1940 *Present :* **Soertsz and Keuneman JJ.**

FERNANDO *v.* FERNANDO *et al.*

96—D. C. Negombo, 10,615.

Paulian action—Claim for unliquidated damages ex-delicto—Notification of claim—Claim reduced to decree—Alienation after claim—Insolvency of debtor—Right of creditor to impeach alienation.

A person who has a claim for unliquidated damages cannot maintain a Paulian action until his claim has been reduced to a decree.

Where, prior to the date of the alienation sought to be impugned, a cause of action *ex-delicto* had accrued to a person, who had notified his intention of bringing an action, and where the alienor knew that in consequence of the alienation there would be no assets or insufficient assets to levy execution upon.

Held, that the creditor was entitled to have the deed set aside on the ground of fraudulent alienation.

Fernando v. Fernando (*26 N. L. R. 292*) and *Silva v. Mack* (*1 N. L. R. 131*) referred to.

APPEAL from a judgment of the District Judge of Negombo.

H. V. Perera, K.C. (with him *L. A. Rajapakse*), for plaintiff, appellant.

N. Nadarajah (with him *H. A. Wijemanne*), for first defendant, respondent.

June 28, 1940. KEUNEMAN J.—

The plaintiff brought this action against the first and second defendants, praying that she be declared entitled to the lands mentioned in Schedules "A" and "B" of the plaint, that the second defendant be declared not entitled to the said lands, and that the said lands be declared not liable for seizure or sale for any debt or liability of the second defendant, for damages and costs. The plaintiff alleged that the second defendant, her husband, conveyed to her by deed P 1 of September 17, 1935, the lands mentioned in Schedule "A" for valuable consideration, and by the same deed conveyed to her the lands in Schedule "B" which he was holding in trust for her. She alleged that the first defendant, her brother, obtained a decree in D. C. Negombo, No. 9,022 for damages Rs. 3,000 and for costs Rs. 530.72½, as against the second defendant, and had seized in execution fifteen out of the eighteen lands conveyed on deed P 1. The plaintiff had claimed the said lands in D. C. Negombo, No. 9,022, but her claim was dismissed.

The first defendant filed answer praying that the action be dismissed, and that the lands mentioned in Schedules "A" and "B" of the plaint be declared liable to seizure and sale in execution of writ in D. C. Negombo, No. 9,022. He further prayed that the deed P 1 be declared null and void, as the said deed was executed in fraud of creditors.

The second defendant admitted the allegations in the plaint but prayed that he be not condemned to pay damages and costs.

After trial, the learned District Judge dismissed plaintiff's action with costs to be paid to the first defendant, and the plaintiff appeals.

In evidence it was established that the second defendant shot and injured the first defendant on September 2, 1934. The second defendant was charged with having voluntarily caused grievous hurt, and was convicted and sentenced to a fine of Rs. 1,000 and imprisonment till the rising of the Court. Out of the amount paid Rs. 750 was paid to the first defendant as compensation. By his proctor's letter (P 15 or 1 D 1), dated September 9, 1935, the first defendant claimed damages from the second defendant to the amount of Rs. 15,000. No reply was received to this letter, and the first defendant subsequently filed action D. C. Negombo, No. 9,022 and, on March 25, 1936, decree was entered for Rs. 3,000 and costs in this action. The second defendant appealed, but his appeal was dismissed. The costs in the case were taxed at Rs. 530.72½.

Meanwhile, on September 17, 1935, the second defendant executed the deed P 1, conveying to his wife, the plaintiff, the lands mentioned in Schedules "A" and "B" of the plaint. The second defendant stated in evidence that the letter of demand, P 15 or 1 D 1, was not received by him till after the execution of P 1, but the District Judge has rejected this evidence, and has held that the letter was received two or three days after its despatch and before the execution of P 1. I agree with the District Judge in this respect.

The principal points argued before us in appeal were as follows :—

(1) That the first defendant could not be regarded as a creditor of the second defendant at the date of P 1, namely, September 17, 1935, as his decree was not obtained till March 25, 1936.

(2) That there was no evidence that the second defendant was insolvent at the date of P 1, as there were no debts proved as being in existence on that date. There is no proof that there was any indebtedness on the part of the second defendant to any other person than the first defendant.

(3) That the deed P 1 could not be set aside, because the lands in Schedule "A" were sold to the plaintiff for valuable consideration, and the lands in Schedule "B" had been held by the second defendant in trust for the plaintiff ; and

(4) That there is sufficient property in the hands of the second defendant, whereby the first defendant's claim can be realized in full, namely, the lands mentioned in deed P 2, dated June 29, 1932, which is a transfer by Peduru Fernando to the second defendant, and also certain movable property of the second defendant.

