1960 *Present :* **Weerasooriya, J., and Sinnetamby, J.**

W. A. M. SIRIWARDENA, Appellant, *and* W. A. CHARLES SINGHO and another, Respondents

S. C. 160—D. C. Chilaw, 15125

Paulian action—Fraudulent alienation—Fraud on part of purchaser—Requirement of proof thereof.

In an action to set aside a deed of transfer of property on the ground that it was executed in fraud of creditors, it is essential for the plaintiff to allege and prove either absence of consideration on the transfer or fraud on the part of the purchaser. A solitary issue whether the deed was executed by the vendor to defraud the plaintiff does not suggest any fraud on the part of the purchaser.

APPEAL from a judgment of the District Court, Chilaw.

E. B. Wikramanayake, Q.C., with *Robert Silva*, for the 1st Defendant-Appellant.

Austin Jayasuriya, for the Plaintiff-Respondent.

Cur. adv. vult.

May 12, 1960. WEERASOORIYA, J.—

In D. C. Chilaw Case No. 14362 the plaintiff-respondent obtained a decree, dated the 16th September, 1955, against his daughter, the second defendant-respondent, for the payment of Rs. 3,000/- and costs. The plaintiff caused to be seized in execution of the decree the second defendant's interests in two lands, which interests, it transpired in the course of the inquiry that took place into a claim made to them by the first defendant-appellant, had been transferred to him by the second defendant on deed No. 2716, dated the 5th July, 1955, marked P3.

The claim of the first defendant having been upheld, the plaintiff filed this action to have deed No. 2716 set aside. The second defendant did not contest the action. Apparently she was possessed of no other assets than those dealt with in P3. The first defendant stated in evidence that at the request of the second defendant, who is his cousin, he advanced to her a sum of Rs. 1,600/- and that when he heard that she was sued in

D. C. Chilaw Case No. 14362 he got the transfer P3 in order to "safeguard" the money which he had advanced. P3, on the face of it, is for a consideration of Rs. 5,000/-. According to the attestation in the deed, out of this consideration, "a sum of Rs. 1,600/- was paid in advance on an informal agreement", a sum of Rs. 100/- was paid in the presence of the notary and for the balance a promissory note was granted to the vendor by the vendee.

After trial the learned District Judge entered judgment as prayed for with costs, holding that the second defendant executed the transfer P3 "deliberately with a view to defrauding the plaintiff". From this judgment the first defendant has appealed.

The main ground of objection taken to the judgment by Mr. Wikramanayake, who appeared for the first defendant, is that although in an action of this nature it is necessary to prove fraud on the part of the vendor as well as of the purchaser, the plaintiff had neither alleged in his plaint any fraud against the first defendant nor had he raised any issue to that effect.

The only issue relating to fraud is in these terms: "Was deed No. 2716 . . . executed by the second defendant in favour of the first defendant to defraud the plaintiff ?". This issue is based on the averment in the plaint that the deed was executed by the second defendant "with a view to defraud the plaintiff". Mr. Jayasuriya, who appeared for the plaintiff, conceded that the issue did not suggest any fraud on the part of the first defendant. There is no averment in the plaint, nor was any issue raised, that the consideration on P3 was fictitious or that any part of it had not actually passed. In *Perera v. Menik Etana*[1], which is a somewhat similar case, Shaw, J., sitting alone, held that in an action to set aside a deed on the ground that it was executed in fraud of creditors, the plaintiff has to allege and prove either that no consideration on the transfer was paid or actual fraud on the part of the purchaser. In *Tobius Fernando v. Don Andris Appuhamy*[2], which was heard before a bench of two Judges, the decision seems to go even further in regard to the need to allege and prove fraud on the part of the purchaser.

Although the learned District Judge has referred to the fact that according to the attestation in P3 only Rs. 100/- out of the consideration was paid in the notary's presence, it is not clear what inference he sought to draw from it, for he has not rejected as untrue the evidence of the first defendant (which is supported by the attestation in P3) that the sum of Rs. 1,600/- previously advanced by him to the second defendant was set off against part of the consideration and that for the balance (less the Rs. 100/-) he gave a promissory note. The first defendant also stated that the amount due on this note was subsequently settled by him in full.

There appear to be further difficulties in the way of the plaintiff succeeding in this action, seeing that the decree in D. C. Chilaw Case No. 14362 was entered more than two months after the execution of P3.

[1] *5 C. W. R. 258.*

[2] *(1950) 43 C. L. W. 44.*

There is no evidence as to how the cause of action in that case arose, and whether it was based on an existing debt due from the second defendant to the plaintiff. In the absence of such evidence, it is not open to the plaintiff to say that he was a creditor of the second defendant when P3 was executed. The present case has, therefore, to be decided on the footing that the only liability of the second defendant at the time was in respect of the Rs. 1,600/- advanced by the first defendant, and that the plaintiff did not become a creditor of the second defendant until his claim in the earlier case was reduced into the form of a decree.

The circumstances in which an alienation may be set aside as in fraud of subsequent creditors were considered in *Fernando v. Fernando*[1]. One of the questions that arose there was whether a plaintiff in a Paulian action, whose status as a creditor of the defendant is derived from a decree entered in an earlier case but which is subsequent to the transfer sought to be set aside, must prove the defendant's insolvency as at the time of the transfer, leaving out of account the amount due on the decree. Keuneman, J., expressed the opinion that it is not necessary that the alienation should cause insolvency to the alienor immediately. He said that the remedy of a Paulian action lies where the alienation was made by the debtor fraudulently, knowing "that, in consequence of the alienation (the creditor) would not be able to realize his decree, in other words, that (the debtor) acted so that when the decree came into being, there would be no assets or insufficient assets to levy execution on", and where, in the result, the claim of the creditor has been defeated. But these *dicta* must be considered in the light of the findings in that case that the transfer was not made in good faith and was without valuable consideration.

As I have already stated, in the present case neither fraud on the part of the first defendant nor want of consideration was alleged in the plaint or in any issue, and even if, in the absence of an allegation to that effect, it is permissible to look at the evidence for proof of such matters, I think that they have been far from established. In fact, such evidence as there is points to the contrary. Even as regards the second defendant, it is difficult to understand what the learned District Judge meant when he said that she had executed P3 "deliberately with a view to defrauding the plaintiff." If P3 was executed for consideration, and the consideration passed in the manner stated in the attestation, no fraud on her part would appear to have been established. In any event, in view of the decisions of this Court in *Perera v. Menik Etana* and *Tobius Fernando v. Don Andris Appuhamy* (*supra*) it was essential for the plaintiff to have alleged, and also to have proved, fraud on the part of the first defendant, and this he failed to do.

The judgment and decree appealed from are set aside and the plaintiff's action is dismissed with costs in both Courts.

SINNETAMBY, J.—I agree.

Appeal allowed.

[1] *(1940) 42 N. L. R. 12.*