APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

NARAYANASAMI PILLAI (FOURTH DEFENDANT IN BOTH), APPELLANT IN BOTH,

1905. January 6, 10.

v.

ESA ABBAYI SAIT (PLAINTIFF), RESPONDENT IN SECOND APPEAL No. 1389 OF 1902

AND

SALI MAHOMED ABBAYI SAIT AND OTHERS (PLAINTIFF'S AND SECOND DEFENDANT), RESPONDENTS IN SECOND APPEAL No. 1390 OF 1902.*

Executor de son tort *liability of, under Hindu Law, when there is a legal representative—Power of, to pay own debt out of assets—Consent of heir to such payment, how far a defence to creditor's action—Creditor, form of suit by.*

Where A on the death of B pays off a debt due to C by B which he had guaranteed, and later on in the same day, removes goods belonging to B's estate, A becomes liable as *executor de son tort*. The rule of English Law that no liability as *executor de son tort* can arise when there is another personal representative does not apply in India. *Magaluri Garudiah* v. *Narayana Rungiah*, (I.L.R., 3 Mad., 359), referred to.

An *executor de son tort* cannot plead *plene administravit* if he retains the assets for his own use or pays his own debt. In this case A became a creditor of the estate when he paid off the debt, and when he removed the goods as he paid a debt due to himself and not to C.

The consent by the heir to the appropriation by an *executor de son tort* will not be a defence to a creditor's action.

Where there is an *executor de son tort* a creditor may sue for his debt and is not confined to an administration action.

SUIT to recover money. The plaintiffs were creditors of one Ambalavana Pillay (deceased). The first defendant was the widow of the deceased; the second and third were alleged to have been partners of the deceased and the fourth defendant Narainsawmy Pillay was charged with liability on the ground that he

* Second Appeal Nos. 1389 and 1390 of 1902, presented against the decrees of M.R.Ry. N. Sarvothama Row, Subordinate Judge of Tanjore, in Appeal Suits Nos. 1034 and 1012 of 1900, presented against the decrees of Syed Tajuddin Sahib, District Munsif of Negapatam, in Original Suits Nos. 121 and 120 of 1899 respectively.

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had misappropriated goods of the value of Rs. 15,000 belonging to the deceased subsequent to his death. The plaintiffs sued to recover debts due by the deceased arising out of dealings with him. The first defendant allowed the suit to proceed *ex parte*. The second and third defendants denied that they were partners in the business carried on by the said Ambalavana Pillay. The fourth defendant pleaded that the deceased Ambalavana Pillay had borrowed Rs. 5,000 on the 30th January 1899 from the Bank of Madras at Negapatam on his becoming surety for him; that Ambalavana Pillay having directed him to pay the said debt to the Bank, sold articles to the defendant to the extent of his debt on the 22nd March 1899; that he had liquidated the said debt due to the Bank and that no property belonging to the deceased remained in his possession.

The District Munsif dismissed the suit as against the second and third defendants on the ground that the plaintiff had not established their partnership with the deceased, and against the fourth defendant on the ground that he had come into possession of the goods in question with the permission of Ambalavana Pillay and for valid consideration.

On appeal the District Judge held that the fourth defendant had taken possession of the deceased's goods, that such possession was wrongful and decreed the plaintiff's suit as against him.

On second appeal to the High Court by the fourth defendant, their Lordships passed the following judgment.

V. K. [illegible] Ayyar and *A. K. Sundaram Ayyar* for appellant.

C. Sankaran Nair, *T. Rangachariar* and *A. S. Balasubrahmania Ayyar* for respondents.

JUDGMENT.—In these cases the plaintiffs are creditors of one Ambalavana deceased. The first defendant is his widow and legal representative. As regards the fourth defendant the case alleged against him in the plaint is that he carried away property worth about Rs. 15,000 from the shop of the deceased after his death. The Munsif held that the first defendant alone was liable in the plaintiff's suits. The District Judge held the fourth defendant was also liable and gave a decree against the first and fourth defendants. The fourth defendant appeals. On the findings of fact by the lower Appellate Court, we are of opinion that the fourth defendant by intermeddling with the estate of the deceased made

himself liable to the plaintiffs as *executor de son tort*. The taking of the goods by the fourth defendant was not denied. His case was that he was a surety of the deceased in respect of a debt of Rs. 5,000 due by the deceased to the Bank of Madras and that, prior to the death of the deceased, he had purchased the goods in consideration of his undertaking to pay off this debt and that he paid it off accordingly. The lower Appellate Court found that he had not purchased the goods and that the document by which he sought to support his case of purchase was a forgery. There was no dispute as to the facts that immediately after the death of the deceased, the fourth defendant paid off the debt due to the Bank by the deceased, and, later on the same day, removed the goods from the shop of the deceased.

The first contention put forward on behalf of the fourth defendant was that inasmuch as the estate was represented by the widow as legal representative, the fourth defendant could not by any act of his constitute himself an *executor de son tort*. The appellant relied upon the English rule of law that when a will is proved or administration granted, and another person intermeddles this does not make him *executor de son tort*, because there is another personal representative of right against whom the creditors can bring their actions. (William's 'Law of Executors,' ninth edition, page 212.)

In our opinion this rule of English law does not apply to a case where, as here, the estate is represented under the Hindu law by the heir. It is to be observed that in the case of *Magaluri Garudiah* v. *Narayana Rungiah*(1) where a party who had taken the property of the deceased was held liable for a debt due by the deceased, it was not suggested that the fact that there was a personal representative exempted him from the same liability as that which arises under the English law, in the case of a party who intermeddles. In fact as under the Hindu law there must always be some legal representative of the estate of a deceased person, if the appellant's contention were sound, a case could never arise in which a party had constituted himself *executor de son tort* and had become liable as such.

It was next urged that assuming the defendant had made himself liable as *executor de son tort* what he had in fact done was

(1) I.L.R., 3 Mad., 359.

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to pay not a debt due by the estate to himself but a debt due to the Bank by the estate, and that being under no obligation to pay the creditors of the estate *pari passu*, he was entitled to do this. On the findings of fact we cannot take this view. By paying off the Bank the fourth defendant became a creditor of the estate. He then paid himself out of the estate. Having paid his own debt he cannot plead *plene administravit* if sued as *executor de son tort*. "An *executor de son tort* cannot give in evidence, or specially plead a retainer for his own debt for otherwise the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him." (William's 'Law of Executors,' page 220.) It is not necessary to decide whether in the view that the fourth defendant had paid a debt due to the Bank out of the assets of the deceased he would be entitled to plead *plene administravit* if sued as *executor de son tort* or whether the passage in William's 'Law of Executors' in page 223 in support of which the authority of *Mountford* v. *Gibson*(1) is cited applies to a case like the present where the suit is by a creditor.

On the findings we do not think it can be said that the widow assented to the fourth defendant paying his own debt but even if she did, this would not be a good defence to the action. (William's 'Law of Executors,' page 220.)

The third contention was that the creditors can only ask for administration and cannot sue for the debt. There is no reason why the plaintiff's rights should be limited to an administration suit. If as we hold the fourth defendant has made himself liable as executor the plaintiffs are entitled to sue him as representing the estate for the debts due by the estate.

We do not think the case of *Magaluri Garudiah* v. *Narayana Rungiah*(2) can be distinguished in principle, although in that case there was a finding of collusion between the legal representative and the parties who got possession of the estate, from the case before us.

The second appeals are dismissed with costs.

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(1) 4 East, 441. (2) I.L.R., 3 Mad., 359 at p. 360.