1935 *Present :* **Akbar J. and Koch A.J.**

DEUTROM *v.* DEUTROM *et. al.*

63—D. C. Colombo, 54,544.

Paulian action—Maintenance order in favour of wife—Distress warrant in execution against the husband—Fraudulent transfer of mortgage bond by the husband to avoid payment—Paulian action by wife—No cause of action.

Where the plaintiff instituted a Paulian action to set aside the assignment of two mortgage bonds by the first defendant in favour of the second defendant in order to levy execution against them under a distress warrant issued against the first defendant (plaintiff's husband) under the Maintenance Ordinance,—

***Held*, that the plaintiff had no cause of action as the assets represented by the mortgage bonds could not have been levied in execution of the order for maintenance in her favour.**

THIS was an action instituted by the plaintiff, wife of the first defendant, to have a deed of assignment of two mortgage bonds by the first defendant in favour of the second defendant set aside as being void in fraud of creditors.

Plaintiff instituted maintenance proceedings against the first defendant and obtained an order and on March 7, 1933, notice was served on the first defendant to show cause why a distress warrant should not be issued against him for the recovery of arrears of maintenance. On March 11, 1933, the first defendant assigned his interests in two mortgage bonds to the second defendant.

The learned District Judge gave judgment for the plaintiff, holding that the deed of assignment was executed in fraud of creditors.

H. V. Perera (with him *D. W. Fernando* and *G. E. Chitty*), for second defendant, appellant.—The plaintiff in this case is not a creditor in the sense that she would be entitled to bring a Paulian action. She has merely an order for maintenance in her favour against the first defendant. A liability for maintenance is not a civil liability (*Menikhamy v. Loku Appu*[1]).

She cannot assign the order for maintenance to a third party nor can she execute it against the first defendant except as provided by the Maintenance Ordinance, No. 19 of 1889. Section 9 empowers a Magistrate in the event of a breach of an order for maintenance to issue a warrant directing the amount due to be levied in the manner by law provided for levying fines by Police Magistrates in the Police Courts. Section 312 (2) of the Criminal Procedure Code provides for the recovery of fines by "distress and sale" of any movable property of the offender. Distress can only be levied on property title to which can pass by delivery. (See definition of "Distress" in *Bell's Legal Dictionary.*) The deed sought to be set aside is a deed of assignment of two mortgage bonds. A mortgage bond is a chose in action and cannot therefore be distrained and sold. (See *B. Mutoscope Co. v. Homer* [2].) A creditor who is entitled to bring a Paulian action must be one who is prejudiced by the alienation (*Punchi Menika v. Dingiri Menika* [3]). Further, he must satisfy the Court that the property fraudulently alienated was available to him for execution against the debtor (*Fernando v. Fernando* [1]). The plaintiff in this case is not prejudiced by the assignment of the bonds nor were the bonds available to her for execution against the first defendant. Even if the assignment is set aside the plaintiff cannot seize the interest of the first defendant on the two bonds. The decree in a Paulian action made a fraudulent deed void only so far as it was necessary to make the property available for execution (*Banda v. Perera* [5]).

H. E. Garvin (with him *S. Alles*), for plaintiff, respondent.—The plaintiff is prejudiced by the assignment of the mortgage bonds. A mortgage bond is a movable which can be distrained and sold. The arrears of maintenance amounts to a large sum of money. It may be possible for the plaintiff to obtain a decree of Court for the amount of arrears and execute the decree against the property of the first defendant. Plaintiff is a creditor who is entitled to maintain a Paulian action.

H. V. Perera, in reply.—The interest under a mortgage bond cannot be assigned by mere delivery. A notarially executed document is necessary for the assignment of a mortgage bond (*Sockalingam Chettiar v. Wijegoonewardane* [6]). Certain class of choses in action may be assigned by mere delivery (*The Noordam* [7]).

Cur. adv. vult.

June 21, 1935. AKBAR J.—

This is a Paulian action by the plaintiff, wife of the first defendant, for a declaration that a certain deed of assignment by the first defendant in favour of the second defendant was void as it was in fraud of creditors. It appears that the plaintiff instituted a maintenance action (A. P. C. Colombo, No. 14,413) and obtained an order against the first defendant, her husband, and on March 7, 1933, a notice was served on the first defendant to show cause why a distress warrant should not be issued against him for the recovery of Rs. 1,425 being arrears of maintenance.

