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October 10.

[FULL BENCH.]

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

HARAMANIS *v.* HARAMANIS.

D. C., Negombo, 6,525.

Action under s. 247, Civil Procedure Code—Question of fraudulent alienation—Adding of judgment-debtor as a party—Paulian action—Civil Procedure Code, ss. 14, 18, and 243-247.

Held (by HUTCHINSON C.J. and MIDDLETON J., *dissentiente* WOOD RENTON J.), that in an action under section 247 of the Civil Procedure Code, where the claimant bases his title to the property seized on a deed of transfer executed by the judgment-debtor, it is competent for the judgment-creditor to claim a declaration that such deed was executed by the judgment-debtor with a view to defraud creditors, and is therefore null and void.

In such a case the grantor of the deed (judgment-debtor) should be joined as a party to the action, and where he is not already joined, the Court may add him as a party, under section 18 of the Civil Procedure Code.

Ossen Lebbe v. Daniel Dias[1] and *Fernando v. Joodit*[2] over-ruled.

THE defendant obtained judgment against one Ungappu in C. R., Pasyala, 3,200, and issued writ and seized certain immovable property on May 15, 1906, which was claimed by the plaintiff, who

[1] (1905) 2 *Bal.* 41

[2] (1906) 2 *Bal.* 139.

based his title on a transfer (No. 6,580) executed by the said Ungappu on May 14, 1906. At the claim inquiry it was agreed that as the judgment-debtor was in possession of the property that the claim should be dismissed. Thereupon the claimant brought this action under section 247 of the Civil Procedure Code for a declaration that the property was not liable to be seized and sold under the above writ. The defendant (judgment-creditor) alleged the said transfer was executed by the judgment-debtor fraudulently and without consideration, with the object of defeating his creditors.

At the trial the following issues were framed:—

(1) Did the plaintiff acquire title by the deed pleaded in the first paragraph of the plaint?

(2) Was the transfer in favour of the plaintiff fraudulent and executed without consideration and with the object of defeating the defendant in executing his writ in case No. 3,200 of the Court of Requests of Pasyala?

(3) Has the plaintiff sustained any damages?

The District Judge (A. de A. Seneviratne, Esq.) held that it was not competent for the defendant to raise the second issue in this action, and that the answer disclosed no defence. He accordingly entered judgment in favour of the plaintiff as claimed with costs.

The defendant appealed.

H. A. Jayewardene, for the defendant, appellant.

A. St. V. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

October 10, 1907. HUTCHINSON C.J.—

The appellant, who is the defendant in this action, was execution-creditor in a previous action; in that action he took out a writ of execution, under which a certain land was seized in execution on May 15, 1906. The respondent thereupon put in a claim to the land under section 241 of the Civil Procedure Code; at the investigation of the claim it was agreed that as the judgment-debtor was in possession of the land the claim should be dismissed, and it was dismissed accordingly. The respondent then brought this action against the execution-creditor in accordance with section 247 of the Civil Procedure Code, alleging that he was the owner of the land by virtue of a deed dated May 14, 1906 (the day before the seizure), and claiming a declaration that he was entitled to have the land released from seizure.

The defendant filed an answer admitting the bare execution of the plaintiff's deed, but denying that the plaintiff thereby became the owner of the land, and alleging that the deed was fraudulent and

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without consideration, and executed with the object of defeating him in the execution of his writ; and he claimed that the land was at the date of the seizure, and still is, the property of the judgment-debtor, and as such liable to be sold in execution under the said writ. He did not in terms ask that the deed should be set aside, but he substantially did so; he asserted that it was fraudulent and void, and asked that the action should therefore be dismissed.

The District Judge held that the answer did not disclose a defence which can be maintained in this action, and that the plaintiff's deed cannot be set aside for fraud except in a properly constituted action; and upon reading the plaint and the answer, and upon hearing the arguments on each side, he gave judgment declaring the plaintiff entitled to the land, and ordering the defendant to pay the plaintiff Rs. 50 as damages, and ordering the plaintiff to pay the costs of the action.

