1934 *Present* : **Macdonell C.J. and Drieberg J.**

PUNCHI APPU *v.* ARALIS APPU *et al.*

249—D. C. Galle, 30,987.

Paulian action—Claim by creditor in execution of his writ—Fraudulent alienation by debtor—Declaration in favour of creditors-purchaser.

A person who has purchased property at an execution sale in satisfaction of his decree is entitled to ask for a declaration that an earlier transfer by his debtor and a sale by that transferee to another are void as being in fraud of creditors.

APPEAL from a judgment by the District Judge of Galle.

H. V. Perera, for third, fourth, fifth, and sixth defendants, appellant.

G. Wickremanayake, for plaintiff, respondent.

Cur. adv. vult.

November 8, 1934. DRIEBERG J.—

The plaintiff claims title to lot 2 on a Fiscal's transfer of July 15, 1931. The sale was in execution of a judgment obtained by him against the first defendant in C. R. Galle, No. 9,531. He purchased the land for a sum in excess of his claim for which he got credit. Lot 2 had previously been sold by the first defendant to the sixth defendant by D 1 of April 25, 1929, and the sixth defendant sold it to the third defendant on D 2 of June 2, 1931, between the dates of the execution sale and the plaintiff's Fiscal transfer. The defendants resisted the attempt of the Fiscal to give him possession and the plaintiff thereupon brought this action.

In the plaint he set out the sales to the sixth defendant and the third defendant and alleged that they were executed in fraud of creditors and that they and the first defendant had acted collusively and with the intention of defrauding him. He pleaded an estoppel based on the presence of the first and third defendants at the sale by the Fiscal. He did not ask that the deeds D 1 and D 2 be declared void. The prayer was only for declaration of title, ejectment, and damages.

Issues were framed on the averment that the deeds D 1 and D 2 were executed in fraud of creditors and thereafter the sixth defendant was added as a necessary party. Counsel for the defendants said he was not prepared to meet these issues as they did not arise on the pleadings and asked for an adjournment of the trial, which was allowed. The learned District Judge found that the deed D 1 was executed by the first defendant without consideration and with intent to defraud his creditors. The consideration for D 1 was Rs. 500 and he thought that the sixth defendant could not have had even Rs. 100 to pay for the land. The plaintiff said the sixth defendant was a cook, he did not know what his salary was, but he could not have had Rs. 500. The first and sixth defendants are cousins.

The finding regarding D 1 will not, however, help the plaintiff, for title had passed to the third defendant by D 2 and he had to prove that this transfer D 2 was procured by the third defendant in collusion with the sixth defendant for the purpose of defeating the claim of the plaintiff as a creditor of the first defendant. The learned District Judge found that the third defendant was a party to the fraud ; this was on the third issue which was " were the first defendant and the third defendant acting in collusion with a view to defraud the plaintiff and is the deed by the sixth defendant in favour of the third defendant void ". The consideration appearing in D 2 is Rs. 500, but it was not paid in the presence of the notary. The trial Judge does not hold that there was no consideration. The finding against the third defendant is mainly on these grounds, that he is a neighbour and also an uncle of the first defendant, that he with the first and sixth defendants was present at the sale by the Fiscal on May 23, 1929, and that he knew at the time of the previous sale by the first defendant to the sixth defendant. I do not see how this last circumstance can tell against him, for in itself it would mean merely that the plaintiff was causing the Fiscal to sell a land of which his execution-debtor was not then the owner. The third defendant did not give evidence and the question is whether the plaintiff has made out a case against him. The first defendant says the third defendant was not present at the sale, but in view of the corroborative evidence of the Police Vidahne of Mawadawila it must be taken that he was. It was not necessary for the alleged purpose of the defendants that they should have been present at the sale. The first defendant's presence needs no explanation. Nor is there any suggestion of a fraudulent intent in the presence of the sixth defendant. He had claimed the land on D 1 when it was seized and his claim was dismissed on March 17, 1931, without an inquiry; under circumstances which do not bar him from denying the title acquired by the

plaintiff under the Fiscal's sale. His not easily understandable transactions with the plaintiff and his wife in 1929 over this land make it quite likely that he would have gone there to see what would happen at the sale.

Mr. Perera argued that the plaintiff could not maintain this action for the reason that having bought the property for an amount in excess of his claim he was no longer a creditor and that it was only a creditor or the heirs of a creditor who could bring such an action. I think it is not possible for the defendants to raise this point in appeal for the first time. They raised no objection to the issue regarding their fraudulent and collusive design and took time to meet it. Further, the right of a creditor who has purchased property at an execution sale in satisfaction of his decree to impeach an earlier transfer by his debtor as a fraudulent alienation is recognized, see *Vallipuram v. Vallipuram*[1] in which the defendant, who had bought land of his debtor on a writ against him, was allowed to ask for a declaration that an earlier transfer by his debtor and a sale by that transferee to another, executed after the sale to the defendant, be declared void as alienations made in fraud of him. The position of the defendant in that case is identical with that of the plaintiff in this action. In *Suppiah Naidu v. Meera Saibo*[2], relied on by Dalton J. in *Vallipuram v. Vallipuram* (*supra*), the interests of the debtor were bought by a creditor in execution proceedings and sold by him to the plaintiff. The plaintiff was allowed to challenge, as in fraud of creditors, earlier transfers by the debtor to the defendants in the action. Further authority is afforded by *Mohamedo v. Manupillai*[3].

