1952 *Present :* **Choksy A.J.**

V. A. APPUHAMY, Appellant, *and* BELIN NONA, Respondent

S. C. 193—C. R. Kegalle, 18,327

Paulian action—Alienation in fraud of creditors—Fraud of purchaser—Requirement of proof thereof.

Where a deed of sale is impeached by a judgment-creditor on the ground that it was executed by the judgment-debtor in fraud of creditors, there must be proof of fraud not only on the part of the judgment-debtor but also on the part of the purchaser, at least where the consideration has been paid.

APPEAL from a judgment of the Court of Requests, Kegalle.

C. R. Gunaratne, with *T. B. Dissanayake*, for the plaintiff appellant.

H. W. Jayewardene, for the respondent.

Cur. adv. vult.

February 6, 1952. CHOKSY A.J.—

The first defendant obtained a decree against the second defendant in C. R. Kegalle 17,277 on the 1st May, 1947, for a sum of Rs. 149. It appears that the claim in that action had been referred to arbitration. The arbitrator made an award on 12th November, 1946, in favour of the first defendant. This award was made a decree of Court on the 1st May, 1947. In pursuance of that decree the first defendant who was the judgment-creditor issued writ against the defendant in that action (who is the second defendant in the case under appeal). Under the writ he seized the land which the plaintiff had purchased upon deed No. 794 dated 27th March, 1947, which deed was registered on the 8th April, 1947. The plaintiff in the present action claimed the property but his claim was dismissed, presumably on the ground that he did not have possession of the property as the question of possession is the all-important question in a claim inquiry. He therefore instituted this action under 247 of the Civil Procedure Code for a declaration of title to 25/48 share of the land and for a declaration that the said share is not liable to seizure and sale under the writ in C. R. Kegalle 17,277 at the instance of the first defendant to this action, in view of the plaintiff's purchase upon his deed No. 874. Among the questions tried in the action was whether the deed in favour of the plaintiff had been executed in fraud of creditors.

The plaintiff has appealed against the dismissal of his action by the learned Commissioner of Requests. The second defendant (who was the judgment-debtor in the earlier action) gave evidence for the first defendant and with very remarkable readiness owned up that he had sold interests in the land to the plaintiff in order to save the land from seizure. He even went to the extent of stating that he expressly told the plaintiff that he was selling the land for the purpose of preventing its seizure at the instance of the present first defendant. Not being content with this very cleansing confession, the second defendant proceeded to add that the plaintiff had promised to re-transfer this land to the second defendant on the latter repaying the former the consideration paid for the land. He proceeded to supply the first defendant with further

evidence on factors which would be necessary to enable the first defendant to successfully defeat the claim of the plaintiff by alleging that the land was a valuable planted land worth about Rs. 1,500. He completed the tale of fraud by stating that he did not own any other lands on the date of the execution of the transfer in favour of the plaintiff. The consideration on the face of the deed is said to be Rs. 200. It is not clear from the evidence of the second defendant whether only the interest which he sold, namely, 25/48 shares, is of the extent of three acres and is worth Rs. 1,500 or whether he meant to say that the entire land was three acres in extent and was worth about Rs. 1,500. According to the second defendant only Rs. 100 out of the consideration was paid to him at the time of the execution of the transfer. He also stated that he had sold his shares in some other lands to the plaintiff himself, in 1945, to pay the expenses which he had incurred in connection with the earlier Court of Requests action. In cross-examination he admitted that he owned some share of a land awarded to him in a partition action, but proceeded to whittle away the effect of this admission by stating that that share was not worth even Rs. 2.50.

The plaintiff's case was that he had paid the full consideration in the presence of the notary and on this point he is corroborated by the notary whom he called. The plaintiff's evidence was that he had the title to this land examined, and the encumbrances searched, on the 20th March, 1947, and that he found that the second defendant had only one fourth share whereas he had agreed to sell to the plaintiff a half share in the land and that therefore the deed was not executed on the 20th March. He further stated the second defendant thereafter asked him, the plaintiff, to buy the full half share and that second defendant " would settle the share-holders off ". He therefore states that he accordingly effected the purchase on the 27th March, 1947. He said that he did not know why this was sold by the second defendant to him nor was he aware of the likelihood of any execution proceedings against the second defendant. In cross-examination he stated that the second defendant was a fairly rich man, that the second defendant owned other property, that even at the date he was giving evidence the share he had purchased was " worth about Rs. 200 to Rs. 250 ", that he was not prepared to re-transfer those interests if the consideration he had paid for his purchase was given back to him. It was not put to him specifically that he had purchased these shares subject to an agreement (even though non-notarial) to re-transfer those interests on re-payment of the consideration. He admitted that he was not aware of the extent of the land forming the subject-matter of the action, of which he said he had had possession, until seizure, although for the last two years, he admitted, he had no possession because the first defendant's brother was in forcible possession. The notary said that he made a search on the 20th March, and found that the second defendant was entitled to 7/12 of this land, but admitted in cross-examination that he did not discover the extent of the second defendant's share in the land and that it was second defendant who had said that he was entitled to 25/48 shares. He also admitted what the plaintiff had said in his evidence, namely, that he, the plaintiff, had on the 20th March produced and handed to the notary the earlier title deed of

