

1954

Present : Gratiaen J. and Gunasekara J.

M. JUSTIN DE SILVA, Appellant, and P. DON NICULAS,
Respondent

S. C. 200—D. C. Negombo, 15,839

Paulian action—Conveyance of property in fraud of creditors—Several colourable transactions—Civil Procedure Code, s. 247.

Alienation of property in fraud of creditors may consist of a series of colourable transactions in respect of the same property.

APPPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q.C., with *H. A. Koattegoda*, for the 1st defendant appellant.

E. G. Wikramanayake, Q.C., with *W. D. Gunasekere*, for the plaintiff respondent.

Cur. adv. vult.

May 10, 1954. GRATIAEN J.—

This is an appeal against a judgment in a "247 action" declaring that the property in dispute belongs to the plaintiff and is not liable to be seized and sold in execution of a money decree dated 21st February 1950 in favour of the appellant against the 2nd defendant.

Admittedly the property belonged to the 2nd defendant until he conveyed it by P3 dated 16th June 1949 to his wife the 3rd defendant. She in turn conveyed it by P4 dated 12th November 1949 to the 4th defendant who purported to sell it to the plaintiff by P5 dated 20th March 1950.

The appellant alleges that P3, P4 and P5 were all colourable transactions whereby the 2nd defendant, who at all times continued in occupation of the property, fraudulently contrived to defeat his creditor the plaintiff. He accordingly asked in reconvention that P5 be set aside as having been executed in fraud of creditors.

The learned Judge took the view that the evidence was insufficient to establish the fraud alleged against the plaintiff and the 2nd to the 4th defendants. In my opinion, however, the allegation has been proved beyond reasonable doubt, and the facts established at the trial are quite inconsistent with the theory that P3, P4 and/or P5 were genuine transactions.

Certain dates are very material to the issue of fraud. On 16th June 1949 the appellant sued the 2nd defendant and another person under Chapter 53 of the Civil Procedure Code in D. C. Negombo No. 15,343 for the recovery of Rs. 1,950/77 due to him on a promissory note. *On the same day the 2nd defendant purported to sell this property (which was admittedly his only valuable asset) to his wife the 3rd defendant for a "consideration" of Rs. 500/- which did not pass before the notary.* (The 2nd defendant had himself paid four times this sum when he purchased the property 10 months earlier.) It is not seriously pretended that this was a genuine transaction, and it is quite clear that the 3rd defendant was in truth her husband's nominee. This was the first step in the fraud which he had planned to defeat the appellant's claim.

In the promissory note action, the 2nd defendant was granted leave to defend the action on condition that he deposited security in the sum of Rs. 1,000/- in cash or Rs. 2,000/- by hypothecation of immovable property. He failed to comply with this condition and, in order to gain further time, he filed an appeal to this Court on 12th September 1949. Pending the hearing of this appeal, his wife purported to sell the property to the 4th defendant (a relation of the 2nd defendant). The attesting notary was the 2nd defendant's proctor in the promissory note action, and (if he searched the register of encumbrances as he said he did) *he must have discovered that the appellant had registered a caveat on 4th July 1949 in respect of this property.* No doubt the purported "consideration" passed before the notary, but as the 4th defendant has not had a day's possession of the land since his so-called purchase, I am perfectly satisfied that P4 was also a colourable transaction. This was the second step in the fraud.

The 2nd defendant's appeal in D. C. No. 15,343 was dismissed with costs, and the record was returned to the District Court of Negombo on 28th January 1950. Judgment in favour of the appellant was entered against the 2nd defendant on 21st February 1950. The 2nd defendant was examined under section 219 of the Civil Procedure Code on 16th March 1950 and disclosed no realisable assets against which execution proceedings could be taken. He mentioned however that he had owned the property in dispute until he "sold" it to his wife.

On 17th March 1950 a writ was issued to the Fiscal to seize and sell the 2nd defendant's property. The final stages of the fraud were then taken in hand. A relative of the 2nd defendant (one Vincent de Paul) instructed notary Payoe to prepare a conveyance from the 4th defendant in favour of a man named Fernandopulle. A draft deed and protocol were accordingly prepared, but Fernandopulle apparently declined to go through with the transaction. At 9.15 a.m. on 20th March 1950 the Fiscal's officer attempted to seize the property, but was forcibly prevented from doing so by the 2nd defendant's wife, who "said that if the seizure notice was affixed on the land she would assault him" (1D13) and eventually "began to cry out saying that if the land was seized she would die on the spot" (1D14). This hysterical demonstration clearly indicates that she regarded the property as still belonging to herself and her husband and not to the 4th defendant. The 4th defendant was not present to protect his alleged title.

In consequence of the incidents which took place at 9.15 a.m. on 20th March, the Fiscal's officer was unable to effect a seizure in pursuance of the writ until two days later. In the meantime, the man Vincent de Paul (who was also closely related to the plaintiff) arrived at notary Payoe's office and said that the plaintiff was prepared to purchase the property in the place of Fernandopulle. Accordingly, the name of Fernandopulle was erased from the protocol and from the draft conveyance, and the plaintiff's name was substituted as purchaser. In all the hurry which took place, the plaintiff "dispensed with a search for encumbrances".

In spite of this purported purchase, the 2nd defendant and his wife continued to occupy the land. The plaintiff says that they did so permissively, but that he took the produce from the trees. His proctor's unqualified admission to the Court at the claim inquiry, however, was to the effect that the 2nd defendant was in possession.

We have here a strong body of circumstantial evidence which compels one to infer that the plaintiff had merely lent his name to a transaction whereby the 2nd defendant fraudulently attempted to defeat his creditor. In view of all these circumstances, the purported payment of the "consideration" in the notary's presence was, I am convinced, a colourable device. The plaintiff has not led any independent evidence to prove that he possessed sufficient funds of his own with which to make a genuine but speculative purchase at very short notice and without investigation of title, and the 4th defendant has not given evidence from which we can test the reality of his participation in this impugned transactions. The 2nd defendant and his wife did not make the slightest attempt to explain away the many incriminating features of their conduct which calls for explanation.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts in favour of the appellant. I would also order a decree in favour of the appellant in terms of paragraphs (b) and (c) of his answer dated 9th October 1950.

GUNASEKARA J.—I agree.

Appeal allowed.