1973 *Present:* **H. N. G. Fernando, C.J., Deheragoda, J., and Wimalaratne J.**

JAYASURIYA, Appellant, *and* JEERIS and another, Respondents

S. C. 308/68F—D. C. Matara, 2372/L

Paulian action—Person who has obtained a decree of Court upon a claim for unliquidated damages—Right of such person to be regarded as a creditor—Civil Procedure Code, ss. 742, 653.

Where, during the pendency of an action for the recovery of unliquidated damages, the defendant fraudulently and collusively alienates to a third party property which belonged to him prior to the institution of the action, so that the property may not be seized in execution proceedings by the plaintiff subsequently, the plaintiff, after he obtains judgment in his favour, is entitled to institute a Paulian action to invalidate the fraudulent alienation. This question was wrongly decided in *Mukthar v. Ismail* (64 N. L. R. 293, Divisional Bench).

APPEAL from a judgment of the District Court, Matara.

Bala Nadarajah, with *K. C. Kamalasabason,* for the plaintiff-appellant.

Nimal Senanayake, for the 1st defendant-respondent.

No appearance for the 2nd defendant-respondent.

Cur. adv. vult.

November 6, 1973. H. N. G. FERNANDO, C.J.—

I agree with my brother Wimalaratne that the question which arises for our decision was wrongly decided in the judgment in the case of *Mukthar v. Ismail.* I wish only to state an additional reason for declining to follow that judgment, and it is necessary to refer to the facts of that case.

The plaintiff (in *Mukthar v. Ismail*) had in February 1954 become the lessor to the 1st defendant of an Estate. In January 1955, the plaintiff instituted an action No. L 4408 against the 1st defendant for cancellation of the lease, for ejectment, and for damages for breach of the conditions of the lease.

In February 1955 (i.e. after the lease of the Estate and after the institution of the action on the lease), the 1st defendant became the owner of a property in the City of Kandy; and in October 1955, the 1st defendant sold this property to the 2nd defendant.

1* A 04465—2,808 (74/01)

In February 1956, decree was entered against the 1st defendant in action L. 4408 for cancellation of the lease of the Estate and for damages. The Kandy property was then seized in execution of this decree, but was claimed by the 2nd defendant by virtue of the transfer of that property to him in October 1955.

It was this transfer of October 1955 which the plaintiff ultimately sought to set aside as having been in fraud of him.

The property in Kandy did not belong to the 1st defendant in February 1954 when the relationship of Lessor and Lessee between the plaintiff and the 1st defendant commenced, or even in January 1955 when the plaintiff instituted his action for breach of the contract of Lease of the Estate. Hence the property in Kandy was not an asset of the 1st defendant to which the plaintiff might have expected to have recourse when he entered into the relationship of Lessor and Lessee, or even when he instituted his action on the lease. Thus the actual question which had to be decided in the case of *Mukthar v. Ismail* was whether a Paulian action will lie to set aside a sale of property acquired by a person after the institution against him of an action based on some pre-existing cause of action. I cite in full the opinion of Basnayake, C.J. on this question :—

> "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 (the plaintiff) 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."

I respectfully agree with the opinion just cited, which disposed of the question which arose for decision in the case of *Mukthar v. Ismail.* It follows that the statements in the judgment in that case on the different question arising in the instant case were only *obiter dicta.*

DEHERAGODA, J.—

I agree with the view taken by my Lord the Chief Justice that the ratio decidendi in the case of *Mukthar v. Ismail* is as stated by him in his judgment and that any observations made by Basnayake, C.J., in that case on the question arising in this case are *obiter dicta*. I have also read the judgment of my brother Wimalaratne, J. and find that there is nothing I can usefully add to what has been said therein.

I agree that this appeal should be allowed as prayed for with costs both here and in the original Court.

WIMALARATNE, J.—

The plaintiff seeks in this action to have deed No. 818 dated 27th September 1963, attested by K. Weeratunga, Notary Public, declared null and void on the ground that it has been executed by the 1st defendant in favour of the 2nd defendant in fraud of the plaintiff.

Shortly the material facts are as follows:—The plaintiff purchased a van, but allowed his nephew the 1st defendant to use it. He subsequently complained to the Hakmana Police that the 1st defendant had committed criminal misappropriation of the van. The Police filed an 'A' report in the Magistrate's Court of Matara and sought an order for its disposal. The Magistrate ordered the van to be returned to the 1st defendant on his giving security in a sum of Rs. 2,000 to produce the van in court when necessary. The 1st defendant furnished as security his interest in the land called Dolegahawatta and the van was returned to him on 15th January 1963.