I think it is convenient to deal with argument (4) first.

By deed P 2 of June 29, 1932, Peduru Fernando purported to convey to the second defendant for the consideration of Rs. 2,400 a one-sixth share of twenty-one lands. The entirety of these lands had belonged to Abraham Fernando, father of Peduru Fernando and of the first defendant. Abraham Fernando, by his last will of June 20, 1911 (1 D 3), devised these lands and certain other lands to his wife Maria Fernando, and ordered that "she shall after filing the final account of my estate divide and set over the said property unto my and her children who are living at that time as she and Pattage Manuel Fernando who will be appointed executor please". Abraham Fernando died about 1915, and the will was admitted to probate in D. C. Negombo (Testy,) No. 1,533, and the final account was filed in March, 1916, and was passed and settled about two years after the death of the testator.

Maria Fernando, an old lady of about eighty years of age, was called by the plaintiff, and stated :

> "I was directed by the will to divide the estate. I did not divide the property. I told my children to possess the lands. I do not claim the lands possessed by the children. Peduru possessed some estate lands . . . . I did not execute a deed in my children's names. They are in possession . . . . ".

On June 1, 1918, Manuel Fernando, the executor of Abraham Fernando's estate, sued Maria Fernando in D. C. Negombo, No. 12,818 for the sum of Rs. 1,633 on the footing that Maria Fernando, the sole heir of the deceased, undertook to pay that amount to him. In her answer, Maria Fernando denied that she was the owner of the deceased's estate, and added :

> "The estate (was) handed over to her children about two years ago as desired by the testator, and the defendant states the plaintiff's action if any is against them and not against her whose interest (ceased) with the filing of the Final Account."

This answer was filed on July 9, 1918 (*vide* P 10). We are not aware of the result of this litigation as no decree in the case has been filed.

I do not think the statement in the answer can be regarded as accurate. The injunction of the testator was that the estate should be divided among the children as Maria Fernando and the executor, Manuel Fernando, pleased. The mere "handing over" of the estate was not contemplated by the testator. There is no allegation that this "handing over" was done with notice to the executor or with his approval. I am inclined to agree with the District Judge that this was merely a statement made to evade a claim. What the testator contemplated was a division of the estate approved by Maria Fernando and the executor, Manuel Fernando. The division need not necessarily be in equal shares or in equal values. For the purpose of passing title to the children, Maria Fernando would have to execute a deed or deeds. In point of fact, all that happened, as Maria Fernando herself says, is that she told the children to possess the lands. It was open to her at any time to execute deeds of division, and I think the children could by action compel her to do so.

If was further argued that Peduru had since that date perfected his title to one-sixth of the lands in question by prescription. The evidence of prescription is very weak, and I think the District Judge has rightly rejected that evidence. I may add that there is specific evidence to the contrary given by the first defendant.

After the present action was filed, Maria Fernando has executed a deed of disclaimer. P 18 dated July 21, 1938, whereby she disclaimed title to the one-sixth shares of the twenty-one lands dealt with by Peduru Fernando in P 2, and purports to confirm and ratify P 2. I do not think this makes any difference in the present case. I am inclined to think that Peduru had no title to convey the shares of the lands dealt with in P 2. and that no title in these lands has passed to the second defendant.

The District Judge has held that in any event the lands dealt with in P 2 were not of sufficient value to enable the first defendant to realize his claim and costs in full. Two of these lands have been transferred by P 1 to the plaintiff. Apart from the value as disclosed in the deed P 2 it must be remembered that what the purchaser in execution would get would, at the best. be a litigation, and consequently he would not be willing to pay anything more than a nominal amount. I think that for all practical purposes the value of this asset, if it can be regarded as an asset. is nil. The movable property of the second defendant is of small value. and falls far short of the first defendant's claim.

I now propose to deal with argument (3) advanced by plaintiff's Counsel.

