

1918.

Present : Shaw J.

FERNANDO v. FERNANDO.

40—C. R. Colombo, 60,144.

Res adjudicata—Finding in action under section 247 that alienation was made without consideration by debtor in favour of claimant—Judgment in favour of claimant on the ground that debtor had other property—Subsequent action by debtor against claimant for re-conveyance—Does finding in former action render dispute res adjudicata in favour of plaintiff?—Can plaintiff set up his own fraud?

Plaintiff purported to convey certain property to the defendant. F obtained a money decree against the plaintiff and seized the property conveyed to the defendant. The defendant claimed, and on the claim being disallowed brought an action (56,948) under section 247 of the Civil Procedure Code. F pleaded that the conveyance in favour of the defendant was fraudulent, and added the plaintiff as a party to that suit.

The Court found that the deed was executed in intended fraud of creditors and without consideration, but did not set aside the deed, as no creditor was in fact defrauded, as the plaintiff had, at the time she executed it, other property, and dismissed the action.

The plaintiff brought the present action, claiming a re-conveyance of the property from the defendant.

Held, that the decision in 56,948 did not render the dispute *res adjudicata* in favour of the plaintiff, as the finding that the conveyance was made without consideration and with the intention of defrauding creditors was unnecessary for the purpose of the decree, and was not the ground on which it was based.

Quære.—Whether the previous suit was between the present parties.

“ To enable a fraudulent confederate to retain property transferred to him, in order to effect a fraud, the contemplated fraud must be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.”

THE facts are set out in the headnote.

Bawa, K.C., for the appellant.

A. St. V. Jayawardene, for the respondent.

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The plaintiff claimed a re-conveyance from the defendant of certain land conveyed by her to the plaintiff on deed No. 211 of April 9, 1913, on the ground that that deed was executed without

consideration and in trust for her. No evidence was called at the hearing, but certain proceedings in a previous case, C. R. Colombo, No. 56,948, were put in, and the Commissioner of Requests has decided that that case renders the present dispute *res adjudicata* in favour of the plaintiff, and has given judgment in her favour. The defendant appeals.

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The facts are as follows:—

On March 6, 1913, an action, C. R. Colombo, No. 33,036, was instituted by one M. M. Fernando against the present plaintiff. On April 9, 1913, the present plaintiff, by deed, purported to convey certain property to the present defendant for valuable consideration, which the notary certified was paid in his presence. On April 10, 1913, M. M. Fernando obtained judgment against the present plaintiff.

On December 6, 1917, M. M. Fernando seized, in execution of his judgment, the property the subject of the conveyance of April 9, 1913, and the present defendant claimed under the deed, but his claim was disallowed.

The defendant then brought an action, C. R. Colombo, No. 56,948, against M. M. Fernando, under the provisions of section 247 of the Civil Procedure Code, and M. M. Fernando set up the answer that the deed of April 9, 1913, was executed without consideration and in fraud of creditors, and he added the present plaintiff as a party to the suit.

The present plaintiff entered no appearance in that suit, but was called by M. M. Fernando as a witness, and she stated that she conveyed the property to the present defendant without consideration, for the purpose of defeating Fernando's claim against her. The present defendant, on the other side, gave evidence to the effect that the transaction was a *bona fide* one on his part, and that he paid the consideration provided for in the deed.

The Commissioner of Requests found that the deed was executed in intended fraud of creditors and without consideration, but held that he could not set it aside as no creditor was in fact defrauded, the present plaintiff having, at the time she executed it, other property available for the payment of her debts. He, therefore, gave judgment for the present defendant, and ordered the property to be released from seizure, and his judgment was affirmed by this Court on appeal.

It is this judgment that the Commissioner of Requests has held renders the dispute between the parties *res adjudicata* in the plaintiff's favour, and entitles her to a re-conveyance of the property from the defendant.

It was contended in support of the appeal that this decision is wrong, and also that the plaintiff cannot be allowed to set up her own fraud, and to recover property that she herself alleges was conveyed by her to the defendant for the purpose of defrauding

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M. M. Fernando. In my view the decision in case No. 56,948 does not amount to an adjudication of the question in dispute in this action.

The decree itself in that case certainly is not such an adjudication. It was a decree in favour of the present defendant, and was an order that the property under seizure in suit No. 33,036 should be released. I agree, however, with the opinion expressed by the majority of the Court in *Samichi v. Pieris*,¹ that in considering the question what was the matter adjudicated on in the previous suit, we may look beyond the actual terms of the decree, and I think that any finding that was necessary for the decision of that suit, and that can be clearly discovered from the judgment, amounts to a prior adjudication of the point so decided in a subsequent suit between the same parties (see *Alison's Case*,² *Priestman v. Thomas*³).

All that was actually decided in suit No. 56,948 was that the conveyance to the defendant was not in fact in fraud of creditors, because the present plaintiff was solvent at the time she made the conveyance, and had other property, out of which her creditors' debt might have been satisfied. It is true the Commissioner went beyond this, and found that the conveyance was made without consideration and with the intention of defrauding M. M. Fernando, but that was unnecessary for the purpose of the decree, and was not the ground on which it was based.

But even if this were not so, it would have been no decision of the dispute in this case, for even if it amounted to a decision that the conveyance was without consideration and fraudulent as against creditors, it does not necessarily follow from that that there was any resulting trust in favour of the present plaintiff, for the conveyance, if made under such circumstances, would have been equally fraudulent if it had been a gift from the grantor to the grantee. There is another point on the question of *res adjudicata*, namely, that there was no adjudication in the previous suit between the present parties. I am by no means sure that this is not also a good answer to the plaintiff's contention, but in view of my opinion expressed above I need not definitely decide the point.

With regard to the objection that the plaintiff cannot be allowed to set up her own fraud, the finding in the previous suit that the deed of April 9, 1913, was not in fact fraudulent, whatever the intention may have been, seems an answer to it, and the case of *Petherpermal Chetty v. Muniandi Servai*⁴ is a direct authority against the appellant's contention. In that case Lord Atkinson, delivering the judgment of the Privy Council, said: "To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according

¹ (1913) 16 N. L. R. 257.

² (1873) 9 Ch. 25.

³ (1884) 9 P. D. 210.

⁴ (1908) I. L. R. 35 Cal. 551.

to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with."

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I think the proper order to make in the present appeal is to set aside the judgment appealed from and to send the case back for the trial of the question of fact, namely, whether the conveyance was for consideration, or whether it was without consideration with a resulting trust for the benefit of the plaintiff.

The appellant is entitled to the costs of this appeal. The costs of the hearing in the Court below will abide the final determination of the action.

Sent back.
