1962 *Present :* **Basnayake, C.J., Herat, J., and Abeyesundere, J.**

MUKTHAR, Appellant, and ISMAIL, Respondent

S. C. 123—D. C. Kandy, 4877/L

Fraudulent alienation—Circumstances in which a sale which is alleged to be in fraud of creditors can be set aside—Combination of Paulian action and action under section 247 of the Civil Procedure Code—" Creditor "—" Debt "—Claim for unliquidated damages in a pending action is not a debt—Civil Procedure Code ss. 244–247, 653.

In a Paulian action which was combined with an action under section 247 of the Civil Procedure Code—

Held, that it is only a creditor *in esse* who can claim that an alienation was made to his prejudice. A creditor is a person to whom a debt is owing by another person. A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor) in the form of a judgment debt or a contract debt or, more specially, what is called in English law a specialty debt.

A claim for unliquidated damages does not fall within the ambit of the expression " debt ". Accordingly, where, pending an action for unliquidated damages, the defendant buys certain property and transfers it to a third party, the plaintiff, if judgment is subsequently entered in his favour awarding a certain sum as damages, is not entitled to institute either a Paulian action or an action under section 247 of the Civil Procedure Code against the defendant and the person to whom the defendant transferred the property. If the plaintiff in an action for unliquidated damages desires to prevent the defendant from alienating property pending the action, he should seek the safeguards provided by section 653 of the Civil Procedure Code.

Held further, that a sale by a debtor, even where it is in fraud of creditors, is not void but is liable to be set aside at the instance of a creditor who has been prejudiced by it and then only to the extent to which he has been prejudiced. In that sense a deed in fraud of creditors may be declared null, but not null and void. Unless and until it is set aside by judicial decree the sale is good.

APPEAL from a judgment of the District Court, Kandy.

On 11th January 1955 the plaintiff instituted D. C. Kandy Case No. 4408 against the 1st defendant for cancellation of two indentures of lease and for the recovery of damages. Decree was entered in his favour on 16th February 1956. When, in execution of the decree for damages and costs, premises No. 101 were seized by the plaintiff, the 2nd defendant preferred a claim to the premises and his claim was upheld. Premises No. 101 had been bought by the 1st defendant in February 1955 and been sold by him to the 2nd defendant by a Deed of Transfer No. 369 in October 1955, during the pendency of Case No. 4408.

In the present action, which was a combination of a Paulian action and an action under section 247 of the Civil Procedure Code, the District Judge gave judgment for the plaintiff declaring that Deed No. 369 was null and void and that the property affected thereby (premises No. 101) was liable to be seized and sold in execution of the writ issued in D. C. Kandy No. 4408. The 2nd defendant thereupon appealed.

H. W. Jayewardene, Q.C., with *G. T. Samerawickreme, M. Rafeek* and *D. S. Wijewardene*, for 2nd Defendant-Appellant.

H. V. Perera, Q.C., with *Vernon Jonklaas* and *M. T. M. Sivardeen*, for Plaintiff-Respondent.

Cur. adv. vult.

October 10, 1962. BASNAYAKE, C.J.—

In this action the plaintiff seeks to obtain a decree declaring that the Deed No. 369 dated 1st October 1955 attested by T. M. A. Sally, Notary Public of Matale, is null and void, and that the premises described in the schedule to the plaint are liable to be seized and sold under writ in D. C. Kandy Case No. L. 4408.

Shortly the material facts are as follows : On 11th January 1955 the plaintiff instituted D. C. Kandy Case No. L. 4408 against the 1st defendant for a cancellation of two indentures of lease bearing numbers 719 and 7435, for his ejectment from the land called Benveula Estate of 40 acres 1 rood and 10 perches situated in Matale, and for the recovery of damages. He obtained judgment in his favour, and on 16th February 1956 the following decree was entered :—

> "It is ordered and decreed that the Indenture of lease No. 7435 dated 1st February, 1954 be and the same is hereby declared cancelled.
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> It is further ordered and decreed that the defendant be ejected from the said land and premises and the plaintiff be put placed and quieted in possession thereof.
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> It is further ordered and decreed that the defendant do pay to the plaintiff damages Rs. 5,500/- up to January 1955 and further damages at Rs. 200/- per mensem till possession is yielded.

It is further ordered and decreed that the defendant do pay plaintiff Rs. 300/– per mensem from 1st February, 1954 till 16th February, 1956.

And it is further ordered and decreed that the defendant do pay to the plaintiff Rs. 20/– a month from 2nd June, 1954 till 16th February, 1956.