The first question is whether the lands mentioned in Schedule "A" of the plaint were transferred to the plaintiff for valuable consideration. The consideration stated in the deed is Rs. 5,000. The plaintiff alleged that this sum was spent by her in the defence of the second defendant in the criminal case, and also for medical and other expenses during his illnesses. The District Judge has taken into consideration the fact that the plaintiff borrowed certain amounts about the time of the criminal case. but does not accept the story of the plaintiff that any amounts borrowed were spent on the second defendant. He has also considered

the financial position of the second defendant as disclosed in the vidence, and has come to the conclusion that the second defendant did not need his wife's assistance to pay his bills. It was alleged that P 1 was executed because the second defendant was seriously ill at the time and not expected to live, and that pressure was put upon the second defendant to execute P 1 in order to ensure to the plaintiff the amount borrowed from her. The District Judge does not accept the story of this serious illness. He further comments on the fact that the value of the lands in Schedule "A" of the plaint was about Rs. 12,000, to judge from the consideration stated in the deeds by which the second defendant obtained title. For her alleged debt of Rs. 5,000 the plaintiff obtained lands worth over double that amount. I think it is difficult to resist the conclusion, accepted by the District Judge, that the transfer was not made in good faith, and was without valuable consideration.

As regards the lands included in Schedule "B" of the plaint, the plaintiff produced mortgage bonds P 4, P 5, and P 6, of 1925, and P 3 of 1927, where certain sums of money were lent out in her own name. In 1933, on deeds P 7, P 8, and P 9, the lands mortgaged on these bonds were transferred to the second defendant in satisfaction of the mortgage debts. These are the lands in Schedule "B". The plaintiff alleged that the moneys lent out on P 4, P 5, P 6, and P 3, were her moneys, and that the second defendant held the lands transferred to him on P 7, P 8, and P 9, in trust for her. The first defendant alleged that the moneys lent out on P 4, P 5, P 6, and P 3, were the moneys of the second defendant, and that he lent these out in the name of his wife, the plaintiff, because he was a Government servant, and that, after his retirement, he had the transfers made out in his own name.

The District Judge has rejected the story of the plaintiff and the second defendant, and has accepted the story of the first defendant. As the District Judge points out, the explanation offered that P 7, P 8, and P 9 were made out in the second defendant's name because he had to institute partition actions cannot be true, because the plaintiff was accustomed to litigation and in point of fact brought a partition suit for one of the lands in Schedule "B". The second defendant, on the other hand, was an invalid. No partition action has been brought by him. It is further to be noticed that in P 1 there is no suggestion that the lands in Schedule "B" were held in trust for the plaintiff, and no attempt was made to differentiate them from the lands in Schedule "B". In fact, in the deed P 1, there are not two Schedules. All the lands were transferred as the property of the second defendant. The District Judge further rejected the plaintiff's story that she had money enough to lend out of her dowry and her savings. I uphold the findings of the District Judge in this connection.

The way is now open to examine arguments (1) and (2) of the plaintiff's Counsel. He argued with much force that the first defendant could not be regarded as a creditor of the second defendant, and that there was no debt due to the first defendant from the second defendant till March 25, 1936, when decree was entered in D. C. Negombo, No. 9,022. He contended that the first defendant must be regarded at the date of deed P 1 as a future creditor, and urged that a future creditor was in no

better position than an antecedent creditor, and had to prove that the voluntary alienation rendered the debtor insolvent at the time of the alienation. He urged that the subsequent debt must not be taken into account in determining the question of insolvency.

In *Fernando v. Fernando* [1], a problem somewhat akin to the present question was raised. Bertram C.J. discussed the question whether a person who has only an unliquidated claim for damages is a creditor for the purpose of the Paulian action. He pointed out that Pothier in his *Commentary on the Pandects* expressed the opinion that a person to whom something is due *ex-delicto* may be considered a creditor. He proceeded to show that there were two views as to what constituted a "creditor" among the Roman jurists. One was that a creditor was a person who relied upon the good faith of another. The other was that anyone to whom anything was due for any cause was a creditor. Bertram C.J. did not decide this matter, but found a solution, namely, that a person may be considered to have formed a design to defraud future creditors. Prejudice caused by such a design, he said, was within the scope of the remedy. He referred to the judgment of Judge Berwick (*vide infra*). He continued.

> "The action does not lie unless the plaintiff can show not only a fraudulent intention, "*concilium*", but also actual prejudice "*eventus*", demonstrated by legal process."

Jayawardana A.J., in the same case, was of opinion that the term "creditor" would not include persons having claims for unliquidated damages arising out of breach of contract, or *ex-delicto*. But he went on to add that once decree was entered in favour of a person who had such a claim, he was entitled to put in issue the question of alienation in fraud of creditors.

At least one point can be regarded as settled in that case, namely, that where the claim is for unliquidated damages, the person who has such a claim cannot maintain a Paulian action, until his claim has been reduced into the form of a decree.

