defendant in the action against whom there could pass a monetary decree capable of binding the testator's estate? This is the first main point made by the appellants and it is by no means easy to say what is the correct answer to that question. The decree was obtained in proceedings against a defendant styled " The Secretary of the District Court of Colombo, as Administrator *de bonis non* of the Estate and Effects of Hadjie Ibrahim Bin Ahmed deceased ". Now the appellants say that Mr. Palliyaguru was not and could not be that defendant since, although for the time being the Secretary of the District Court, he had not received Letters of Administration to the estate and could not therefore represent it: that under S. 520 Letters of Administration could only issue to a Secretary of the District Court as an individual person and that there was no corporation sole constituted by the office which could be sued under the corporate name as distinct from the individual holders from time to time: and that, consequently, no person representing the estate had ever been made defendant in the action or had been effectively cited to appear in it.

It is necessary first to enquire what is the scheme established by the Civil Procedure Code under its Chapter on Testamentary Actions in order to see how much support it would give to the appellants' argument that the Letters can only issue to a Secretary in his individual capacity. Section 520 itself says no more than that, when no fit and proper person otherwise appears, the Court shall appoint the Secretary of the Court to be administrator *cum testamento annexo*. There is nothing said explicitly about successors to the office or the creation of a corporation sole. Section 538 prescribes certain general duties to be performed by (*inter alios*) all persons appointed administrator, without exception. They must take an oath in the form set out in the 1st Schedule, file an inventory and valuation of the estate, and enter into a bond with sureties, securing the due administration of the estate, which bond is to be in accordance with Form 90 in the Schedule. By virtue

of S. 521 the Court, when it appoints its Secretary as administrator, is precluded from dispensing with the giving of security, as under S. 541 it has a limited power to do in other cases.

When reference is made to the forms prescribed in the Schedule it is seen that while Form 87 (Letters of Administration) and Form 88 (Oath) are neutral and would be as consonant with the appointment of a corporation sole as that of an individual, Form 90 (Security Bond) is irreconcilable with a bond entered into by a corporation, since it is expressed to bind the administrator and the sureties in the specified sums, " for which payment we and each of us bind ourselves, our heirs, executors and administrators ". Any conclusive argument that is sought to be extracted from the form of the Security Bond, however, must take account of the fact that it is not merely irreconcilable with the conception of an administrator being a corporation sole: it is also irreconcilable with the idea of the Secretary being administrator at all, since the prescribed form requires the bond to be entered into with " the Secretary of the District Court of ——— (or . . . the Secretary of the District Court for the time being) ", and one can hardly suppose that the Secretary, whether individual or corporate, was envisaged as offering security by himself to himself. This is only one of several indications that neither the scheme laid down by the relevant sections of the Code nor the prescribed forms have been framed to fit the special situation of a Secretary of the Court acting as administrator.

If at this stage one follows up the suggestion that the only admissible administrator is a Secretary in his individual capacity, the practical consequences become so unworkable that it is virtually impossible to accept it. The first Secretary to take the appointment must necessarily remain administrator until his death or the final winding up of the estate, since the Code provides no means by which the Court can relieve him, once appointed, and transfer his duties to a new Secretary. The only lawful power to recall or revoke a grant (S. 536) is not applicable to such a case. Yet it is inevitable that Secretaries will retire or be transferred to another District while administrations are still pending and it is inconceivable that they are intended to remain charged with these duties, undertaken for the original Court, after they have ceased to have any official contact with the office or the District.

It was argued for the appellants that the difficulty of this position could be met if S. 540, which is styled " Power of administrator when not limited ", were to be read as impliedly sanctioning the appointment of individual Secretaries for no longer period than their tenure of office as Secretary of the Court that appointed them. It was suggested that the opening words " If no limitation is expressed in the order making the grant . . ." could warrant the view that the mere naming of the Secretary of the District Court in the grant amounted to a limitation in time for this purpose. But this argument can provide no solution and would in any case create more difficulties than it could solve. First, it is plain that S. 540 does not carry the implication suggested but is the obverse of the immediately preceding Section, S. 539, styled " Limited probate and administration ", a section which does enable the Court in certain circumstances, though not circumstances that obtain here, to make limited grants in express terms. Section 540 merely says that, except and so far as there are such express limitations, an executor's or administrator's powers are to endure for his life or until final administration and to extend to the whole of the assets. Secondly, even if an administrator, though appointed individually, could drop out of his appointment upon leaving his post as Secretary to the Court, provisions, which are lacking, would be needed for determining the liability of his sureties and himself on his bond, which is unlimited, and for requiring him to bring in and pass the accounts of his administration up to the date of his retirement.