And it is further ordered and decreed that the defendant do pay to the plaintiff his costs of this action as taxed by the officer of this court. "

In execution of the decree, premises bearing 101 Trincomalee Street, Matale, were seized on 22nd May 1956. The 2nd defendant preferred a claim to the premises seized, and on 26th July 1956 his claim was upheld. He based his claim on the Deed of Transfer No. 369 executed by the 1st defendant on 1st October 1955 of the premises which the 1st defendant himself had purchased on 1st February 1955 after the institution of the plaintiff's action on the lease.

At the trial it was admitted—

(*a*) that Deed No. 369 was executed on 1st October 1955,

(*b*) that the plaintiff had seized the premises affected thereby in execution of a decree in his favour in D. C. Kandy Case No. L. 4408,

(*c*) that the 2nd defendant had claimed the land and the claim was upheld on 26th July 1956,

(*d*) that the 1st defendant is the judgment-debtor in D.C. Kandy L.4408,

(*e*) that the amount of the decree in D.C. Kandy L. 4408 was Rs. 16,000/–.

The matters on which the parties were at variance were stated in the form of the following issues :—

" (1) Was the said Deed No. 369 executed by the 1st defendant with the object of defrauding the plaintiff ?

(2) By the execution of the said deed, has the 1st defendant left himself without sufficient property to satisfy the plaintiff's decree ?

(3) Did the defendants act collusively in the execution of the said deed ? "

All these issues were answered against the defendant and judgment was accordingly given for the plaintiff declaring Deed No. 369 null and void and the property affected thereby liable to be seized and sold in execution of the writ in D. C. Kandy Case No. L. 4408. The present appeal is from that judgment.

The instant case is a combination of a Paulian action and an action under section 247 of the Civil Procedure Code. What is a Paulian action ? Planiol, Vol. 2 Pt. I p. 179, (Louisiana State Law Institute Translation) defines it thus :

" This action which is referred to as the 'Paulian' or 'revocatory action' can be defined : as an action given to creditors to obtain the revocation of acts done by their debtor in fraud of their rights. "

The action is a creation of the Praetorian Law and is named after the praetor Paulus who introduced it. The word "revocatory" in the definition is also of Roman origin and owes its origin to the word "*revocare*" used by the Roman Jurisconsults in connection with the Paulian action in the phrase "*per quam quae infrandem creditorum alienata sunt revocantur*" (Digest Bk. XXII Tit. I s. 4). The fraud in the case of a Paulian action consists in the debtor's intention to put his assets beyond the reach of his creditors. An action under section 247 is a statutory remedy provided by the Civil Procedure Code in cases in which the circumstances prescribed in that section exist. The section reads—

> "The party against whom an order under section 244, 245, or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour; subject to the result of such action, if any, the order shall be conclusive."

To understand the scope of the action under section 247 it is necessary to see what the orders referred to in the section are. The Court is empowered—

(*a*) under section 244 to make an order releasing the property wholly or partly from seizure,

(*b*) under section 245 to make an order disallowing the claim, and

(*c*) under section 246 to make an order continuing the sequestration or seizure subject to an existing mortgage or lien.

An action under section 247 cannot be brought unless an order under section 244, 245, or 246 is made. Such an action can only be brought by the party against whom an order under any of those sections has been made and must be instituted within 14 days of the order. The object of an action under section 247 is either to establish the right which the plaintiff claims to the property in dispute or to have the property declared liable to be sold in execution of the decree in his favour. The 247 action is available only to a decree-holder while a creditor who is not a decree-holder may bring a Paulian action. Section 247 does not empower the Court to revoke a sale by the judgment-debtor while the Paulian action does. The reliefs sought by the plaintiff in the instant case are—

(*a*) that the deed by which the 1st defendant transferred the land in question be declared null and void, and

(*b*) that the property be declared liable to be seized and sold under writ issued in D. C. Kandy Case No. L. 4408.

The learned District Judge has granted a decree in terms of the prayer and declared the deed null and void. A sale by a debtor even where it is in fraud of creditors is not void, but is liable to be set aside or annulled

at the instance of a creditor who has been prejudiced by it and then only to the extent to which he has been prejudiced. In that sense a deed in fraud of creditors may be declared null, but not null and void. Unless and until it is set aside by the judicial decree the sale is good, and where the purchaser from the debtor sells the property the creditors cannot reach it in the hands of third persons. Planiol explains the matter thus :

> "But the nullity which results from the Paulian action is not a nullity like the others ; the fraudulent act is only annulled in the interest of the defrauded creditor and remains effective with all its consequences with regard to all other persons ; thus it is more proper, in referring to it, to use the expression "revocatory action", which indicates its special nature.
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> In thus acquiring an effect which approaches that of actions in nullity the revocatory action has preserved the fundamental character which it has always had in accordance with the principle of its institution ; it has not ceased to be an action for an indemnity arising from an illicit act ; it always tends to repair the damage suffered by the creditor and belongs to the group of delictual actions. The nullity which is its consequence is the most direct and simple means of assuring to the creditor the reparation to which he has a right."