[1] *1 Balasingham's Reports 161.*
[2] *(1901) 1 Ch. D. 671.*
[3] *3 C. A. C. 93.*
[4] *4 C. W. R. 143.*
[5] *30 N. L. R. 355.*
[6] *13 Ceylon Law Recorder 138.*
[7] *(1920) A. C. 904.*

The first defendant had lent moneys to plaintiff's father on two mortgage bonds, viz., No. 92 of December 1, 1935, for Rs. 500 and No. 162 of March 24, 1927, for Rs. 300, and by deed No. 839 of March 11, 1933 (just 4 days after notice was served on the first defendant in the maintenance case), first defendant assigned his interests under the two bonds to the second defendant, his aunt, for an alleged consideration. It is this deed of assignment which is the subject-matter of this action. There were 5 issues framed, the 5th being as follows:—

(5) Can the plaintiff have and maintain this action inasmuch as the claim set out in the plaint as being due to her by the first defendant was a claim for arrears of maintenance due to her in case No. 14,413, A. P. C., Colombo ?

The District Judge gave judgment for plaintiff holding that the deed of assignment was executed in fraud of creditors and also on issue 5 that plaintiff could maintain this action. The appeal has been pressed on us by second defendant-appellant's counsel on the law on issue 5. Unfortunately the learned Judge has not discussed the law arising on issue 5, but as there is the issue and the learned District Judge has held against the appellant on this issue, the appellant is entitled to ask for a decision from this Court on it. It is argued for the appellant that the plaintiff was not a creditor in the sense that she would be entitled to bring a Paulian action on two grounds—(*a*) that she was not a creditor, and (*b*) that even if the deed of assignment is set aside she would not be entitled to seize the interest of the first defendant on the two mortgage bonds in satisfaction of the sum due to her on the maintenance orders. It has been held in *Menikhamy v. Loku Appu*[1] that a liability for maintenance is not a civil liability. All maintenance actions are regulated by the Maintenance Ordinance, No. 19 of 1889, and under section 3 a Police Magistrate is empowered to make order directing a husband who, having sufficient means, neglects or refuses to maintain his wife, to pay a monthly allowance for such maintenance and also to pay to such person as the Magistrate may from time to time direct. Under section 9 if a person against whom a maintenance order has been made commits a breach of that order the Magistrate is given the power to issue a warrant directing the amount due to be levied in the manner by law provided for levying fines imposed by Police Magistrates in the Police Courts. The Police Magistrate may also sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to simple or rigorous imprisonment for a term which may extend to one month. The method of recovering fines imposed by Police Courts is provided for in section 312 (2) of the Criminal Procedure Code, 1898, and under that section the levy of the amount is made "by distress and sale of any movable property belonging to the offender". Now the word "distress" only conveys the idea of "goods" or "chattels" which can be seized (see definition of "distress" and "goods" in *Bell's Legal Dictionary*). The form of the distress warrant given in the old Criminal Procedure Code (Ordinance No. 3 of 1883) also conveys the idea of the movable property being capable of seizure. Further, the word "sale" in section 312 can only suggest the sale of such

[1] *Balasingham's Reports* 16.

movable property which the Fiscal can seize and sell and pass the title in it to a purchaser by delivery of possession. The two mortgage bonds are not movable property of this description. There is no provision in section 312 for the passing of the rights of the mortgagee on a mortgage bond to a purchaser on the execution of a document by a specified person (see section 60 of the Criminal Procedure Code) or for the issue of a notice on the mortgagor not to make any payments to the mortgagee on the mortgage bond.

A chose in action is not movable property of this description (see *B. Mutoscope Co. v. Homer*[1]) unless it is a chose in action where title to it can be passed by delivery of a document (*The Noordam No. 2 and other Ships*[2]). So that it will be seen that the plaintiff could not have seized first defendant's interest in the mortgage bonds under a distress warrant issued under the Maintenance Ordinance. In *Fernando v. Fernando*[3] Bertram C.J. held that a Paulian action does not lie unless the plaintiff can show not only a fraudulent intention "*consilium*" but also actual prejudice "*eventus*" demonstrated by a legal process, that is to say, that the action is only competent to a judgment-creditor who can show that by reason of the alienation complained of the judgment-debtor has no assets on which execution can be levied, or that assets on which it has already been levied are insufficient to satisfy the debt. In the case before me, the assets represented by the mortgage bonds could not have been levied by the plaintiff on her maintenance order whether the deed of assignment was executed or not by the first defendant. Hence the plaintiff had no cause of action on which to sue in this action.

In *Banda v. Perera*[4] it was held that the decree in a Paulian action made a fraudulent deed void only so far as it was necessary to make the property available for execution. In my opinion, much as I regret it in view of the strong finding of fact by the learned trial Judge, the appeal must be allowed and the plaintiff's action dismissed with costs in this Court and the Court below.

KOCH A.J.—

The plaintiff, who alleged that she was a creditor of the first defendant, sued the first defendant and the second defendant for a declaration that a conveyance No. 831, dated March 11, 1933, executed by the first defendant in favour of the second defendant be declared null and void on the ground that it was a fraudulent alienation collusively effected in deprivation of the plaintiff's rights as a creditor.