But when a judgment-creditor, who becomes aware during the execution proceedings of an earlier alienation by his debtor which he desires to impeach as fraudulent, proceeds to sell and buy the property himself without first having the earlier deed set aside he creates considerable difficulty for himself. The plaintiff admits that before his purchase he knew of the transfer D 1. In fact, he knew of it a long time before. For some reason which is not easy to see the plaintiff procured a transfer D 3 of September 6, 1929, in favour of his wife from the first defendant of a half of lot 2A and the whole of lot 2. The plaintiff said the first defendant owed his wife Rs. 300 but it was in fact his money which she lent to the first defendant. He valued lot 2 in his plaint at Rs. 503 and he finally valued the half of lot 2A at Rs. 75 though he previously said the whole of lot 2A was worth Rs. 600. In the preparation of D 3 he instructed the notary not to search for encumbrances. It is not easy to see any reason for this but that he did not wish to be affected with knowledge of D 1 which the first defendant had executed on April 25 previous. In November, 1929, he prosecuted the first defendant for cheating him by inducing him to buy lot 2 when he had previously sold it on D 1 to the sixth defendant. He said he came to know of D 1 when he sought to mortgage lot 2. The first defendant said that all he intended to sell on D 3 was lot 2A, but that the plaintiff induced him to include lot 2. The first defendant was acquitted. In the face of all these circumstances the plaintiff obtained judgment and issued execution on November 24, 1931—we do not know when he obtained judgment—and proceeded to buy at the execution sale in May, 1931, the property

[1] *(1930) 7 Times Law Reports 99.*
[2] *(1907) 3 Bal. 129.*
[3] *(1916) 3 C. W. R. 19.*

which, though his wife was the nominal party, he had previously bought on D 3 in September, 1929, and on which he could not successfully assert title against the sixth defendant's earlier conveyance of April, 1929. The proper course for the plaintiff to have adopted was to have seized and registered his seizure of lot 2. He should have had the first defendant examined under section 219 of the Civil Procedure Code and if he disclosed other property which was not claimed by others the plaintiff should have sold it and he would have then known whether lot 2 was needed to satisfy his claim. If his claim was still entirely or substantially unsatisfied that would show that by the alienation of this land the first defendant rendered himself insolvent and it would be an important circumstance in deciding whether the transfer should be set aside. He should then have brought a Paulian action to have the transfer set aside and thereafter had the land sold in execution. The first defendant said that there was a land the half of which he owned was worth Rs. 300 and that he owned shares of other lands worth Rs. 200 and Rs. 300. A headman called earlier by the plaintiff said that the first defendant's lands in his division were not worth more than Rs. 100 or Rs. 150. Does this refer to all the lands stated by the first defendant? The truth of the first defendant's statement could have been effectively tested if the plaintiff had adopted the course I have mentioned. In these proceedings with such evidence as there is one can only be led to a conclusion against the first defendant by suspicion and this is not enough.

In my opinion, it has not been proved that there was no consideration for D 1, that by it the first defendant rendered himself insolvent, and that he executed it for the purpose of defrauding the plaintiff. The conduct of the plaintiff in procuring the deed D 3 in favour of his wife for lot 2 when he knew of the previous transfer to the sixth defendant, and in not taking steps to ascertain what other property the first defendant had before he sold lot 2 in execution, is open to great suspicion and suggests that his objective was not so much to obtain satisfaction of his claim as to acquire this lot which adjoined lot 2A in which he had acquired an interest. I think it is unsafe to hold against the defendants on what is practically the evidence of the plaintiff alone.

The case against the third defendant also rests only on suspicion. If he was present at the Fiscal's sale there was no reason why he should not buy the land from the sixth defendant merely because the plaintiff was selling on his writ property which the first defendant had previously parted with. There is no evidence of the third defendant having had anything to do with the execution of D 1. If the plaintiff had adopted the proper course in this matter there would have been a registration of the seizure under his writ before the sixth defendant purchased ; purchase by the sixth defendant thereafter would have been then subject to the plaintiff's claim. The plaintiff omitted to do what was necessary to warn innocent parties of the danger of a purchase from the first defendant while his claim was unsatisfied.

The judgment is set aside and the plaintiff's action dismissed. The plaintiff will pay to the second, third, fourth, fifth, and sixth defendants their costs in the District Court and their costs of this appeal.

MACDONELL C.J.—I agree.

Appeal allowed.