On 21st March 1963 the plaintiff instituted D. C. Matara 2216M against the 1st defendant for the recovery of the van or its value, together with damages. The 1st defendant filed answer on 13th September 1963 denying that the plaintiff was the owner of the van and also set up his own claim thereto.

In the meantime, on 8th August 1963, the 1st defendant was successful in withdrawing the title deed of Dolegahawatta, which he had deposited as security in the Magistrate's Court on his undertaking not to alienate the property during the pendency of the District Court action filed by the plaintiff. Notwithstanding such undertaking he transferred Dolegahawatta to his brother-in-law, the 2nd defendant, for a consideration of Rs. 1,000 on deed No. 818 of 27th September 1963, which is the deed sought to be declared null and void in the present action.

Decree was entered in D. C. Matara 2216M in favour of the plaintiff on 9th June 1965. When the property Dolegahawatta was seized in execution of the decree, the 2nd defendant preferred a claim based on deed No. 818. On that claim being upheld the plaintiff instituted the present action within 14 days as required by section 247 of the Civil Procedure Code.

Both defendants filed answer stating that deed No. 818 was executed for valuable consideration and at a point of time anterior to the decree in D. C. Matara 2216M.

The learned District Judge held that—

(*a*) the transaction evidenced by deed No. 818 was a sham transaction, entered into in fraud and collusion between the 1st and 2nd defendants in order to put the property seized beyond the reach of the plaintiff;

(*b*) the alienation rendered the 1st defendant insolvent; but

(*c*) as the decree in D. C. Matara 2216M was entered in favour of the plaintiff after the execution of deed No. 818, the plaintiff was not a judgment creditor to whom the Paulian relief is available.

He took the view that he was bound by the Divisional Bench decision in *Mukthar v. Ismail*,[1] (1962) 64 N. L. R. 293.

The findings of the learned District Judge on points (*a*) and (*b*) above have not been canvassed in appeal. The contention of learned Counsel for the plaintiff-appellant, however, is that the plaintiff was a creditor of the 1st defendant on the date of the impugned deed, and that the finding on point (*c*) is erroneous and contrary to law. The argument in appeal is that it is not necessary for a person to be a creditor *in esse* to entitle him to institute a Paulian action in order to set aside the alienation made to defraud him.

In *Mukthar v. Ismail* (above) Basnayake, C.J. stated that it is only a creditor *in esse* who can claim that an alienation has been made to his prejudice—a creditor *in esse* being a person to whom another person owes a debt which actually exists either in an ascertained sum of money or in the form of a judgment debt or a contract debt. He further stated, in the course of his judgment at p. 299, " a claim for unliquidated damages does not fall within the ambit of the expression ' debt ' ".

" The law, which always seeks to have good faith reign, cannot tolerate fraudulent operations. In every case where it is possible to discover them, it gives creditors a special action whereby they

[1] *(1962) 64 N L. R 293.*

can avoid the consequences of the fraud. 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.", says *Planiol* in his *Treatise on the Civil Law*, Vol. 2, Pt. I, No. 296, (Louisiana State Law Institute Translation).

Under French Law, the Paulian action is provided for by Article 1167 of the Code Civil, up to the enactment of which the law in France on this matter was the same as the Roman Dutch Law—Planiol No. 298.

Although under the Roman law it was a collective action instituted in the name of the mass of creditors, it later became an individual action, the exercise of which belongs separately to each creditor—Planiol No. 297.

Under the heading "Who has right to Revocatory Action" Planiol says, "In the normal state of affairs the creditor who attacks an act of his debtor should prove that his credit arose prior to the act attacked. In fact if he has not dealt with the debtor until afterwards, what can he complain of ? He could not have counted on property which had already left the hands of his debtor ; he has dealt with a man already impoverished and has taken him as such"—*Planiol* No. 316. From this passage it would seem that a person who has a claim for unliquidated damages is not a creditor for the purpose of a Paulian action. Basnayake, C.J. probably relied on this part of the passage from Planiol when he held that it was only a creditor *in esse* who could bring the Paulian action. But the second part of the same passage is in the following words :—

> "Those who become creditors after the fraudulent act have therefore no right to attack it. They have such a right, however, if the fraud was directed against them. Examples of this are seen in practice : certain debtors commit frauds against their future creditors, in arranging in advance the manner of withdrawing the pledge on which creditors will count in dealing with them."