The facts are briefly these. The plaintiff, who was the wife of the first defendant, instituted maintenance proceedings in A. P. C., Colombo, No. 14,413, against her husband and obtained an order from the Magistrate for the payment of a monthly allowance of Rs. 50 for herself and her child. The first defendant paid nothing on that order with the result that the arrears stood at Rs. 1,425 on March 2, 1933. On that day she filed an affidavit and moved for a distress warrant against the first defendant. Notice was issued and served on him to show cause. The parties appeared in Court on March 17 and after hearing them the Magistrate ordered a distress warrant to issue.

[1] (*1901*) *1 Ch. D. 671.*
[2] (*1920*) *1 A. C. 904.*
[3] *26 N. L. R. 292.*
[4] *30 N. L. R. 355.*

At this date there were outstanding in the first defendant's favour two mortgage bonds No. 92 of December 1, 1925, and No. 162 of March 24, 1927, for sums of Rs. 500 and Rs. 300 respectively, with interest. These the first defendant purported to assign to the second defendant (appellant) by deed No. 839 of April 11, 1933, for a consideration of Rs. 850. It is the validity of this deed that is questioned in these proceedings. It would appear from the maintenance proceedings that the two bonds in favour of the first defendant were seized under the distress warrant that issued and were advertised for sale. Objection was taken to the seizure by the first defendant on the ground that they could not be seized under the distress warrant, and argument was fixed for June 23, 1933. On that day the plaintiff moved to withdraw the steps she had taken without prejudice to her rights. This was allowed. She thereafter on August 16, 1933, instituted the present action.

The learned District Judge held that the first defendant had acted fradulently and collusively with the second defendant in executing the impugned assignment and declared the deed in question null and void.

One of the issues (No. 5) framed between the parties was in regard to the maintainability of this action, as the alleged debt due to the plaintiff (respondent) was in respect merely of arrears of monthly allowances ordered in maintenance proceedings.

The findings of fact of the learned District Judge in favour of the respondent on the 1st, 2nd, and 3rd issues, which were concerned with the assignment No. 839 being fraudulent and executed in collusion with the second defendant, were hardly challenged, and I see no reason to interfere with them.

The remaining issue runs as follows:—

> "Can the plaintiff have and maintain this action inasmuch as the claim set out in the plaint as being due to her by the first defendant is a claim for arrears of maintenance due to her in case No. 14,413 of the Additional Police Court, Colombo?

This is an issue of law and the learned District Judge has also held on this issue in favour of the respondent. The correctness of this finding, however, has been seriously challenged by the appellant, and the success of the appeal solely depends on whether the view put before us by the appellant's counsel is right.

Now the present action is in the nature of a Paulian action. This action was permitted to a person in certain circumstances by the Roman-Dutch law. The action could only be brought by a creditor, and it was necessary that he should be in a position to prove two conditions ; firstly, that there was fraudulent intent on the part of the debtor to defraud his creditors—not necessarily any particular creditor—secondly, that the creditors have been thereby prevented from recovering their debts. (*Voet 42, 8, 14.*)

The law stated above was followed by Berwick D. J. in *Brodie's case* [1], and approved by Bonser C.J. in *Baba Etana v. Daru Terunanse* [2].

The creditor must be one to whose prejudice the alienation has been effected. (*Punchi Menika v. Dingiri Menika* [3].)

The creditor need not necessarily be a judgment-creditor, but he must be such a creditor as can establish to the satisfaction of the Court that he was a creditor at the time of the execution of the fraudulent deed. (*Baronchi Appu v. Siyadoris Appu* [4].) In doing so he must show that there was a debt actually due to him. It is insufficient if he merely held a claim for unliquidated damages, whether founded on contract or tort. (*Fernando v. Fernando* [5].) Further, he must satisfy the Court that the property fraudulently alienated was available to him for execution against the debtor. (*Fernando v. Fernando* [6].)

In the case before us the respondent (plaintiff) is in the position of one in whose favour an order has been made by a Magistrate in maintenance proceedings against her husband, the first defendant, for the payment of a monthly allowance which had at the date of the fraudulent assignment run into arrears. It is argued by the appellant's counsel that in these circumstances she is not a creditor of the type contemplated under the Roman-Dutch law.

This is a question which judging from the authorities I have already referred to, is not easy to determine, and although I do not dissent from the view taken by my brother Akbar J., I do not decide, and will confine my judgment to the second point raised by Mr. Perera which in my opinion should succeed. He argues that the plaintiff's action must fail if she is herself unable to proceed to execution to recover what is due to her in the ordinary way that a creditor proper could do, and that is by executing the decree when obtained by seizure and sale according to the procedure laid down in the Civil Procedure Code. He further argues that it does not matter that other creditors who are affected by the fraudulent alienation are entitled to proceed in this way. It is the plaintiff's own remedy that concerns us, and if the plaintiff has not the remedy by seizure and sale under the Civil Procedure Code in the ordinary way, the action must fail.