In the present action the first defendant has a decree in his favour. But this does not dispose of the whole matter. Is it necessary that the first defendant should prove insolvency on the part of the second defendant at the time of the deed P 1, leaving out of account the amount of the decree subsequently obtained?

In this connection the case of *Silva v. Mack* [2] is important. The judgment of Judge Berwick in the District Court is given *in extenso*, and is valuable, not only because of the full and able discussion of the authorities bearing on the matter, but also because it appears to have been accepted by the Supreme Court. Judge Berwick considered the principle of the English Law, whereby the element of fraudulent intent seems to be entirely eliminated, and a subsequent debtor may impeach a voluntary settlement, if there be still existing at the time of the impeachment any debt contracted antecedent to the settlement. He asked whether this was also the Roman-Dutch law, or, failing facilities to

[1] *26 N. L. R. 292.*

[2] *1 N. L. R. 131.*

answer the question in that form, the Civil law. He continued: "It appears to me that the Civil law requires a concurrence of prejudice and fraudulent intention immediately directed against the person who seek to impeach the deed; that is to say, there must be both these circumstances, and they must also meet in the same person". But where the creditor who was intended to be defrauded was paid off with money of subsequent creditors, the latter were entitled to impeach the fraudulent act. These two elements are further emphasized again where Judge Berwick quotes with approval a passage from *Kent's Commentaries* to the effect that in Louisiana a deed cannot be set aside as fraudulent unless it be proved to have been made with an intention to defeat future creditors. He adds:

> "This I consider exactly to express the law of this country, if we add the words, 'or unless it be proved that a person, who was a creditor at its date, has been paid with the money of the subsequent creditor who seeks to set it aside'. And with this addition it exactly and tersely summarizes what I have decided on the points raised in this suit".

I agree that this is the correct conclusion to be drawn from the authorities discussed.

But the question still remains whether the alienation must cause insolvency to the alienor immediately. On this point no direct authority has been cited to us. But, I am inclined to think that such a view would place an unnecessary restriction on the person defrauded. In this case, it has been established that the alienation was made by the second defendant fraudulently and with the express intention of hindering and defeating the claim of the first defendant. It is clear that prior to the date of the alienation a cause of action *ex-delicto* had accrued to the first defendant, and that the first defendant had notified to the second defendant his intention of bringing an action for damages. I hold that the second defendant knew that, in consequence of the alienation, the first defendant would not be able to realize his decree, in other words, that he acted so that when the decree came into being, there would be no assets or insufficient assets to levy execution on. In fact the second defendant was deliberately rendering himself insolvent as against the time that the decree would come into being. In the result, the claim of the first defendant has been defeated. Further, it is not possible to acquit the plaintiff from complicity in this matter.

I do not think it is necessary to go as far as to hold that the first defendant was a creditor of the second defendant, or that there was a debt due to him at the time of the alienation. I may add, however, that I incline towards holding that he was a creditor *ex-delicto*, and, therefore, to be regarded as an antecedent, and not as a subsequent, creditor. It is sufficient to say that even if he is to be regarded as a subsequent creditor, he has established the conditions necessary to enable him to succeed in his action. I think this finding is in conformity with the argument of Bertram C.J. in *Fernando v. Fernando* (*supra*), and not at variance with that of Jayawardana A.J. in the same case, and that it follows also from the decision in the case of *Silva v. Mack* (*supra*).

Further, I do not think it is in conflict with *Voet's Commentary on the Pandects (42-8-14)*:

"There must be fraud on the part of the alienating debtor, and two things are necessary before this can be alleged, to wit, that he should have had a fraudulent intention, knowing that he was not solvent, and nevertheless diminishing his estate, although he may not have intended to defraud this or that particular person; and the result should have corresponded with the intention so that the creditors are unable to obtain their own; and finally, that the fraudulent intention and the result should both meet in the person of the creditor, unless he, whom the debtor originally intended to defraud, has been paid from the money of the person whom he has defrauded in fact."

I see no reason why the words, "knowing that he was not solvent, and nevertheless diminishing his estate", should not cover the facts of the present case.

I may add that in *Muttiah Chetty v. Mohamood Hadjiar* [1], Ennis A.C.J., following Hutchinson C.J. in *Saravanai Arumugam v. Kanthar Ponnampalam* [2], laid down the circumstances under which a fraudulent intention can be inferred among them "(4) that the transfer left (the debtor) without any property, and (5) or without enough to pay the debts which he owed at the time or was about to incur".

The appeal is dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.