1937 *Present :* **Abrahams, C.J. and Koch J.**

JULIUS *et al. v.* PODISINGHO *et al.*

303—D. C. Galle, 31,724.

Action under section 247 of Civil Procedure Code—Unsuccessful claimant's action—Defence of judgment-creditor—Plea of jus tertii.

In a 247 action brought by an unsuccessful claimant the judgment-creditor is not entitled to set up the plea that the property seized belongs to a party other than the judgment-debtor.

APPEAL from a judgment of the District Judge of Galle.

E. B. Wikramanayake, for plaintiffs, appellants.

N. E. Weerasooria, for defendants, respondents.

Cur. adv. vult.

February 16, 1937. KOCH J.—

This appeal raises some interesting and controversial points.

The facts briefly are that the first respondent having obtained a decree for costs in D. C. Galle, No. 23,119, against the second respondent in that case issued writ and seized the right, title, and interest of his judgment-debtor to a land called Ihalaweyamulla. The plaintiffs in this case, who are the appellants, claimed to be in possession of an undivided $\frac{5}{8}$ths share of the land seized, but the claim was dismissed with costs. The plaintiffs, thereupon, instituted these proceedings under section 247 of the Civil Procedure Code against the defendants—the successful judgment-creditors and the judgment-debtor—to vindicate their rights. It is not in evidence what reasons the learned Judge had for dismissing the plaintiff's claim, but presumably, the dismissal was due to his not having been satisfied that the plaintiffs were in *ut dominus* possession of the share claimed at the date of the seizure. I say this because in the vast majority of cases the only matter considered at an inquiry in claim proceedings is that of possession at the date of seizure. This possession need not have been long-sustained nor lawful ; sufficient it would be, however short its duration, if it were independent of the judgment-debtor. The claim Judge would have no alternative but to uphold the claim if possession of this nature has been established, however strong the judgment-debtor's title may be or however weak the plaintiff's.

The unsuccessful claimants have in these proceedings averred in their pleadings a title to this share derived from the judgment-debtor—the second defendant—under a deed of transfer No. 15,900 dated July 20, 1928, *i.e.*, four years prior to the issue of writ and seizure. They further aver that they were in possession of this share at the time of seizure. They further state that " a cause of action has accrued to them to sue the defendants to establish a title *to the said interest* " and finally pray that they be declared entitled to " the share and interest aforesaid ".

The first respondent—first defendant—in his answer impeached the title of the plaintiffs on the ground that the deed pleaded was executed in fraud of him. He thus seeks to introduce a Paulian action into these proceedings, but omits to make a very necessary averment that his costs—the judgment-debt—have not been paid and are still owing.

Whether this could be done was a much debated question. In *Fernando v. Joodt* [1], Wood Renton J. was strongly of opinion that the judgment-creditor cannot be allowed to raise this issue and that this can only be done in a properly constituted Paulian action. Pereira J., in 5 *Tamb. 9,* said that the impeachment of a deed as fraudulent is not strictly incidental to an action under section 247 of the Civil Procedure Code but more properly ought to form the subject of a distinct action to which the grantor should be a party. The same Judge, however, in *Ossen Lebbe v. Daniel Dias* [2], countenanced such an issue in proceedings under section 247 when all the parties were before the Court, and Wood Renton J., in *Muttiah Chetty v. Rajah* [3], was willing to permit that issue in an action under section 247. In an authoritative judgment of three Judges the case of *Haramanis v. Haramanis* [4] left very little doubt as to the inclusion of such an issue in proceedings under section 247, so that one may now consider the law fairly settled that this point can be raised by the judgment-creditor in proceedings of that nature.

The learned District Judge, however, without going into this issue dismissed the appellants' action on the ground that at the date of seizure the title was in a third party, viz., the second defendant's son-in-law, one Wijeris, who held a deed from the judgment-debtor, prior in date and registration to that held by the appellants. It is submitted by the appellants that Wijeris is not a party to this case and that all the plaintiffs need do is to show that they have title superior to that of the judgment-debtor. In fact, it is urged that this has been more than accomplished as it is the judgment-debtor himself who transferred the rights the plaintiffs claim under the deed to which I have referred, four years previously.

On the other hand, Mr. Weerasooria submits that there is no such thing as superior and weaker title ; a person has title or no title, because, says he, the title can only be in one person. No doubt, theoretically, Mr. Weerasooria is right but in practice how can such a pronouncement be made unless and until every single claimant to that title is before the Court and all the titles investigated and a verdict given ?

There are three types of titles which are generally recognized in Ceylon as being safe, viz., (1) title under a partition decree, (2) a purchase from the Municipal Council when the property concerned has previously vested in the Council for arrears of rates, and (3) a settlement under the Waste Lands Ordinance. But even in these cases, however secure such titles may primâ facie appear to be, they may be successfully attacked on the grounds respectively that the formalities prescribed prior to the sale in partition proceedings have not been complied with, or that there is a material defect in the conveyance in favour of the Municipal Council or by the Council, or that the settlement in proceedings under the Waste Lands Ordinance has not been made after an inquiry.