For these reasons their Lordships think that it is in effect impossible to treat a grant to the Secretary of a District Court as if it were a grant to him in his individual capacity. Not much help is to be had from reference to the actual course that administration has taken in this case since no theory that is internally consistent seems to prevail. The first person to receive

Letters of Administration was Mr. Culanthaivalu. They were issued to him in his own name but " as Secretary of the District Court ". He took the Oath of Office, and entered into a Bond acknowledging that he was bound to himself, " Secretary of the District Court of Colombo or to the Secretary of that Court for the time being " in the sum of Rs. 500, for which payment he bound himself and his heirs, executors and administrators. When he retired from the Secretaryship, fresh Letters were issued to his successor, Mr. Peiris, on the basis that there was an unadministered estate for him to succeed to as administrator *de bonis non*: yet there is not to be found in the Code of Civil Procedure power for the Court either to discharge an existing administrator or to appoint an administrator de bonis non except upon the death (not retirement) of a sole surviving administrator (S. 549). Rightly or wrongly, Mr. Peiris then took a new oath and entered into a new Bond, made on this occasion in favour of " N. Sinnetamby, District Judge of Colombo or . . . the District Judge of Colombo for the time being ", but again binding the giver of the Bond, his heirs, executors and administrators.

When Mr. Peiris retired in his turn, no new Letters were issued to Mr. Palliyaguru, nor did he take an oath or give a bond. The only official action which recognised him as administrator of the estate was an order made on the 7th July, 1949, in the testamentary proceedings directing him to be substituted for Mr. Peiris.

There is not much that can be said about the course of practice, which very likely follows the practice accepted from time to time, except that it is impossible to treat it as altogether consistent either with the idea that the Secretary, when appointed by the Court under S. 520, is appointed in his individual capacity or with the idea that what is appointed is a corporation sole represented by the holder for the time being of the Secretary's office. For, if the former, there was no way of getting rid of Mr. Culanthaivalu, the first holder, and no vacancy to which his successors could be appointed: and, if the latter, there was no vacancy at any time and nothing to which either Mr. Peiris or Mr. Palliyaguru required appointment.

The change in procedure on the last occasion was no doubt due to a decision of the Supreme Court given in the same year, 1949, in the case of *Samarasekara v. Secretary of the District Court* 51 N.L.R. 90. In that case the Court (Basnayake and Gratiaen J.J.) held that S. 520 contemplated the appointment of the Secretary of the Court as such and not the individual who held the office of the Secretary at the time of the appointment. Letters of Administration in such cases should, in their view, be addressed to the Secretary of the Court and not to the current holder by name, and a change of the individuals holding the office would not affect the appointment once made. The sum of their judgment was expressed in their holding that the Civil Procedure Code intended the Secretary of the Court to possess " all such attributes of a corporation sole as are necessary for the proper discharge of his functions qua administrator."

Their Lordships accept this as a correct proposition. Despite the difficulties created by the wording of certain sections and of the prescribed forms, they think that, having regard to the functions to be performed by the Secretary of the District Court and the evident intention that his office should carry a continuing responsibility for the property to be administered, it must have been intended that the Code should create the holder of the office a corporation sole for this purpose. Even if their Lordships did not think that this was the preferable conclusion, they would find themselves very reluctant indeed to overrule a decision of this kind which has now stood for 12 years and upon the strength of which many judgments and orders must have been made in the course of testamentary proceedings.

For these reasons the appellants' first argument fails. There was a proper defendant before the Court in the mortgage proceedings and Mr. Palliyaguru did not require a grant of Letters of Administration for himself.