The learned Judge was therefore wrong in declaring that the deed was null and void. Now what are the circumstances in which a sale which is alleged to be in fraud of creditors can be set aside ? They are stated thus by Domat who discusses the subject with greater clarity than Voet—

> "1635. The alienations of movables and immovables which debtors make, upon another score than that of liberality, to persons who purchase with an honest intention, and for a valuable consideration, knowing nothing of the prejudice done thereby to creditors, cannot be revoked, whatever intention of defrauding the debtor may have had. For the debtor's knavish intention ought not to cause a loss to those who deal with him in a lawful commerce, and who have no share in his fraud.
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> 1636. Although the fraudulent alienation be made for a valuable consideration, such as a sale, yet if it be proved that the purchaser has been a partaker in the fraud, that he might profit by it, getting the thing upon that account at a cheaper rate, the alienation will be revoked, without any restitution of the price to the purchaser who is an accomplice in the fraud, unless the money which he paid for it be still in being, in the hands of the debtor who sold the thing to him.
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> 1637. To oblige him who purchases a thing of a debtor to make restitution of it, it is not enough that the purchaser knew that the said debtor had creditors ; but he must have been privy to the design of defrauding them. For many of those who have creditors are not insolvent, and one does not become an accomplice in the fraud except by taking part in it."

Voet's comment is in Book XLII Tit. 8 section 2 (Gane's translation Vol. 6 p. 408).. He states—

> "Nay it only arises from some disgraceful act, to wit the fraud not only of the alienator, but more especially of the person to whom alienation has been made, inasmuch as, to make it possible for a place to be found for this action, the alienation must have been made by the debtor in fraud of creditors with the knowledge of such person....."

Now turning to the facts of this case with the above propositions of law before me it would appear that the 2nd defendant who carried on business at the premises in question had been in occupation of those premises as tenant since 1935. He became the tenant of the 1st defendant in February 1955 when the latter purchased the premises from Mrs. Croos for Rs. 17,500/-, and on 1st October 1955 the 2nd defendant purchased them himself from the 1st defendant for a sum of Rs. 17,500/- subject to two mortgage bonds Nos. 1628 and 1629 dated 1st February 1955. The latter was a bond for Rs. 5,000/- carrying interest at 18% per annum. Judgment was obtained on that bond and decree was entered on 26th December 1955 for a sum of Rs. 5,225/-. The former was a bond for Rs. 3,000/-. These debts the 2nd defendant paid. At the time the 2nd defendant purchased the premises there was in force a caveat which had been presented by the plaintiff on 20th April 1955. The notary who gave evidence said that he informed the 2nd defendant that a caveat had been registered ; but he not only paid no heed to it, but also authorised the notary to execute the deed without examining the relevant land registers. But whatever may be the consequences of the 2nd defendant's action in purchasing the land despite the caveat the question is whether the 1st defendant's alienation was in fraud of creditors. Judgment had not been entered in the action against the 1st defendant at the time of the alienation. That was done only in January 1956. There is no evidence that the 1st defendant was in debt, except that there were two mortgages on this very land, a primary and a secondary mortgage. The alienation did not affect the mortgage creditors. There is no evidence that other creditors, if any, were affected by it.

The question that arises for decision is whether the plaintiff was a creditor at the date of the alienation of his property by the 1st defendant. For it is only a creditor *in esse* that can claim that an alienation was made to his prejudice, (Planiol, Vol. 2 Pt. 1 p. 186). To answer that question it is necessary to decide who is a creditor. Sweet's Law Dictionary defines the expression thus :

> "Creditor is a person to whom a debt is owing by another person called the debtor. The creditor is called a simple contract creditor, a specialty creditor, a bond creditor, or a judgment creditor, according to the nature of the obligation giving rise to the debt ; and if he has issued execution to enforce a judgment he is called an execution creditor. He may be a sole or joint creditor."

A creditor being a person to whom a debt is owing by another person the next question that arises for decision is— What is a debt ? To that question too Sweet's Law Dictionary provides an answer. It states—

> "In the strict sense of the word a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence 'debt' is properly opposed (1) to unliquidated damages, (2) to 'liability' when used in the sense of an inchoate or contingent debt; and (3) to certain obligations not enforceable by ordinary process. 'Debt' denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.
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> Debts are of various kinds, according to their origin."

The author next goes on to describe the different kinds of debts such as, statutory debts, specialty debts, simple contract debts, debts arising from privity of estate, crown debts, secured debts, petitioning creditor's debt, debt provable in bankruptcy, and preferential debts.