the second defendant for purposes of the search and examination of title. In his evidence in chief the notary said that the plaintiff took up the position on 20th March, that the second defendant's " title was not good ", and accordingly refused to buy the land. A week later, however, according to the notary, the plaintiff and the second defendant came and wanted the notary to draw up a deed. This he did and the deed was executed, the plaintiff paying to the second defendant the full consideration of Rs. 200, in the notary's presence. The notary also admitted that the plaintiff had paid him his search fees for the search on the 20th March.

It has been strongly urged that the notary has contradicted the plaintiff as regards the reason for the refusal of the plaintiff to complete the transaction on the 20th March. Whatever the reason may have been. all the parties are definitely agreed that the plaintiff refused to complete the purchase on the 20th March and that the purchase actually went through seven days later. The notary was not able to give any reasons for this change in the situation at the end of the seven days. The plaintiff's evidence as to the reason why he changed his mind and made the purchase on the 27th March is not contradicted either by the notary or by the second defendant. It seems to me that the refusal of the plaintiff to complete the transaction on the 20th March—whatever the reason for it—is a strong point in favour of the bona fides of the transaction. It is not stated that this was a piece of sham gone through on the 20th March for the sake of lending an appearance of reality to a sham transaction. Moreover the deed was registered within a few days, namely on the 8th April. The notary and the plaintiff both swore to the fact that the second defendant was paid the consideration in full. The contemporaneous attestation in the deed of transfer also supports the plaintiff. These are strong considerations in favour of the plaintiff, vide *Nicko Nona v. Thomas Appu* [1]. In that case Ennis J. stated that the fact that the vendor had remained in possession and the judgment-debtor had no other property with which to meet other debts were of themselves not sufficient to rebut the inference of the bona fides of a transaction which arises from the fact that it was not secret and that consideration was paid. In that case Ennis J. also stresses the fact that the purchaser had a strong motive for obtaining a transfer of the land because in that way he was obtaining satisfaction of the debt due to him by his vendor. That also tended in favour of the bona fides of the transaction. As against that, in the present case, we have the undoubted fact that the plaintiff refused to complete the transaction on the 20th March and completed it a week later. There is also the uncontradicted evidence of the plaintiff that he had possession and that his loss of possession was due to the judgment-creditor's brother taking forcible possession from him. In my opinion these are also strong factors—at least prima facie—in support of the bona fides of the transaction.

One of the elements that is usually relied on in establishing a case of fraudulent intention to defeat judgment-creditors is that possession has remained in the judgment-debtor despite the alleged transfer. In

[1] *(1918) 5 C. W. R. 155.*

the present case the second defendant in the course of his voluble confession has not stated anywhere that he remained in possession of the property despite the transfer to the plaintiff. He has maintained a singular silence on that point. The plaintiff, however, has admitted and explained how it is that he, either lost the possession which according to him he once had, or how he did not have possession at all. However that may be, there is no evidence that the second defendant at any time had possession after the transfer. This again is a factor to be taken into account in deciding the question as to whether the transfer was a genuine one or a mere pretence.

Another important question for determination in cases of this nature is as to whether the consideration for the alleged transfer was genuine and has in fact been paid or not. The Commissioner has expressed no finding on this question. The plaintiff and the notary testified that the consideration was paid in the notary's presence. The learned Judge, on another point, has preferred to accept the evidence of the notary rather than the evidence of the plaintiff. Had he been disposed to reject the notary's evidence on this point regarding the payment of the consideration, he would, I have no doubt, have said so. It certainly cannot be said that he has rejected the evidence of the notary on this point. There are no attendant or inherent circumstances upon which one can reject the notary's evidence on this point. There is at least prima facie evidence of the payment of the consideration afforded by the attestation of the notary in the deed of transfer itself, and therefore in the absence of an express finding against the plaintiff on this point a further element of some importance in establishing a case of a conveyance in fraud of creditors has not been established. It is no doubt true that the payment of the consideration for the purchase is by no means conclusive of the genuineness or honesty of the transaction. It is only one factor and, while it will not enable the purchaser to retain the property where he has participated in the fraud, vide *Meera Saibo v. Ayan Sinnavan* [1], yet where there is not sufficient evidence to involve the purchaser in any fraud, or where it is merely a case of suspicion of his participation in a fraud, then the payment of the full stipulated consideration strengthens considerably the purchaser's claim to retain the land he has bought, vide *Perera v. Menik Etana* [2]. If however it is proved that the consideration has not been paid then that establishes one element in proving that the transaction is a contrivance to defraud creditors, vide *Bala Etana v. Dassi Terunnanse* [3].