I agree that it is the plaintiff's own remedy that has to be considered. The ruling in *Punchi Banda v. Perera* [7] helps me to this conclusion.

Now the procedure laid down for the enforcement of such an order as the plaintiff in this case has obtained is to be found in section 9 of the Maintenance Ordinance, No. 19 of 1889. The section provides that for every breach of his order the Magistrate may issue a warrant directing that the amount due be levied in the manner provided by law for levying fines imposed by Magistrates in Police Courts. He may also sentence the party neglecting to comply with his order made under section 3 for the whole or any part of the month's allowance to simple or rigorous imprisonment for a term which may extend to one month.

[1] (1887) *Ramanathan 89.*
[2] *2 Br. 355.*
[3] *3 C. A. C. 93.*
[4] *4 C. A. C. 65.*
[5] *26 N. L. R. 292.*
[6] *4 C. W. R. 143.*
[7] *30 N. L. R. 355.*

The manner in which fines imposed by Magistrates in Police Courts may be recovered is to be found in section 312 (2) of the Criminal Procedure Code, *i.e.*, by issuing a warrant for the levy of the amount of the fine *by distress and sale* of any movable property belonging to the offender. It will be seen that the words used are "*by distress and sale*" and not by seizure and sale as is found in the Civil Procedure Code.

It is argued that "distress" can only be levied on property that is corporeal in its nature, on something that can pass by delivery.

In the *Encyclopedia of the Laws of England, vol. IV., p. 626,* "distress" is explained as "a remedy for the redress of an injury or the satisfaction of a demand which consists in the taking *without legal process* of a *personal* chattel from the possession of the wrong-doer or defaulter *into the hands* of the party grieved to be held as a pledge for the satisfaction required".

It has been held in England that only corporeal property can be made liable, but rights of an incorporeal nature (*e.g.*, patent rights) cannot be affected by distress. (*British Mutoscope Co. v. Homer* [1].)

In *Bell's Legal Dictionary* (*South African*), *2nd ed.*, distress is referred to as an English term signifying the taking of the *goods* of another to satisfy some claim.

I think there is ample authority that "distress" can only be levied on goods.

Can a debt due on a mortgage bond be brought within the word "goods"? Such a debt is a chose in action and incorporeal in its nature. The right to recover such a debt cannot pass by the mere delivery of the bond which records it. It cannot pass even by a mere endorsement such as a negotiable instrument or a coupon or a bearer bond known in commerce.

In the case of "*The Noordam*" on appeal from the Prize Court, England, to the House of Lords [2], the point came up for decision whether bearer bonds and coupons shipped by letter mail in Dutch steamships for carriage from Dutch ports to New York, which were seized in the course of the voyage, could be detained under the Reprisal Order in Council of March 11, 1915. These securities had been bought in Germany. The question turned on whether they were "goods" within the meaning of the Order. The judgment of their Lordships was delivered by Lord Sumner, who was of opinion that they were records of proprietary rights *that were transferable* by mercantile usage applicable to them *by delivery*, and that they required no separate assignment nor execution of any instrument of transfer. In addition, their Lordships, being of opinion that this Order was made for the purpose of further restricting the commerce of Germany and in retaliation of the sinking of ships by that country with all they contained, felt that the word "goods" in the Order ought to include goods that having been enemy property may become neutral property at a definable date, and that the

[1] (*1901*) *1 Ch. 671.*

[2] (*1920*) *Appeal cases 904*

language in the Order should be interpreted with reference to the general scope of the Order, and that if securities such as these are not covered by the word "goods", the Order as a means of carrying out its declared policy would contain a large and lamentable lacuna. They were also of opinion that these documents were not mere symbols of a right or title to be transferred by the operation of other instruments. If lost, they could not be proved and given effect to by secondary evidence. They themselves were things of price, the subjects of sale and delivery irreplaceable and unalterable. Their Lordships therefore held that these documents came within the descriptive word "goods".

Can the same be said of mortgage bonds? They are symbols of right that must be transferred by the operation of other instruments. This Court has so held in the case of *Sockalingam Chettiar v. Wijegoonewardena* [1] They are not irreplaceable, and if lost could be proved and given effect to by secondary evidence. I do not think that any doubt can be entertained that a mortgage bond, which is a mere symbol of a right, a chose in action and of an incorporeal nature, and which cannot pass by a mere formal endorsement or delivery, does not come within the word "goods" which only can be distrained.

For these reasons I hold that the respondent has failed to satisfy the Court that the property fraudulently alienated by the first defendant to the appellant is available to her for execution against her debtor.

The judgment of the District Court is set aside and the plaintiff's action is dismissed with costs. The appellant is entitled to the costs of this appeal.

Appeal dismissed.