

1944

*Present: Keuneman and de Kretser JJ.*DE SILVA, Appellant, *and* PERIES, Respondent.

94—D. C. Colombo, 11,988.

*Fraudulent seizure of property—Absence of reasonable and probable cause—Burden of proof.*

In an action to recover damages for fraudulent seizure of property the burden is on the plaintiff to prove that the defendant acted without reasonable and probable cause.

**A** PPEAL from a judgment of the District Judge of Colombo.

*H. V. Perera, K.C.* (with him *H. W. Thambiah* and *S. E. J. Fernando*), for plaintiff, appellant.

*N. E. Weerasooria, K.C.* (with him *D. W. Fernando*), for defendant, respondent.

*Cur. adv. vult.*

August 24, 1944. KEUNEMAN J.—

The facts of this case may shortly be stated as follows:—The defendant in 1930, married the eldest daughter of Emily de Silva. On that occasion Emily de Silva promised the defendant a dowry of Rs. 25,000, but out of this only Rs. 3,000 was given. Also, Emily de Silva conveyed her half share in the life interest over Shadeview to the defendant. A substantial amount of the dowry remained unpaid.

Later, the plaintiff who was a proctor became a suitor for the second daughter of Emily de Silva. He wrote the letter of solicitation D 1 of September 5, 1933, and Emily de Silva replied by P 2 of the same date, promising as dowry Rs. 5,000 in cash and her life interests in certain specified properties. This letter (P 2) was sent to the plaintiff by the hand of the defendant.

The plaintiff's marriage took place on October 5, 1933, and almost immediately after the marriage trouble began between the defendant and the plaintiff, and Emily de Silva also became involved in it. It is not necessary to mention in detail the course of the trouble, but it is clear that Emily de Silva made complaints to the authorities against the defendant.

The defendant sued Emily de Silva in D. C. Colombo, 671, for the unpaid balance of the dowry. Matters came to a head about June 30, 1934, when Emily de Silva was apparently forced to leave the defendant's house, and went to live with her younger daughter and the plaintiff.

At this point, as the District Judge holds, Emily de Silva came under the influence of the plaintiff. While living with the plaintiff Emily de Silva on July 14, 1934, gave a lease of her life interest in Shadeview to one Nikulas, who the Judge surmises was a "rowdy", and sent him to share the house with the defendant and his wife.

Two days later, on July 16, 1934, Emily de Silva executed the deed P 1 in favour of the plaintiff, the effect of which was to divest her of almost everything she had, except the small pension she was receiving. It is interesting to note that not only the life interests in the properties mentioned in the promise of dowry (P 2) were given to the plaintiff but also the life interest over practically all the properties in which she had that right. It is also clear from the documentary evidence that in spite of the deed P 1 Emily de Silva remained in possession of the property conveyed. The documents D 4 to D 15 show this.

Apparently about this time Emily de Silva was advised by her relations to make terms with the defendant and, as a result of this, displeasure arose between herself and the plaintiff. On April 23, 1936, she left the plaintiff's house and began to live by herself. Shortly afterwards a son of Emily de Silva was charged for murder and the defendant came to the aid of the accused man, but the plaintiff did not. Emily de Silva became the more estranged from the plaintiff, and came back under the influence of the defendant. Consequently Emily de Silva cancelled the proxy she had given to the plaintiff in D. C. 671 and made terms with the defendant, and judgment was entered against her in favour of the defendant for Rs. 9,500.

In execution of the decree in D. C. 671 the defendant proceeded to seize the interests which Emily de Silva had conveyed to the plaintiff by P 1. The plaintiff made claim to these properties and his claim was upheld with costs on October 2, 1936. Thereafter the defendant brought an action under section 247 of the Civil Procedure Code, D. C. Colombo, 652. This action was dismissed with costs, and the appeal taken by the defendant was also dismissed with costs on June 21, 1939. On June 5, 1940, the plaintiff brought the present action claiming damages in Rs. 5,000 in respect of the seizure and the subsequent proceedings on the footing that they were "fraudulent and in collusion with Emily de Silva". The action was dismissed and the plaintiff now appeals to this Court.

It cannot be denied that there was malice, in the sense of ill-will towards the plaintiff, on the part of the defendant. There had been a long-standing quarrel between them. The defendant, however, maintained that the plaintiff had failed to prove the absence of reasonable and probable cause for the defendant's action. On this point the District Judge held that "under normal circumstances there would be force in the argument" but that the circumstances were "far from normal". The District Judge then dealt with the argument that the defendant had placed matters before his legal advisers before he took the action I have mentioned. The District Judge commented upon the fact that the lawyers were not called, and rightly held that he was not in a position to decide what facts were placed before the lawyers. He held that on a review of all the facts the defendant himself must have known that P 1 was a good deed which could not be attacked.