The most important element is that of a fraudulent intention to defeat the claims of creditors. It is a truism to say that fraud cannot be presumed but that it must be proved, vide *Muttiah Chetty v. Mohamood Hadjiar* [4]. That means, as the judgment in that case shows, that there must be circumstances found from which a reasonable inference of intention to defraud can be drawn, because it is very difficult, or very rare, to get a plain and demonstrable case of fraud. Where fraud would be a reasonable inference from the facts then the burden is shifted to the other side and unless that side satisfactorily explains those

[1] *(1927) 29 N. L. R. 84.*
[2] *(1918) 5 C. W. R. 258.*
[3] *(1896) 2 Browne's Reports 355.*
[4] *(1923) 25 N. L. R. 185.*

circumstances otherwise, the Court would draw the inference of fraud ; but to begin with, however, the onus is on the party alleging fraud and until a prima facie case is made out by such party from which fraud could reasonably be inferred, no onus is thrown on the party charged with fraud to repel the charge, because it just fails.

Moreover the effect of the authorities is that fraud must be proved not only on the part of the vendor but also on the part of the purchaser, at least where the consideration has been paid, vide *Perera v. Menik Etana* [1]. In that case too this Court felt considerable suspicion that both purchaser and debtor knew that the property would be seized in a pending case, but held that the creation of suspicion is not a sufficient discharge of the onus of proving fraud, vide *Tobias Fernando v. Don Andris Appuhamy* [2]. In *Fernando v. Fernando* [3], Keuneman J., while basing his judgment on other points, observed—*vide* page 18—that the plaintiff was not free from complicity in the fraud, the plaintiff there being the purchaser.

Consideration will not avail the purchaser if he had participated in the fraud. Vide *Meera Saibo v. Ayan Sinnavan* [4]. The Commissioner has not found that the plaintiff was a party to the fraudulent intention which the second defendant confesses he entertained in his mind in executing the transfer in question. Indeed the Commissioner could not have come to any such conclusion because there is no evidence whatsoever to connect the plaintiff with the second defendant's all too readily confessed dishonest intention. The evidence of a man who so readily owns up to having had a fraudulent intention must be accepted with caution where that evidence tends to defeat what appears prima facie to be a bona fide transaction for consideration, especially where the person testifying is labouring under a grievance that the purchaser has gone back on his promise to reconvey the property.

The fact that the plaintiff two years earlier had purchased some other interests of the second defendant in some other land is, in my opinion, insufficient to fix the plaintiff with the knowledge of the fraudulent character of the intentions of the second defendant in the present transaction, and the circumstance that the plaintiff and the defendant were " no strangers to one another " as the Commissioner has found is a very slender circumstance to rely on to prove fraud in the purchaser. In these circumstances the contention that the transfer was in fraud of creditors cannot be upheld, vide *Tobias Fernando v. Don Andris Appuhamy* [2]. Even if the second defendant's evidence is accepted, as it was by the Commissioner, that his intention was to defraud the first defendant of her rights under the decree, there is no proof that the plaintiff participated in those intentions.

In the course of the argument it was said that the case involved a question of fact and that therefore the Court of Appeal should be very slow to interfere with the findings on facts of the lower Court. It is because I accept the soundness of that position that I have been at pains to analyse the evidence in this case, for it appears to me that the final

[1] *(1918) 5 C. W. R. 258.*
[2] *(1950) 43 C. L. W. 44.*
[3] *(1940) 42 N. L. R. 12.*
[4] *(1927) 29 N. L. R. 84.*

outcome does not rest merely on the belief or disbelief of witnesses as to a particular situation or set of facts, but rather to depend on the correct inferences to be drawn from the testimony of witnesses whose evidence the Court of first instance has accepted.

I accordingly set aside the judgment of the learned Commissioner and order that decree be entered in favour of the plaintiff as prayed for in his plaint. The plaintiff will be entitled to his costs in the Court below and to the costs of this appeal.

Appeal allowed.