1957 *Present :* Basnayake, C.J., and K. D. de Silva, J.

PITCHCHOHAMY DE SILVA, Appellant, *and* SIYANERIS and others, Respondents

S. C. 192—D. C. Matara, 22,717

Paulian action—Fraudulent alienation—Existence of debt at date of impugned deed—Necessary ingredient—Transferor must be made party—Effect of his death—Action under s. 247 of Civil Procedure Code—Scope.

Where a judgment-creditor seeks to have a deed of transfer executed by his judgment-debtor set aside on the ground that it was executed in fraud of creditors, he must establish, *inter alia*, that the transferor owed him money at the date of the impugned deed.

Where fraudulent alienation is alleged, the transferor must be made a party to the action.

The *actio Pauliana* does not lie against the heirs of a debtor unless they were parties to the fraud or benefited thereby.

Quaere, whether in an action under section 247 of the Civil Procedure Code where the claimant bases his title to the property seized on a deed of transfer executed by the judgment-debtor, it is competent for the judgment-creditor to claim a declaration that such deed was executed by the judgment-debtor in fraud of creditors.

APPEAL from a judgment of the District Court, Matara.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for Plaintiff-Appellant.

H. V. Perera, Q.C., with *D. R. P. Goonetilleke*, for Defendant-Respondent.

Cur. adv. vult.

September 30, 1957. BASNAYAKE, C.J.—

The plaintiff-appellant instituted this action under section 247 of the Civil Procedure Code in order to establish her right to the lands described in the schedule to the plaint which have been seized at the instance of the defendant in execution of the writ issued in D. C. Matara Case No. 16621. She claims that she is the owner of the lands by virtue of a deed of gift executed by her husband in her favour on 11th September 1944.

The defendant resists the plaintiff's action on the ground that the deed of gift on which she relies was executed fraudulently and collusively by the plantiff's husband (hereinafter referred to as the donor) in order to defraud his creditors especially the defendant and that he thereby rendered himself insolvent.

The scope of an action under section 247 of the Civil Procedure Code is limited. In the instant case the main issue was whether the plaintiff and not the donor was on the date of the seizure the owner of the lands seized. It is not denied that the title to the lands was in the plaintiff

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when the seizure was effected. Even if the defendant's claim that the gift was made in fraud of the donor's creditors, particularly himself, and that the donor rendered himself insolvent thereby, is established, the title conferred by the deed would be in the donee until the deed is set aside, for an alienation in fraud of creditors is not *ipso jure* void and is valid unless it is set aside within the prescriptive period (Voet Bk XLII. 8 ; Van der Keessel, Select Theses, CC, Lorenz's Translation, p. 67). Under the Roman Dutch law that period is one year and under our Ordinance three years [1].

Under section 218 of the Civil Procedure Code the defendant had power to seize and sell and realize in money by the hands of the Fiscal "immovable property belonging to the judgment-debtor, or over which or the profits of which the judgment-debtor has a disposing power, which he may exercise for his own benefit, and whether the same be held by or in the name of the judgment-debtor or by another person in trust for him or on his behalf". The lands claimed by the plaintiff did not at the date of seizure come within the above description of lands liable to be seized for the donor's debts. The plaintiff is therefore entitled to succeed in her action as she has established her title to them. This aspect of the case does not appear to have been given the emphasis it deserved at the trial although an issue in the following form was tried and answered in favour of the plaintiff :

> "Was the plaintiff the owner of the premises referred to in the schedule to the plaint at the date of seizure—27.8.51—by virtue of deed of gift No. 7906 of 11.9.1944."

The attention of both sides seems to have been directed more to the question whether the deed of gift was liable to be set aside on the grounds alleged by the defendant.