The parties were before the Court, and the issue was raised whether the plaintiff had any interest in the land, or whether the deed under which he claimed was fraudulent and void as against the defendant. The Court held that the issue could not be tried in that action, because the action was not properly constituted, meaning, I suppose, that the grantor of the deed was not a party. If the issue should afterwards be tried and should be decided in the defendant's favour, the plaintiff will have got damages for interference with land to which he had no title, and his claim to which was fraudulent; he will have got the damages as the reward of his fraud from the man whom he defrauded. That hardly seems right. The Court should, I think, at least have given the defendant an opportunity of bringing an action to have the issue tried before awarding damages against him.

The question, however, which we are now asked to decide is whether in such an action as this the defendant be allowed to set up this defence, or whether he must bring another action claiming to have the deed declared to be fraudulent and void as against him. The opinions of Judges have differed on this question. Pereira A.J. in *Ossen Lebbe v. Daniel Dias*[1] expressed his opinion, and Wood Renton J. in *Fernando v. Joodt*[2] decided, that the defence could not be set up. In *Abdul Cader v. Annamalay*[3] Bonser C.J. appears to have thought, though it was not necessary to decide it, that the defendant in an action under section 247 might counterclaim.

If the Court, on investigating a claim to property seized in execution, is satisfied that for the reason stated in the claim the property was not, when seized, in the possession of the judgment-debtor or of some one in trust for him, or of his tenant, or that, being in his possession, it was so not on his account or as his own property, the Court must release the property; but if it was in his possession

[1] (1905) 2 *Bal.* 41. [2] (1906) 2 *Bal.* 139. [3] (1896) 2 *N. L. R.* 166.

as his own property, or in the possession of some one in trust for him, or of his tenant, it must disallow the claim (sections 244 and 245). And the party against whom an order under section 244 or 245 is made may institute an action within fourteen days " to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour " (section 247).

Here the Court, having found that the property was in the possession of the debtor at the time of the seizure, disallowed the claim, and the claimant thereupon brought this action within fourteen days.

The execution-creditor contends that the property was liable to be sold in execution of the writ, because the deed on which the claimant relies was void as against him. If the Court should find that the deed was void as against him, I think it follows that the property was so liable. The contention of the plaintiff is that at the date of the seizure the deed was in force, being valid until declared to be void, and that therefore the property was not at the time liable to be sold. But a subsequent judgment declaring that the deed was void would imply that it was void at the date of the seizure.

It is also objected that the grantor of the deed is not a party to this action, and that the issue whether his deed was fraudulent ought not to be tried in his absence. If a formal claim in reconvention for a declaration that the deed is void is necessary, the Civil Procedure Code allows the defendant to set up such a claim. And section 18 empowers the Court, either upon or without the application of any party, to add the name of the grantor as an " added party." Those provisions apply to every action, their object being to enable the Court in one action, instead of in two, to adjudicate on " all the questions involved in the action." The court might refuse to exercise the power given by section 18. If it should so refuse, the execution-creditor would then, if the presence of the grantor of the deed was necessary, be compelled to bring another action; and if the fourteen days allowed by section 247 had then expired, his claim in that action could not be, as it is in this, to have the property declared liable to be sold in execution of the decree in his favour. Possibly it might be for a declaration that the claimant's deed was void; and perhaps, if he succeeded in obtaining such a declaration, he might then take out a fresh writ of execution and have the property seized again. But I see no reason to doubt that the Court has the power to add the grantor as a party in the present action.

I think, therefore, that the judgment of the District Court should be set aside and the case sent back to enable the grantor of the deed to be added as a party to this action and for trial of the second issue proposed by the defendant on September 27, 1906. I would make no order as to the costs of this appeal.

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MIDDLETON J.—

This was an appeal by an execution-creditor, who was defendant in an action under section 247 brought against him by an unsuccessful claimant of the property of defendant's execution-debtor, against a judgment, holding that the property seized was at the date of the seizure not liable to be seized and sold as the property of defendant's execution-debtor.

The plaintiff upon the claim inquiry consented to his claim being dismissed, and then brought this action under section 247. The defendant, being decree-holder in action C. R., 3,200, against one Ungappu, caused the Fiscal to seize certain property of his debtor on May 15, 1906. On May 14, 1906, the plaintiff, by deed No. 6,580 registered on June 19, 1906, purchased the property subsequently seized from defendant's judgment-debtor Ungappu.