The plaintiffs' answer to the first defendant's contention appears from the proceedings to be that the very deed on which the first defendant is relying to show that his judgment-debtor had no title at the time of

[1] *2 Bal. 139.*
[2] *2 Bal. 41.*
[3] *4 C. W. R. 178.*
[4] *10 N. L. R. 332.*

the transfer to the plaintiffs is a deed executed without consideration and in trust. Certain mortgage bonds have been produced by the plaintiffs to show that the judgment-debtor, in spite of this conveyance, remained in possession and treated with the property as though he were the owner. It would, therefore, be an open question whether the earlier deed can be regarded as divesting the judgment-debtor of his title. If it be regarded that the deed does not divest, the plaintiffs clearly hold the title.

In the *Laws of Ceylon vol. II.*, the author says that a plaintiff who seeks for a declaration of title against a third party can successfully show that the defendant has "no title or a weaker title". This is supported by the ruling in *Appuhamy v. Appuhamy*[1]. Hutchinson C.J. in *de Silva v. Gunasekera*[2], observed that the defendant can succeed—putting out of consideration the issue on prescription—by showing "a good paper title and that the plaintiff has no better title". This view is supported by Pereira J. in *Goonesekere v. Fernando*[3] who declares that the defendant cannot succeed unless he can justify the ouster "by proof that at the date of ouster he had a superior title or acted under the authority of somebody having a superior title".

I am therefore of opinion that if it came to a question of title all the plaintiffs would have to establish is title superior to that of the judgment-debtor. The fact that a third party had title *prima facie* superior to that of the plaintiffs is immaterial (*Banda v. Mahatmaya*[4]).

This brings me to the last point as to what precisely has to be established by an unsuccessful claimant who figures as plaintiff in an action under section 247.

Section 247 of the Civil Procedure Code lays down that the party against whom an order is made at the claim inquiry may institute an action "to establish the right" which he claims to the property in dispute, and section 243, in referring to what the claimant would have to establish at the claim inquiry, says that the claimant would have to adduce evidence to show that at the date of the seizure he had some interest in, or was possessed of, the property seized. It would therefore appear that, free from any complications, a plaintiff in an action under section 247 should succeed if he establishes the right he claimed at the claim inquiry.

I have often heard the argument that although the material issue at a claim inquiry is that of possession, the case is different when the parties are against each other in an action under section 247, and that in such an action the question of possession is submerged in the bigger issue of title. I do admit that in the great majority of cases this is so, but the reason must be appreciated. The reason is that in all these cases the title of the judgment-debtor is expressly raised by the judgment-creditor and the conflict must perforce centre round the question of superiority of title. In other cases the claimant himself sets up an interest—title—at the claim inquiry, and this interest he will have to

[1] *3 S. C. C. 61.*
[2] *3 A. C. R. 29.*
[3] *3 C. A. C. 19.*
[4] *16 N. L. R. 485.*

establish in the action under section 247. (Vide (1) *Wijewardena v. Maitland* [1], (2) *Abdul Cader v. Annamally* [2], (3) *Dissanayaka v. Baban* [3], (4) *Samaranayaka v. Sidembrem Chetty* [4], (5) *Abayaratne v. Supramaniam Chetty* [5], (6) *Tamel v. Palaniappa Chetty* [6].)

In this case the plaintiffs have prayed for more than they need have done. They would have been quite in order had they confined their prayer to have it declared that they were in possession *ut dominus* at the date of seizure and that the share which they possessed should be released from the seizure. This however will not prevent the Court from granting the lesser relief, for it has been held that actions under section 247 of the Civil Procedure Code are not exempt from the general rule that the Court has power to give less than is prayed for (*Siyadoris Appu v. Wannigasekera* [7]). It was open to the first defendant, if he was in a position to do so, to have claimed superior title in his judgment-debtor and thus force an issue on title. He, however, did not do this for obvious reasons. Three issues were accordingly framed, one of them being whether the plaintiff had title to maintain the action. The learned District Judge held against the plaintiff on this issue and dismissed his action for the reason, as he says, that the title of the judgment-debtor had previously passed to another.

I am well aware of instances where a plaintiff's action under section 247 has been dismissed on the ground that he had no title at the date of seizure, but these are cases where the plaintiff has compromised himself by alleging title in another and did not have, at the date of seizure, the conveying deed from that other—notoriously a Fiscal's conveyance. (Vide *Abubaker v. Tikiri Banda* [8].)

I cannot see how this judgment of the learned District Judge can, in view of what I have stated, be sustained. Further, it would be monstrous to permit the first defendant, who, on his own showing, had seized the right, title, and interest of the judgment-debtor on the footing that his debtor had such interest, later to set up the defence that in point of fact his judgment-debtor had no such interest at the date of seizure. The first defendant has by his act jockeyed the plaintiffs into asserting their possession in a claim and he cannot now be allowed to defeat by this means the plaintiffs from vindicating that right in the present action. He is hoist with his own petard and must take the consequences.

The first issue must be answered in favour of the appellants, and the appeal allowed with costs.

The first respondent will pay the appellants their costs of the contention in the District Court and the case will be remitted for determination on the remaining issues.

ABRAHAMS C.J.—I agree.

Appeal allowed.

[1] *3 C. L. R. 7.*
[2] *2 N. L. R. 166.*
[3] *1 Matara Cases 211.*
[4] *6 N. L. R. 354.*
[5] *2 Bal. 33.*
[6] *9 N. L. R. 371.*
[7] *3 Tamb. 108.*
[8] *29 N. L. R. 132.*