

Present : Pereira J. and De Sampayo A.J.

1914.

USUBU LEBBE v. GABRIEL *et al.*

48—D. C. Kurunegala, 4,767.

Conspiracy—Conveyance of land by A in favour of B—Representation to C that A was owner to raise loan from C on mortgage—Registration by B of his conveyance before the mortgage bond—Conveyance by B in favour of A's children—Action by purchaser under mortgage decree—Actio doli—Cancellation of conveyance.

In pursuance of a conspiracy between A and B to cheat C, A executed a conveyance of a parcel of land in favour of B, and thereafter both went to C and led him to believe that the land was not encumbered, and induced him to lend money to A, taking from him a mortgage of the land as security. B thereafter promptly registered the conveyance in his favour, that is to say, before C could register this mortgage bond in his favour, and conveyed the land in favour of A's children.

Held, that it was competent to a purchaser in execution of a decree in an action on the bond in favour of C to maintain an action in the nature of an *actio doli* against A, B, and A's children to obtain a cancellation of the conveyance in favour of B and A's children.

THE facts appear from the headnote.

Bawa, K.C., for defendants, appellants.

G. Koch and F. H. B. Koch, for plaintiff, respondent.

Cur. adv. vult.

March 12, 1914. PEREIRA J.—

From the facts established by the evidence in this case I have no doubt in my mind that the first and second defendants were guilty of a foul conspiracy to cheat Ibrahim Saibo, and to induce him to accept a mortgage of the share of land in claim and part with his money for the benefit of these two men. It was no doubt a part of

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their fraudulent scheme to register deed No. 23,068 at the earliest opportunity, and thus to render nugatory the mortgage in favour of Ibrahim Saibo. It is the plaintiff who eventually has become the victim of the fraud and conspiracy of the two defendants. The deed by the second defendant in favour of the minor children of the first (deed No. 9,490) cannot be said to be in any better position than the other deed, because the grantees on that deed cannot be said to be *bona fide* alienees for value, and the two deeds must therefore stand or fall together. The main question in the case is whether it is competent to the plaintiff to maintain this action. The plaintiff is the purchaser in execution of the property mortgaged by means of the bond in favour of Ibrahim Saibo. After the purchase the plaintiff instituted a suit for the partition of the land, of which he had purchased at the Fiscal's sale a two-thirds share, and the third defendant asserted title to that share on deed No. 9,490. Hence this action to have both the deeds (23,068 and 9,490) rescinded. The action, can hardly, in my opinion, be regarded as a Paulian action. Deed No. 23,068 can hardly be said to be a deed intended simply to defraud present or future creditors. It was a deed executed in pursuance of a conspiracy to cheat Ibrahim Saibo. This action is more in the nature of an *actio doli* under the Roman-Dutch law, which is open to any person injured by the fraud of another (*Voet 4, 3, 7-12*). As stated by Natkan in his work on the *Common Law of South Africa* (vol. IV., p. 2622), to constitute fraud it is necessary (1) that the person charged should have acted with wrongful and unlawful intent, (2) that he should have made a false representation, and (3) that such false representation should have been made in order to prejudice either the person to whom it was directly made or some other person. According to the evidence of the witness, Ibrahim Saibo, at the execution of the bond in his favour, the first defendant told him that the property to be mortgaged was not encumbered. The second defendant, who, the evidence shows, was acting in conspiracy with the first, was present, and raised no objection to the execution of the bond. In these circumstances he was, equally with the first, responsible for the representation made by the latter, and the object of both the defendants was manifestly to prejudice Ibrahim Saibo or any person who might purchase the property when it was exposed for sale in execution of any judgment that might be obtained by Ibrahim Saibo in an action on the bond. The present plaintiff eventually happened to purchase the property in that way, and I think that he thus became entitled to maintain the present action for a cancellation of the deeds. The cancellation will, of course, in each case, refer back to the date of the deed.

I would dismiss the appeal with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.