APPELLATE JURISDICTION (*a*)

Special Appeal No. 219 *of* 1866.

KOTTALA UPPI .....*Appellant.*

SHANGARA VARMA RÁJAH of Kottayath Padinhari Kovilagam..... } *Respondent.*

In a suit against an heir for debts of his ancestor, in the absence of special circumstances it lies upon the plaintiff in the first instance to give such evidence as would *prima facie* afford reasonable ground for an inference that assets had or ought to have come to the hands of the defendant. Plaintiff having laid this foundation for his case, it then lies upon the defendant to show that the amonnt of such assets is not sufficient to satisfy the plaintiff's claim, or that he was not entitled to be satisfied out of them, or that there were no assets, or that they had been disposed of in satisfaction of other claims.

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THIS was a special appeal from the decision of A. W. Sullivan, the Civil Judge of Tellicherry, in Regular Appeal No. 122 of 1864, reversing the decree of the Principal Sadr Amin of Tellicherry in Original Suit No. 251 of 1862.

The suit was brought to recover the principal and interest due on a bond dated 29th May 1860, and executed by Vira Varma Mutha Rájah (since deceased) to plaintiff, and the plaint alleged that defendants, his heirs, had neglected to discharge the debt.

The first defendant in his answer stated that the bond was the result of collusion between the plaintiff and the Eruvatti Rájah : that the deceased had not acquired any property, nor had he, 1st defendant, inherited any property from him : that the 1st defendant succeeded the deceased only in the management of the devasom and brahmasom trusts belonging to the western Kovilagam ; that the deceased and 2nd defendant lived together ; that under a karar the Malikhána allowance was divided between him, 1st defendant, and the deceased ; that 2nd defendant received deceased's share after his death and was liable for deceased's just debts, and that he, first defendant, was not liable.

(*a*) Present Innes and Collett, J. J.

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The 2nd defendant denied the truth of the transaction alluded to in the plaint and stated that she had not inherited any of the personal assets of the deceased; that the deceased had no debts, and that the suit was collusive between plaintiff and 1st defendant, the adopted heir.

The Court of First Instance decreed against the 1st defendant for the amount sued for. The Appellate Court reversed this decree.

The plaintiff preferred a special appeal.

Advocate General, for the appellant, the plaintiff.

O'Sullivan, for the respondent, the first defendant.

The Court made the following

ORDER :—The first defendant in this suit admits (as appears from the judgment of the Lower Appellate Court) that he is the heir-at-law of the executor of the bond sued upon, the genuineness of which has been found by both the lower courts. The first defendant admits also that he has taken out a certificate which constitutes him the representative, for all the purposes of Act XXVII of 1860, of the deceased executor of the bond. The terms of the certificate are quite general, and would include both Kovilagam as well as devasom and brahmasom property asserts of the deceased. Both in his character as heir-at-law and also as holder of the certificate, the 1st defendant is competent to deal with, and is liable to the extent of, the assets of every description, which have, or which but for his own act or wilful default might have, come to his hands.

It was argued for the plaintiff that the 1st defendant had in fact admitted that he allowed the 2nd defendant to deal with and take possession of the Kovilagam property of the deceased Rájah. But it does not appear that the written statement of the 1st defendant does more than allege that the 2nd defendant is now receiving the half share of the málikhána, which the deceased Rájah used to receive during his life-time. Such half share, or at least so much of it as had not accrued due at the date of the death of the deceased Rájah, would not be assets of the deceased ;

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for we apprehend that there can be no question that the deceased Rájah had a mere life interest in the share of the málikhána received by him, and the 1st defendant, though entitled to it on his death because he is his heir, would take it not by descent, but by purchase according to the form of

Prima facie, therefore, the 1st defendant is the right person to be sued upon this bond, and the only question open to us in this special appeal is, whether the Lower Appellate Court erred in imposing the burden of proof as to the receipt of assets. If there had been such error in law, then it will be for us to state what, in our opinion, is the law upon the point, and to remit this case for a fresh finding upon the evidence, the Lower Court applying our exposition of the law as to the burden of proof.

