

1966 Present : T. S. Fernando, J., and Sri Skanda Rajah, J.

S. K. SELLATHURAI, Appellant, and YOGAMMAH, Respondent

S.C. 485/64—D.C. Jaffna, 5043/MB

Mortgage—Co-mortgagors bound in solido—Death of one of them—Action instituted against the survivor—Maintainability.

Prescription—Joint and several obligation—Institution of action against one of the co-debtors—Interruption of prescription against the other debtors.

Where the liability of two co-mortgagors is joint and several, and one of the mortgagors dies, the mortgagee is entitled to maintain a hypothecary action subsequently against the survivor and the legal representative of the deceased.

Where two debtors are jointly and severally liable, the institution of action against one of them interrupts the course of prescription against the other.

APPEAL from a judgment of the District Court, Jaffna.

Bala Nadarajah, for 1st Defendant-Appellant.

S. Sharvananda, for Plaintiff-Respondent.

Cur. adv. vult.

July 10, 1966. SRI SKANDA RAJAH, J.—

The 1st defendant-appellant and his wife, Avayambal, granted the plaintiff-respondent a mortgage bond on the 4th of September, 1952. The land mortgaged was Avayambal's dowry property, but the bond was an obligation *in solido* (joint and several). Four days before the term of prescription, namely, on 30th August, 1962, the plaintiff-respondent filed the plaint in this case against the 1st defendant, husband of Avayambal who it was discovered later had died over three years before the action. When the fact of the death of Avayambal came to the plaintiff-respondent's knowledge, he made an application to appoint the 1st defendant-appellant himself to represent the estate of the deceased Avayambal, which estate was stated in the petition for such appointment to be worth under Rs. 2,500. That application was made on 18th of February, 1963, and the 1st defendant-appellant on whom notice of that application was served was absent on 28th of March, 1963, and on that date the application to appoint him to represent the estate of the deceased Avayambal was allowed. Answer was filed thereafter. There was no appeal from the order allowing that application.

The case went to trial on a number of issues. The issues relevant for the decision of this appeal are :

- (2) Was the action properly constituted in so far as the 2nd defendant was dead at the time of the institution of this action ?
- (3) If so, is the appointment of the first defendant as legal representative of the deceased wife valid ?
- (4) In any event, is plaintiff's claim prescribed as against the estate of the deceased, wife of the first defendant ?

These issues were answered by the learned trial Judge as follows :—

- (2) I hold that the joinder of the second defendant as a party defendant in this case was not proper in view of the fact that the second defendant was already dead at the time of this action, but this does not prescribe plaintiff's claim against 1st defendant.
- (3) No.
- (4) Does not arise.

It was argued before us that the action was a nullity. In the case of *Muthu Ramaie et al. v. Athimulam et al.*,¹ where a mortgagee instituted a hypothecary action in respect of a land mortgaged to him by two co-mortgagors A and B and B had died prior to the date of action but a representative of his estate was appointed in the mortgage action and added as a defendant, it was held that the death of co-mortgagor B prior to the institution of the mortgage action could not render the action a nullity.

It was also argued that the action against the second defendant wife was prescribed because the substitution was made over 10 years after the date of the mortgage bond. But in this case the institution of the action against the husband, the 1st defendant, was sufficient to interrupt prescription against the estate of the deceased wife. In *Dharmasena v. Lewis et al.* ² the facts were as follows : The plaintiff sued the defendants for the recovery of money due upon a mortgage bond dated August 1, 1917. The mortgage was executed by the first and second defendants and their mother, Nona Rodrigo, jointly and severally. The plaint was filed on July 27, 1927, four days before the expiration of ten years, as in the present case. Nona Rodrigo had died six months before action, and the third defendant was described as her legal representative. On December 12, 1927, on the application of the plaintiff the third defendant was appointed as a fit person to be the legal representative of the deceased mortgagor. It was contended for the defence that the action was prescribed as it must be regarded as having been instituted on December 12. The learned District Judge held that the action was instituted on July 27, and gave judgment for the plaintiff. This Court held that the action against the third defendant must be regarded as having been instituted on December 12, that is over 10 years after the bond, but went on to hold

¹ (1961) 66 N. L. R. 251.

² (1930) 31 N. L. R. 353.

that the institution of an action against one of several debtors *in solido* interrupts the course of prescription against the others. Therefore, in this case, too, the institution of action against the 1st defendant-appellant interrupted the course of prescription against the estate of the deceased Avayambal. For these reasons, the 1st defendant-appellant's appeal is dismissed with costs.

There was a cross-objection filed by the plaintiff-respondent because the learned District Judge did not hold that the 1st defendant was properly appointed to represent the estate of the deceased. In view of our findings that the appointment has been properly made and that the claim is not prescribed, this cross-objection is entitled to succeed.

Enter decree as prayed for in the plaint.

T. S. FERNANDO, J.—I agree.

Appeal dismissed.