This exception in favour of granting relief to future creditors has been adopted in several cases. In the report of the case of *Silva v. Mack*,[1] (1875) 1 N. L. R. 131, there appears the judgment of Mr. Berwick, District Judge, in which he considers the position exhaustively. After referring to an intention to defraud antecedent creditors, he says at p. 138, "I think there is no room to doubt that, where there has been an actual intention to defraud future creditors as well, any one of them who is prejudiced may set aside the deed."

[1] *(1875) 1 N. L. R. 131.*

That the Paulian action is available to all creditors without distinction—both those "who have acquired a right by a voluntary act on their part, such as a contract" and those who have become creditors "without having wished it"—is the opinion expressed by Bertram, C.J. (following the view of Planiol) in *Fernando v. Fernando,*[1] (1924) 26 N. L. R. 292, where he continues at p. 295—

> "One feels reluctant to adopt a view which would seem to imply that, if a person committed a gross fraud or wrong against another and then disposed of his property with a view to avoiding the result of any consequent action, the person defrauded would not be a creditor for the purpose of a Paulian action. There is, however, a solution of this difficulty, namely, that such a person may be considered to have formed a design to defraud future creditors, and prejudice caused by such fraudulent design is declared to be within the scope of this remedy. This view is expanded by Mr. Berwick in the judgment above referred to (i.e. in *Silva v. Mack*)."

The decisions relating to claims for unliquidated damages did not go so far as to hold that at the time of alienation judgment should have already been entered. In *Fernando v. Fernando* (above) Jayewardene A.J. pointed out that although the term "creditor" would not include a person having a claim for unliquidated damages, once decree is entered in favour of a person having such a claim, he would be entitled to put in issue the question of alienation in fraud of creditors. *Pothier,* in his *Commentary on the Pandects,* expresses the opinion that a person to whom something is due *ex delicto* may be considered a 'creditor'. Bertram, C.J. would describe such a person as a creditor *ex delicto.* (See 26 N. L. R. at p. 295).

In *Fernando v. Fernando,*[2] (1940) 42 N. L. R. 12, prior to the date of the impugned alienation a cause of action in delict had accrued to a person who had notified to the alienor his intention of bringing an action. The plaintiff succeeded on the ground of fraudulent alienation despite the fact that it was only subsequent to the alienation that a decree was obtained against the alienor.

In *Punchi Appuhamy v. Sedera,*[3] (1947) 48 N. L. R. 130, Wijeyewardene, J. held it to be quite sufficient if the plaintiff had obtained judgment on his unliquidated claim at the time of the institution of the Paulian action, notwithstanding that the

[1] *(1924) 26 N. L. R. 292 at 295.* [2] *(1940) 42 N. L. R. 12.*
[3] *(1947) 48 N. L. R. 130.*

fraudulent transfer was effected before decree was entered in his favour.

The three cases referred to above recognised the rights of a creditor *ex delicto* to attack a transfer on the ground of fraudulent alienation, provided that at the date of institution of action his claim had been reduced to a decree. The observations of Basnayake, C. J. that it is only a creditor *in esse* who can claim that an alienation was made to his prejudice, that a claim for unliquidated damages does not fall within the ambit of the expression "debt", and that a person who had only such a claim could not institute a Paulian action, do not accord with the law that prevailed up to then.

To deny the Paulian relief to a person who has a claim for unliquidated damages would be to leave the door open to fraudulent alienations by persons who, as a result of their wrongful acts, have caused damage to others. Victims of fraud and negligence would have to look on helplessly, not merely after the notification of their claims but until the final determination of their claims, whilst those who perpetrated such wrongful acts openly parted with their assets. The injustice resulting cannot, in my view, be prevented effectively by resorting to the remedies suggested in *Mukthar v. Ismail.* I refer to such reliefs as mandates of sequestration, which from a practical point of view are not readily available. For one thing, it would be difficult to place before Court evidence that the defendant is fraudulently alienating property to avoid payment of the debt or damage. Another difficulty is that a certificate under section 14 of the Conciliation Boards Act, No. 10 of 1958, would have to be obtained before plaint is filed for the purpose of invoking section 653 of the Civil Procedure Code.

The remedy of a Paulian action is available, in my view, to a plaintiff who has a claim for unliquidated damages, which claim is subsequently converted to a decree in his favour prior to the institution of the action, even though the fraudulent alienation was prior to the date of such decree.

The plaintiff in the present action is therefore a person to whom the Paulian action is available, and I would set aside the judgment of the learned District Judge.

The appeal is allowed. Judgment will be entered for the plaintiff as prayed for with costs both here and in the District Court.

Appeal allowed.