It must, however, be pointed out that the judgment of the Supreme Court in *Samarasekara's* case has not disposed of several difficulties which still attend the reconciliation of the requirements of the Civil Procedure Code

with the responsibilities of the Secretary of the Court as administrator. If it is a corporation sole which is appointed in the first instance, what is the correct form of security to be offered by that corporation? The provision of proper security is of the first importance when the assets of an estate are entrusted to the hands of a stranger. The Supreme Court themselves said in their judgment in that case that Form No. 90 was inappropriate to a Secretary administrator: but neither there nor in their judgment in the present case, where they seem to have followed the same principle, did they indicate what should be done to ensure that proper security is at all times available. Should the Secretary in office when the appointment is made give a bond for the office binding himself and his successors, and, if so, out of what funds, public or private, should the penalty be exacted if there should be devastavit? And, again, is there to be indemnity at the public expense if the corporation sole commits devastavit? It does not seem satisfactory that the estate should be secured by the mere personal bond of the Secretary in his individual capacity. And what should be the form of oath appropriate to the corporation sole, and should a new oath be required from each new holder? Their Lordships must earnestly commend these questions to the attention of the authorities in Ceylon, for the present position calls for immediate review and it looks as if it may be necessary to produce new statutory forms and even, possibly, new statutory provisions if a complete scheme is to be provided.

Turning now to the appellants' second ground of appeal, their Lordships are of opinion that the decision of the Supreme Court ought not to stand. It is quite true that as a general rule a secured creditor of an estate is entitled to decline to rely on his security and to claim payment out of the estate as a whole; though it must be remembered that if he does so his action releases the secured property into the general pool of assets and the creditor does not make a side deal, as was done here, with the specific devisees of the land subject to the mortgage with the intention of exempting their property from any contribution at all towards the satisfaction of his debt. It is quite true, too, that an unsatisfied creditor is entitled to follow assets of the estate into the hands of devisees or legatees and those claiming through them for the purpose of obtaining payment: but this right of following is fundamentally an equitable right. As such it is liable to be lost by laches and acquiescence on the part of the creditor or by other conduct which raises an equity against him (see *Ridgway* v. *Newstead* 2 Giff. 492); or it may be defeated by a sale by the devisee to a purchaser for value without notice or by a transfer from the devisee to someone who takes in consideration of marriage (see *Dilkes* v. *Broadmead* 2 Giff. 113, *Spackman* v. *Timbrell* 8 Sim. 253). In such cases the marriage consideration is as effective a bar as a purchase for value without notice, and this should be so, since the property is transferred as provision for an alteration of status which is in its nature irrevocable. From this aspect the decision in the case of *Theodoris Fernando* v. *W. L. Roslin Fernando* 2 Browne's Reports 277, the correctness of which was doubted by the Supreme Court, must be regarded as unexceptionable. Nor is the creditor affected to his prejudice by these rules; for, while he cannot follow the property against the purchaser, he can follow the purchase price in the hands of the devisee and, if there has been a transfer in consideration of marriage, he can claim as assets from the transferor the value equivalent to that which has been transferred.

These general principles of equity are in their Lordships' opinion fully applicable to the administration of a deceased's estate in Ceylon (see *Staples* v. *de Saram* Ramanatham 265, *Gavin* v. *Hadden* 8. Moore N.S., 90). If they are applied to the circumstances of the present case, it must result that the disputed land is not liable to be seized to satisfy the first respondent's decree. The first and second appellants derive title to it through their mother and she took it from her brother in consideration of marriage, " a dowry or marriage gift absolute and irrevocable ", as it is described in his Deed of the 21st December, 1941. The transfer on marriage blocks the first respondent's claim. Even if this was not enough in itself, the defence is strongly reinforced by the other circumstances of the case. The mortgagee stood by while administration was proceeding during all the years until

1949, ostensibly in possession of an ample security and without making any call for payment off of the mortgage monies. This alone would not be prejudicial; but if, when at length proceedings are taken, the mortgagee deliberately denudes herself of her security, apparently with the intention of favouring the devisees of the land subject to the mortgage at the expense of other devisees, she has only herself to blame if she finds that her rights against other devised property are not so far-reaching as she may have wished to suppose. It is not that in the absence of evidence the Court will impute to the first respondent bad faith in the making of the arrangement that she made in the course of the mortgage action; but it is that, if such an arrangement is made, without explanation, at the time and in the circumstances that prevailed here, the creditor's equity to follow assets after they have passed from the hands of the executor may find itself destroyed by the mere situation that the creditor's own choice has brought about.

For the reasons that have been set out their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the Judgment and Decree of the District Court of Colombo dated the 5th July 1954 dismissing the first respondent's action with costs should be restored; and that the Judgment and Decree of the Supreme Court dated the 4th December 1957 should be reversed and that in lieu thereof the first respondent should be ordered to pay the appellants' costs of the hearing before that Court. The first respondent must also pay the appellants' costs of this appeal.

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