In his answer the defendant alleged that the transfer of May 14, 1906, was fraudulent and without consideration, and executed for the purpose of defeating the plaintiff in the execution of his writ. and without making a claim in reconvention sought the dismissal of the action.

Possession *ut dominus* at the date of seizure is, in my opinion, the criterion of liability to seizure (7 *N. L. R.* 195; 10 *N. L.R.* 44). Such a deed as the plaintiff relies on is not in itself void, but can be avoided if it is shown that it was executed in fraud of the plaintiff. Beyond the fact that the deed was executed one day before the seizure there is nothing to show it was fraudulent, or that Ungappu had not other property sufficient to meet the debt due by him to the defendant.

There was no evidence taken in the case, and the defendant did not claim in reconvention, and the ground the District Judge went on was that the deed must be held good until it is declared void for fraud. There is no reason therefore on the record why the judgment of the District Judge should not stand.

Assuming, however, that there was evidence that the deed was fraudulent to the knowledge of the plaintiff as against the defendant, the Court would in a so-called Paulian action declare by its judgment that the deed was void; in other words, that the property had not been conveyed. This would imply that at the date of seizure the possession *ut dominus* was still in the defendant's judgment-debtor

In the Ceylon Courts it has not been the practice, so far as I am aware, to distinguish between Paulian and rescissory actions (*Voet bk.* 41, *tit.* 8, De Vos' translation), but in what is known as the Paulian action the Courts here have granted rescission of contracts. The distinction between the two actions appears to be that the Paulian action was *in personam* and the rescissory action *in rem* (*Voet* 42, 8, 2, and 12, De Vos' translation), so that, strictly speaking, an action to avoid a deed and to recover the thing

fraudulently conveyed would be an action *in rem* and so not a Paulian action.

It has hitherto not been the practice, except, as I understand, in the Colombo District Court, to cite the judgment-debtor on a claim inquiry or to make him a party to an action under section 247.

In an action also under section 247 Pereira A.J. in *Ossen Lebbe v. Daniel Dias*[1] doubted whether an issue can be raised that the property in dispute has been transferred by his judgment-debtor in fraud of the judgment-creditor, and my brother Wood Renton in *Fernando v. Joodt*[2] held that such an issue cannot be raised.

One ground for those decisions might be the view that it was useless to allow it to be raised, inasmuch as the effect would be valueless to the judgment-creditor, because the order of the Court setting aside the deed might not affect its validity at the date of seizure, which is the test of the action.

In my opinion, however, if the Court in its judgment declared the deed was void on account of fraud, as it would be entitled to declare if fraud were proved on both sides, the effect of that declaration would be to declare that the *property had not been conveyed*, and therefore at the date of the seizure was the property of the judgment-debtor and liable to be seized. I, therefore, can see no reason under the Civil Procedure Code why a claim to set aside the deed might not be added to the plaint in an action under section 247, or be pleaded in the answer in reconvention, as in a case like the present where the judgment-creditor is the defendant.

The matter put in issue under sections 241—247 is whether the property seized is that of the judgment-debtor, and I do not accede to the proposition that the sequence of sections 243 and 246 show that it is only property belonging to the judgment-debtor, or over which he had a disposing power at the date of seizure, which can be put in issue under section 247.

I think that in such a case as the present, as I said in my judgment in 284, *D. C., Batticaloa*, 2,192,[3] the judgment-debtor should be cited as a party defendant under section 14 of the Civil Procedure Code as being a person against whom the right to some relief is alleged to exist, he having fraudulently conveyed his property, which was liable for his debts, to a third person. The effect of this is to obviate the necessity of another action to set aside the deed and to enable justice to be done conveniently and speedily. In my opinion, therefore, the defendant should be allowed to amend his answer if he desires to prove that the deed was fraudulent, by claiming that the deed be declared void at the date of its execution.

For this purpose I would set aside the judgment of the District Judge and send the case back for the necessary amendment and citation of the judgment-debtor and trial. Under the circumstances

[1] (1905) 2 *Bal.* 41. [2] (1906) 2 *Bal.* 139.
[3] *S. C. Min. Aug.* 17, 1908.