This finding of the District Judge has been assailed by the defendant in this appeal, and as it is a fundamental matter I shall deal with it at once. The defendant lays great stress on the following facts:—

(1) Emily de Silva had by the deed P 1 for all practical purposes divested herself of every interest which she possessed and had rendered herself

insolvent and unable to meet the claim which the defendant had brought against her. This has been held by the District Judge.

(2) By the deed P 1 Emily de Silva had granted to the plaintiff not only the life interests promised to him in P 2 but the life interests over practically all her remaining properties.

(3) There seems to be little doubt that the claim for balance dowry by the defendant in action No. D. C. 671 was a genuine claim.

(4) At the time of the deed P 1, Emily de Silva was under the influence of the plaintiff. This too the District Judge has held.

(5) Even after the conveyance (P 1) to the plaintiff, Emily de Silva had remained in possession of the assets conveyed, and the plaintiff himself had acted on the footing that she continued to be the owner. This was shown by the documents D 4 to D 15, and the District Judge has held that this was the case.

(6) The evidence given on oath in this case by the defendant shows that about April, 1936, Emily de Silva came to his house at Colombo crying and bringing these very documents (D 4 to D 15) with her. On that occasion she told him that the plaintiff, after getting all she had, had driven her away, and that up to that date she had been enjoying the income. She added that the deed was a bogus deed—in the sense of a trust deed—and that she was prepared to give evidence to that effect. Emily de Silva also gave evidence on the same lines in this case. Strangely enough, the District Judge has not held whether in fact Emily de Silva did or did not make this statement to the defendant. No doubt it has now been proved in the course of the various proceedings including the present case that Emily de Silva is not a witness whose word can be relied on. But the question is not whether Emily de Silva's statement was true but whether she made the statement, and whether the defendant believed it and had some reasonable ground for believing it. I see no reason for rejecting the evidence of the defendant on this point.

No doubt these points were before the District Judge, but the only comment he makes on it is that "Had the lawyers known all the facts which are now known to this Court, and upon which another District Judge and the Supreme Court in the Paulian action held against the defendant, they would have given different advice to the defendant. Those facts, had they been fully disclosed to the lawyers or had they been impartially reviewed by the defendant himself, would have shown him that P 1 was a good deed which could not be attacked, and that there was no reasonable or probable cause for taking steps by seizure and a 247 action to have it set aside".

I think the District Judge here puts the matter in a way that is unduly unfavourable to the defendant. For instance, the defendant could hardly be expected to know all the matters of defence which were available to the plaintiff and which may by now have been revealed. The Judge immediately before the passage I have cited had been dealing with the fact that the circumstances were "far from normal". I have carefully

examined the earlier part of his judgment, and the only matters relevant to this that he has mentioned are as follows:—

There had been previous ill-feeling between Emily de Silva and the defendant, and also between the plaintiff and the defendant. Also, the defendant was aware of the contents of the letter P 2. Further, it is now clear that Emily de Silva is a very weak-willed person and one whose veracity is open to grave question.

I have considered these matters but I do not think they lead me to hold that the defendant did not believe the story of Emily de Silva. For one thing there is nothing to show that at that date the defendant must have regarded Emily de Silva as an untruthful person, and the documents produced to him by her may have gone far to impress him with the truth of her story, although no doubt her story may now be regarded as untrue or at the least unreliable and insufficient to show that P 1 was a fraudulent alienation. Further, as I have shown, the transfer P 1 dealt with interests far in excess of the landed interests promised in the letter P 2, and had the effect of rendering Emily de Silva insolvent and unable to meet the claim of the defendant against her. Again, while the ill-will between the defendant and the plaintiff is a point against the former, it may have made the defendant more readily disposed to believe the suggestion that the plaintiff acted fraudulently in obtaining P 1, and had the intention of defeating the defendant's claim against Emily de Silva.

In all the circumstances I cannot support the finding of the District Judge that the plaintiff has proved that the defendant seized the properties and instituted the action D.C. 652 without reasonable and probable cause. On this ground alone the plaintiff's claim fails, and the judgment appealed from dismissing his action must be sustained.

In the circumstances it is unnecessary to consider at length the other grounds mentioned by the District Judge for dismissing the plaintiff's action. I may say that I am in agreement with the finding of the District Judge that the claim for damages arising from the seizure is barred by prescription. Though there is some substance in his argument that the only claim contained in the plaint relates to the seizure and that there is no claim for damages in respect of the action under section 247 (Civil Procedure Code). I do not think I can uphold this in view of the fact that two issues were framed. (1) in relation to the seizure, and (2) in relation to the action under section 247, and clearly if damages were proved in respect of (2) they are not prescribed. As regards damages, the District Judge's comment is sound. In relation to the action under section 247 I am of opinion that the plaintiff has not proved any damages which can legally be claimed.

The appeal is dismissed with costs.

DE KRETZER J.—I agree.

*Appeal dismissed.*