As I have pointed out above the question raised by the defendant in his answer does not affect the only issue in this action. Two out of the three Judges who heard the case of *Haramanis v. Haramanis* [2], took the view that in an action under section 247 where the claimant bases his title to the property seized on a deed of transfer executed by the judgment-debtor it is competent for the judgment-creditor to claim a declaration that such deed was executed by the judgment-debtor in fraud of creditors. This view is based on the assumption, as Wood Renton J. points out in the same case, that an alienation in fraud of creditors is void and not voidable. It is clear from the discussion of the subject of Frauds on Creditors in Voet, Book XLII, Title 8, and Van der Keessel, Select Theses, cited above, that that assumption is erroneous and that the better view is that taken by Wood Renton J. in the case of *Haramanis v. Haramanis* (*supra*) and in the cases referred to by him in his Judgment [3].

[1] *Section 10, Prescription Ordinance.*
Ahamado Lebbe et al. v. Adam Bawa et al., 3 A. C. R. 1.
[2] *10 N. L. R. 332.*
[3] *Abdul Cader v. Annamalay, 2 N. L. R. 166.*
Wijewardene v. Maitland, 3 C. L. R. 7.
Silva v. Kirigoris, 7 N. L. R. 195.
Silva v. Nona Hamine, 10 N. L. R. 44.

Even if instead of praying by way of answer that the deed be set aside the defendant had instituted a Paulian action for the same purpose the defendant could not on the facts proved in this case have succeeded. In the first place the evidence does not establish that the defendant was a creditor at the date of the deed of gift, nor was the donor a debtor. In September 1944 the defendant had notified to the donor that he had purchased a land called Palugahawatte which the latter claimed and in respect of which he had entered a caveat. When action was eventually instituted the defendant succeeded in the District Court. The decision of the District Court was reversed on appeal to this Court and finally the defendant succeeded in the appeal to the Privy Council. It is for the recovery of the costs of the legal proceedings which amount to Rs. 10,513.31 that the defendant has caused the plaintiff's lands to be seized. In no sense of the expression can the defendant be said to have been a creditor of the donor on 11th September 1944. On that day the donor did not owe him any money nor did the creditor have a claim which was enforceable against him. The debt came into existence only on 8th February 1951 over six years after the gift. As the question of prescription has not been raised at the trial it need not be discussed for the purpose of this case. The defendant's own exhibit D7 shows that he challenged the deed of gift in Case No. 16621 and that the donor was cross-examined as to it and the circumstances under which it was executed. He gave a long list of lands which he still owned after he had made the gift and generally referred to the assets he had at that date and thereafter. His evidence shows that he was by no means insolvent in September 1944. There is also no evidence that he then had unsecured creditors whose claims he was not able to meet. Furthermore the defendant has made no endeavour to establish that the donor has impoverished himself by the gift by having him examined under section 219 of the Civil Procedure Code. The defendant is therefore not entitled to a decree setting aside the deed.

There is a serious defect in the defendant's case. He alleged fraud on the part of both the donor and the donee but did not make the donor, who was alive at the time he filed answer, a party to the action. Where fraud is alleged the party against whom the allegation is made must be made a party [1]. The defendant has since the death of the donor brought in his children as parties; but that cannot cure the defect nor are the children proper parties where it is not alleged that they were parties to the fraud or benefited thereby. The *actio Pauliana* is an action *in personam* (Voet Bk XLII 8.2), and does not lie against the heirs of a debtor unless they are conscious of the fraud and only if something has come into their hands through the guile of the deceased debtor (Voet Bk XLII 8.4).

For the above reasons I am of opinion that the plaintiff-appellant is entitled to succeed in her action. I therefore set aside the judgment of the District Judge and order that decree be entered—

(*a*) declaring the plaintiff entitled to the lands described in the schedule to the plaint,

[1] *Dissanayake v. Baban (1903), Matara Cases 211.*
284 D. C. Batticaloa 2192 (S. C. Minutes Aug. 17, 1903).
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(*b*) declaring that the defendant has no power to seize and sell the lands in question for the recovery of his decree for costs in D. C. Matara Case No. 16,621, and

(*c*) ordering the Deputy Fiscal to release the lands from seizure.

The appellant is entitled to his costs both here and below.

DE SILVA, J.—I agree.

Appeal allowed.