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I would order each party to bear his own costs of this appeal, and leave the question of costs of all proceedings in the District Court to be decided by the District Judge in his judgment in the case.

WOOD RENTON J.—

I think that this appeal should be dismissed with costs. The sequence of sections 243 to 246 of the Civil Procedure Code seems to me to show that it is only property belonging to the judgment-debtor, or over which he had disposing power, at the date of seizure that can be put in issue in an action under section 247. In support of this view I refer to the following decisions:—*Abdul Cader v. Annamalay*,[1] *Wijewardene v. Maitland*,[2] *Silva v. Kirigoris*,[3] *Silva v. Nona Hamine*.[4] By the common law of the Colony (see *Vander Keesel, Thes.* 200; *Grotius* 2, 5, 4; *Voet* 42, 8) an alienation alleged to be in fraud of creditors is not void but voidable; that is to say, valid till it is set aside and not invalid till it is confirmed (*cf.* on this point *Duncan v. Dixon*),[5] and the appropriate remedy for setting it aside is the Paulian action. It follows, therefore, that if a judgment-debtor has prior to the seizure alienated his property, the property so alienated does not belong to him; nor has he any disposing power over it at the date of seizure, if the deed of alienation is then still in force. Even if under the Roman-Dutch Law the setting aside of a deed by the Paulian action as a fraud on creditors relates back to the date of the conveyance and involves as a matter of common law and not merely of Prætorian remedy (*Voet* 42, 8, 11) the restoration of intermediate fruits, I still think it would not do so for the purpose of the strictly limited statutory procedure under section 247. A Fiscal's conveyance relates back to the date of the execution sale, and therefore enures to the benefit of a party to whom the execution-purchaser conveyed it before obtaining the Fiscal's conveyance (*Abubakker v. Kalu Ettena*[6]). But the relation back does not apply to proceedings under section 247 (*Silva v. Nona Hamine, ubi sup.*). I think that the view taken by Pereira A.J. in *Ossen Lebbe v. Dias*[7] and again in D. C., Galle 7,555,[8] and followed by myself in *Fernando v. Joodt*[9] was sound. If it creates any hardship, the Legislature can deal with the question. In England the statutory rules regulating interpleaders (R. S. C. Ord. 57, *rr.* 7 and 8) give the Courts wide powers to add parties and to secure the trial of any question that may arise either summarily or by the framing of an issue according to its difficulty and importance. At present we have, as regards proceedings under section 247, no adequate machinery of this kind in Ceylon. Under section 18 of the Civil Procedure

[1] (1896) 2 *N. D. R.* 166.
[2] (1898) 3 *C. L. R.* 7.
[3] (1903) 7 *N. L. R.* 195.
[4] (1906) 10 *N. L. R.* 44.
[5] (1890) 44 *Ch. D.* 211.
[6] (1889) 9 *S. C. C.* 32.
[7] (1905) 2 *Bal.* 41.
[8] *S. C. Min., Aug.* 23, 1905.
[9] (1906) 2 *Bal.* 139.

Code it might no doubt be competent for the Court to add a party simply as "added party," where, as here, it is difficult to describe him correctly as either a plaintiff or a defendant. But the decisions, as they stand, place grave difficulties in the way of any such manipulation of section 18 of the Code. On the one hand, it has been held that a judgment-debtor is not a "party" against whom an order is passed within the meaning of section 247 (*Silva v. Gunewardana*[1]), though he may be entitled to notice (*Silva v. Silva*[2]). On the other hand, the Court has repeatedly said that there cannot be a finding that a conveyance is fraudulent unless the vendor has been made a party to the action (291, Matara, D.C., 1,015,[3] Layard C.J. and Grenier J., 284, D.C., Batticaloa, 2,192[4]). In addition to all this the Civil Procedure Code contains no special provision for securing the full trial of the issue of fraudulent alienation such as we find embodied in the English rules. If such provision is to be made it should be the work of the Legislature and not of the Judiciary.

I regret to differ in this case from the rest of the Court. But I have formed a strong opinion on the question before us, and I record it for what it is worth.

Appeal allowed: case remitted.