WIKRAMATILLAKA *v.* MARIKAR *et al.*

1895. *October 22 and 29.*

D. C., Colombo, 5,711.

Civil Procedure Code, s. 247—Misjoinder of parties—Technical objections in judicial proceedings.

A gifted a parcel of land to B, C, and D. On a writ sued out by plaintiff against A the parcel of land donated was seized and advertised for sale. B and C claimed it, and their claim was upheld by the District Court, and the property released from seizure. Plaintiff now sued A, B, C, and D under section 247 of the Civil Procedure Code to have the order of the District Court releasing the seizure set aside, and the deed of gift declared null and void on the ground of fraud and collusion.

Held, that A should not have been joined as a party to this action, but that D was properly made a party defendant, and that the action was maintainable against B, C, and D.

Observations by BONSER, C.J., against District Judges giving effect to merely technical objections in the course of judicial proceedings.

THE plaintiff issued writ against the property of the first defendant in this case for the recovery of a sum of Rs. 903·75, and the Fiscal seized thereunder the land which is the subject-matter of this case, whereupon the second and third defendants claimed the same under a deed of gift executed by the first defendant in their favour. Their claim was upheld, and the land released from seizure by the Court. The plaintiff then brought the present action under section 247 of the Civil Procedure Code, alleging that the deed of gift was executed by the first defendant fraudulently and in collusion with the second, third, and fourth defendants, with intent to defeat and delay the plaintiff as creditor of the first defendant, and praying for a declaration that the deed was void as against the plaintiff, and that the premises seized were executable under the plaintiff's writ.

The first defendant, as matter of law, denied that it was competent to the plaintiff to pray that the deed of gift be declared void as against him, and contended that he had been improperly joined as a defendant.

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The second, third, and fourth defendants filed together a separate answer, wherein the fourth defendant pleaded that the plaint did not disclose any cause of action against him ; and that the present action being one under section 247 of the Civil Procedure Code, it lay only against those who claimed the property seized ; but that there was no averment in the plaint that the fourth defendant was one who so claimed.

The second, third, and fourth defendants admitted the execution of the deed of gift, but denied that it was fraudulent.

The District Judge held that the action was misconceived, and it could not be said to be an action under section 247 of the Civil Procedure Code in view of the above-mentioned allegations and prayer in the plaint ; and that, if he was to consider the action as one under the common law, the proof in support of plaintiff's cause of action, as stated in the plaint, had failed ; and dismissed the plaintiff's claim with costs.

The plaintiff appealed ; and the case came on for argument on the 22nd October, 1895.

Dornhorst and *Sampayo*, for appellant.

Bawa, for first defendant, respondent.

Jayawardena, for second, third, and fourth defendants, respondents.

Cur. adv. vult.

29th October, 1895. WITHERS, J.—

Plaintiff's action against all the four defendants has been dismissed, and the question for decision is whether that judgment is a right one.

One reason given by the Acting District Judge, Mr. Grenier, for his judgment is, that the action appears to him to be altogether misconceived.

He observes that it cannot be said to be an action under section 247 of the Civil Procedure Code in view of the averments contained in paragraph 5 of the plaint and of the prayer, and in his opinion the case cited by Mr. Van Langenberg (*2 C. L. R 191*) is exactly in point.

If, he adds, the action is to be considered one at common law he finds that the plaintiff has signally failed to sustain the cause of action embodied in the 5th paragraph of the plaint.

The manifest object of this action is to have it declared by judgment that a certain land and premises bearing assessment No. 70, situated at Dean's road, Maradana, Colombo, are liable to be sold in execution of a decree for a sum of money which the plaintiff has obtained against the first defendant, and which is still unsatisfied.

The second and third defendants are joined in this action for more causes than one.

The first cause for joining them is that they, on the 4th May, 1894, procured an order of Court releasing the said premises from seizure under plaintiff's writ of execution against the first defendant.

The plaintiff, being the party against whom that order was made, was, therefore, under the 247th section of the Civil Procedure Code, at liberty to institute an action within fourteen days of that order to have the said property declared liable to be sold in execution of the said decree in his favour. He has instituted this action within the time prescribed.

In the 4th paragraph of the plaint the plaintiff, after setting out the fact of the first defendant having a life-interest in the said premises, and his donation of that interest on the 22nd December, 1893, to the second, third, and fourth defendants, goes on in the 5th paragraph to allege that the gift was made and accepted collusively between the parties thereto, with the fraudulent intent of defeating and delaying the plaintiff as creditor of the first defendant, and that in the said circumstances it is void as against him.

He consequently prays that this deed notwithstanding, which he asks may be pronounced void only so far as it hinders his prosecution of a just claim against the first defendant, the premises may be declared executable under his said decree.

This, as I said before, is the object of this action, and I think it was competent for him to join the fourth defendant, as he is a necessary party to that adjudication he prays for in respect of the said instrument of donation, viz., that it shall not avail the defendants who hold the premises under it to stay the prosecution of his writ.

Then the case relied on by the Acting District Judge is not in point. The defendants, claimants in that case, had bought at a Fiscal's sale a share in certain premises subject to a mortgage to the plaintiff by the owner, against whom the plaintiff afterwards obtained a mortgage decree. We held that the defendants, claimants, were in the position of third parties in possession of mortgaged property, against which the plaintiff could only proceed in the usual hypothecary action. The claimants had purchased the land before the plaintiff's mortgage decree, and therefore it could not be declared subject to that decree. Hence the present action is, I consider, maintainable against the second, third, and fourth defendants.

The first defendant has, however, specially pleaded that he has been improperly joined in this action, and I think he is entitled

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to succeed. The only apparent reason for his being made a party defendant is that he donated his interest in the premises to the other defendants with the fraudulent intent of defeating his creditor, the plaintiff's claim. But it is not sought to dissolve that interest of donation. As has been observed, voluntary settlements, void against creditors, may be good for other purposes.

And even when a suit was instituted by a trustee in bankruptcy to set aside a conveyance executed by the bankrupt to his son with intent to delay or defeat his creditors, it was held on demurrer by the bankrupt that he was not a necessary party to the suit, per late Jessel, M. R., in *Weise v. Wardle, 19 L. R. Eq. 171.*

The first defendant has no interest in the donated premises, and the other defendants can keep them intact if they settle the plaintiff's unsatisfied judgment against the donor.

As to the merits, I think the case should go back to allow the plaintiff to read in evidence an affidavit of the first defendant, which forms part of the proceedings in the record referred to in clause 1 of the memorandum of documents relied on by the plaintiff. The Acting District Judge should not have sustained the objection to this document being put in evidence. It was a technical objection. The first defendant's name will be struck off this record, and he will be allowed his costs in both courts. The plaintiff will have his costs in appeal against the second, third, and fourth defendants. All other costs will be costs in the cause.

BONSER, C.J.—

I agree in the judgment that has just been read. I wish to add that I think the District Judge should not have given effect to the technical objection which was raised. I commend to his attention, as to that of all other Judges of first instance, the observations of Jessel, M. R., *in re Chenwell, 8 Ch. D. 506* :—" It is " not the duty of a Judge to throw technical difficulties in the way " of the administration of justice, but when he sees that he is " prevented receiving material or available evidence merely by " reason of a technical objection, he ought to remove the technical " objection out of the way upon proper terms as to costs and " otherwise."