With these definitions in mind I shall now address myself to the facts of the instant case to determine the nature of the debt, if any, owed by the 1st defendant to the plaintiff at the date of the transfer. It would appear from the plaint that there was a contract of lease between the plaintiff and the 1st defendant (Lease Bond No. 7435 dated 1st February 1954) and that the plaintiff had sued the 1st defendant for damages for breach of the terms of that contract. As the plaintiff had not obtained judgment at the time of the transfer on 1st October 1955, there was no judgment debt in existence, nor was there a contract debt or more specially what is called in English law a specialty debt as no rent or money payable on the lease bond was claimed. The claim made in the action on the contract of lease was for unliquidated damages.

A claim for unliquidated damages does not fall within the ambit of the expression "debt". As there was no debt due from the 1st defendant the plaintiff was not a creditor of the 1st defendant at that date and the transfer cannot be said to be in fraud of him.

In the instant case the 1st defendant became the plaintiff's lessee on 1st February 1954. Action for cancellation of the lease, damages and ejectment was instituted on 11th January 1955. The 1st defendant purchased the premises in question on 1st February 1955 and on 3rd October 1955 sold it to the 2nd defendant. It was not till 16th February 1956 that decree was entered in favour of the plaintiff. He can have no grievance because when the lease was executed the 1st defendant was not the owner of the land, nor was he the owner of the land when the action was instituted. So that it is not open to him to say that to his detriment the defendant got rid of property which at the time of institution of his action he reasonably expected would be available to him for execution of his judgment debt in the event of his succeeding in the action. The 1st defendant purchased it after the action was instituted and sold

it before judgment. The Paulian remedy does not lie in such a case and no relief under section 247 can be claimed. It may be asked what safeguards does our law provide against the alienation of his property by the defendant to an action in order to prevent the plaintiff from executing his writ in the event of his obtaining judgment. They are to be found in our statute law. Section 653 of the Civil Procedure Code provides—

> "If a plaintiff in any action, either at the commencement thereof or at any subsequent period before judgment, shall, by way of motion on petition supported by his own affidavit and viva voce examination (if the Judge should consider such examination necessary) satisfy the Judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding two hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is fraudulently alienating his property to avoid payment of the said debt or damage ; and if he shall at the same time further establish to the satisfaction of the Judge by affidavit or (if the Judge should so require) by viva voce testimony such facts that the Judge infers from them that the defendant is fraudulently alienating his property with intent to avoid payment of the said debt or damage, or that he has with such intent quitted the Island leaving therein property belonging to him, such Judge may order a mandate (form No. 104, First Schedule) to issue to the Fiscal, directing him to seize and sequester the houses, lands, goods, money, securities for money and debts, wheresoever or in whose custody soever the same may be within his district, to such value as the court shall think reasonable and adequate and shall specify in the mandate, and to detain or secure the same to abide the further orders of the court."

In the instant case if the plaintiff wished to safeguard himself he should have sought the protection offered by the above cited section. Not having invoked section 653 he cannot complain afterwards and resort to the Paulian action for the purpose of obtaining the relief afforded by section 653.

There remains for consideration only the question of the effect of the purchase of a land in respect of which there has been entered in the appropriate land register a caveat. Provision for the registration of a caveat is made in section 32 of the Registration of Documents Ordinance which reads—

> "(1) Any person (in this Ordinance called a 'caveator') may present for registration a caveat in the prescribed form requiring to be served with notice of the presentation for registration of any instrument affecting the land described in the caveat.
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> (2) The Registrar shall on receiving a caveat register it in the same manner as other instruments, but shall retain the caveat.

(3) A caveat shall be in force for such period as may be specified therein, not being longer than the period covered by the fee paid on the caveat.

(4) The notice to be given to the caveator shall be in the prescribed form and shall be sent by registered letter to the address mentioned in the caveat.

(5) If, while a caveat is in force, an instrument affecting the land described in the caveat is presented for registration, and in an action commenced by the caveator in a competent court within thirty days from posting of the notice required by subsection (4) it is proved to the satisfaction of the court that the instrument presented for registration is or was at the time of registration void or voidable by the caveator or fraudulent as against him or in derogation of his lawful rights, the court may order the instrument to be rectified or cancelled as may be necessary to preserve the rights of the caveator, and may order the necessary correction to be made in the register.

(6) Nothing in this section shall affect any other power which may be possessed by any court of ordering any instrument to be rectified or cancelled. "

As the alienation is not void or voidable by the caveator, and as there has been no fraudulent alienation, and as the alienation is not in derogation of the lawful rights of the caveator, no action under section 32 (5) can be taken. The judgment of the learned District Judge is therefore reversed and the plaintiff's action dismissed with costs.

The appellant is entitled to the costs of appeal.

HERAT, J.—I agree.

ABEYESUNDERE, J.—I agree.

Appeal allowed.