In one respect we think that the Lower Appellate Court has clearly erred as to the burden of proof. If there was evidence that some assets had come to the hands of the 1st defendant, but it did not appear whether they were Kovilagam property or not, the burden was upon the 1st defendant, standing in the relation that he does to the deceased, to show that such assets were devasom or other property, out of which the plaintiff is not entitled to be satisfied his claim. It would appear from paras. 22 and 25 of the Civil Court's judgment that the burden of proving the assets to be Kovilagam property was thrown upon the plaintiff; and if so, this was, we think, an error.

Whatever was originally the Hindu Law as to the liability of the heir for the debts of his ancestor, it has now settled down to the rule that the heir is liable to the extent of the assets and no further. In England, in a suit against an executor or administrator, the general rule no doubt is that the burden of proof lies upon the plaintiff, who must prove that assets existed or ought to have existed in the hands of the defendant at the time of the commencement of the suit. But the question, to what extent the evidence for the plaintiff must go before he can shift the burden on to the defendant, has not perhaps been always decided with uniformity. And, however it may be, we

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think that it does not follow that rules of evidence in favor of an executor or administrator, who often at least stands in the position of a mere gratuitous bailee, or manager of the property of a deceased person, can be reasonably or properly applied in favor of one who stands in the position of heir-at-law of the deceased and is also his representative under a certificate.

In the present case the certificate was granted before it had become necessary, as it now is, for the purposes of the stamp duty, that the amount of assets to be collected under the certificate should be apparent from it. We think therefore that the Court of first instance was in error in treating the certificate as evidence even *prima facie* of there being any assets. We desire though to guard ourselves from giving an opinion as to how far, even now, the stamp upon the certificate would be of any value as evidence.

Under the circumstances of the present case it is enough to say, that we think that it lay upon the plaintiff in the first instance to give such evidence as would *prima facie* afford reasonable ground for an inference that assets had or ought to have come to the hands of the first defendant. But it was not necessary, we think, for the plaintiff's evidence to go further than this, and, having laid this foundation for his case, it then lay upon the first defendant to show that the amount of such assets was not sufficient to satisfy the plaintiff's claim, or that they were of such a nature that the plaintiff was not entitled to be satisfied out of them, or that there never were any assets, or that they have been duly administered and disposed of in satisfaction of other claims.

The Lower Appellate Court has been apparently influenced by an erroneous view as to the burden of proof in the present case, and we think that it is desirable to remit the case that answers may be returned to the following questions :—

(1.) Is there *prima facie* evidence on the part of the plaintiff that some assets have, or ought to have come to the hands of the first defendant ?

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(2.) If so, has the first defendant disproved the existence of such assets, or duly accounted for the same ?

It is difficult to suppose that, in regard to a person in the apparent position in life of the deceased Rajah, there would be any want of *prima facie* evidence that he left assets which ought to have come to the hands of his heirs ; and it is of course that an heir cannot, by giving away the assets to others, defeat the claims of the creditors of his deceased ancestor. As neither of the Lower Courts has apparently taken the right view as to the burden of proof, and the parties have probably been thus misdirected as to the production of evidence, we think it advisable to give liberty to the Lower Court, under Section 355, to receive further evidence from both parties, in order to a satisfactory decision of the above questions.

It is accordingly hereby ordered that the foregoing issues be and the same hereby are referred to the Lower Appellate Court for trial ; the finding thereon together with the evidence, to be returned to this Court within two months from the date of receiving this order.

Suit remanded.

APPELLATE JURISDICTION (*a*)

Referred Case No. 5 *of* 1866.

AMIRTHAMMÁL, widow of LAKSHMANA PILLAI.

against RANGANÁDHA PILLAI and others.

Defendants carried off a quantity of unthreshed paddy from the plaintiff's threshing floor :—*Held,* that the plaintiff's right of action is not barred for 6 years.

The word ' injury' in Clause 2, Sec. I, Act XIV of 1859, means a loss or deterioration caused by a wrongful act, and the phrase ' injury to personal property' means some damage directly caused by some wrongful act to some particular piece of property.

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THIS was a case referred for the opinion of the High Court by F. C. Carr, the Judge of the Court of Small Causes at Cuddalore.

No Counsel were instructed.

(*a*) Before Scotland, C. J., and Bittleston, Holloway, Innes and Collett, J. J.