

1949

Present: **Jayetilleke S.P.J. and Windham J.****KARUNADASA, Appellant, and YOOSOOF, Respondent***S. C. 101—D. C. (Inty.) Colombo, 19,201M*

*Civil Procedure Code—Application for mandate of sequestration before judgment—Allegations in petition—Nature of facts to be alleged—Need not be within the knowledge of party—Sections 181 and 653.*

In an application for a mandate of sequestration before judgment, the facts which the petitioner is required to allege need not be such as he is able to testify to of his own knowledge and observation. They may be merely statements of his belief provided he gives reasonable grounds for such belief. An allegation that the defendant is preparing to do something is a sufficient allegation of fact within the meaning of sections 181 and 653 of the Civil Procedure Code.

**A**PPEAL from a judgment of the District Court, Colombo.

*H. V. Perera, K.C., with E. B. Wikramanayake, K.C., and Titus Goonetilleke, for defendant appellant.*

*N. E. Weerasooria, K.C., with V. A. Kandiah, for plaintiff respondent.*

January 26, 1949. WINDHAM J.—

The defendant-appellant appeals against a mandate of sequestration issued by the learned District Judge under section 653 of the Civil Procedure Code. The ground of appeal is that the affidavit in support of the plaintiff-respondent's petition for the mandate, while alleging that the defendant was fraudulently alienating his properties with intent to avoid paying the amount due to the plaintiff, did not contain any allegations of fact from which the court might infer such fraudulent alienation.

Now an examination of sections 653 and 181 of the Civil Procedure Code makes two points clear. First, section 653 requires the affidavit to set out allegations of fact from which the judge may infer that the defendant is fraudulently alienating his property with intent to avoid payment of the debt or damage; that is to say, a mere statement in the affidavit that the defendant is fraudulently alienating is not enough,—it is for the court to infer fraudulent alienation, or not, from the allegations of fact set out in the affidavit. Secondly, since petitions under section 653 are interlocutory, the allegations of fact so set out in the affidavit need only comply with the second part of section 181 of the Civil Procedure Code and not with the first part; that is to say they need not be such as the declarant is able of his own knowledge and observation to testify to, but they may be merely statements of his belief, provided that reasonable grounds for such belief are set forth in the affidavit.

The position as I have set it forth with regard to both these points is recognized in *David & Co. v. Albert Silva*<sup>1</sup> and in *Samarakoon v. Ponniah*<sup>2</sup>. In both those cases the mandate was rightly dissolved because the

<sup>1</sup> (1929) 31 N. L. R. 316.

<sup>2</sup> (1930) 32 N. L. R. 257.

affidavit set out no grounds for the petitioner's belief that the defendant was fraudulently alienating his property. Similarly in the earlier case of *K. Hing Appu v. Donchamy*<sup>1</sup>, the writ of sequestration was set aside because the supporting affidavit merely alleged that the "defendants were alienating the assets, and that unless sequestration were issued he would be unable to recover the debt due by the intestate to him". In short, the affidavit merely alleged as a fact the conclusion which it was for the judge to arrive at on the strength of further allegations of fact, and did not set out any such supporting allegations of fact.

In the present case, however, the affidavit does set out allegations of fact from which the judge might infer the conclusion that the defendant was fraudulently alienating his property. It sets out the same question-begging allegations that I have quoted from the affidavit in *K. Hing Appu v. Donchamy*, but in addition it contains the following, among other, allegations with regard to the defendant, to whom monies had been paid and further monies were to be paid, monthly, by Government as the purchase price of beef and liver sold to them by the defendant. Paragraph 6 of the affidavit states—"The defendant is making preparations to draw the amount payable this month; he has been trying to avoid me". Paragraph 8 states—"The defendant is making preparations to have the deposits with the Prisons Department transferred to other persons; he is making preparations to sell or put away his only immovable property, No. 6, Campbell Terrace".

In my view these are allegations of fact sufficient to satisfy sections 653 and 181 of the Civil Procedure Code, and to distinguish the present case from the earlier decisions which I have cited. It is argued for the defendant, not without some force, that to state that a person is "making preparations" to transfer or sell property is again to state an opinion or inference rather than a fact, and that just as it was for the court and not the plaintiff to infer fraudulent alienation from facts alleged, so it would be for the court and not the plaintiff to decide whether specific acts alleged by the plaintiff constituted the "making of preparations", and that therefore the allegation of such specific acts was essential. But this argument, though attractive, would lead to the logical conclusion that the only facts permitted to be alleged in the affidavit under section 653 would be the performance of specified physical movements in relation to concrete objects; for allegations of all other kinds may be argued to involve some degree of mental inference from acts of that physical nature. I do not consider that the word "facts" in section 653 is to be construed in so narrow a sense, or that, in the present case, it would require the plaintiff to state precisely what movements or acts on the defendant's part constituted the "preparations to sell" the particular property named. To allege that somebody is preparing to do something is to allege a fact, and that is all that the section requires.

For these reasons I hold that the affidavit in support of the plaintiff's petition complied with the requirements of sections 653 and 181 of the Civil Procedure Code. The appeal is accordingly dismissed with costs.

JAYETILEKE S.P.J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1900) 1 *Browne* 376.