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Present: **Macdonell C.J. and Garvin S.P.J.**

FERNANDO *v.* PEIRIS.

241—D. C. Colombo, 33,512.

Paulian action—Action by assignee to set aside deed by insolvent—Fraud of creditors—Prescription—Concealed fraud—Cause of action—Ordinance No. 7 of 1853, s. 51.

Where an assignee of an insolvent sued the defendant to set aside a conveyance of land made by the insolvent to the defendant on the ground that it was a voluntary conveyance within the meaning of section 51 of the Insolvency Ordinance or alternately that it was made in fraud of creditors—

Held, that there must be proof that the transferor made himself insolvent by depriving himself of the assets conveyed by the impugned deed.

Per GARVIN J.—A Paulian action is prescribed in three years from the cause of action.

In such a case the cause of action is the alienation which, it is sought to impeach, as being in fraud of creditors.

In a case of concealed fraud, the cause of action arises when the fraud comes to the knowledge of the party impugning the deed.

THIS was an action instituted by the assignee of an insolvent estate to set aside two conveyances of land made by the insolvent on the ground that they were voluntary conveyances within section 51 of the Insolvency Ordinance or alternately that they were made in fraud of creditors. The learned District Judge dismissed the action on the ground that consideration passed for the conveyances.

Hayley, K.C. (with him *M. C. Abeywardena*), for plaintiff, appellant.—contended on the facts that the finding of the District Judge that there was no evidence of fraud was not justified.

H. V. Perera (with him *R. St. L. P. Deraniyagala*), for defendant, respondent.—After dealing with the question of fact—

It is further submitted that this action is prescribed. A Paulian action falls under section 11 of the Prescription Ordinance, No. 22 of 1871. It cannot be said that here there was concealed fraud. The mere

perpetration of a fraud which gives rise to a cause of action is not sufficient, even though that fraud is unknown to the person injured. There must be a further and distinct act of concealment (*Dodwell & Co. v. John*[1]).

From the facts in this case it is clear, that plaintiff was aware of the transfer sought to be set aside more than three years before the plaint was filed.

This action is not maintainable. The assignee's rights are limited to those possessed by the insolvent and vested in the assignee on his appointment, and those conferred on an assignee by our Insolvency Ordinance. It is clear law that our Insolvency Ordinance is exhaustive of the law applicable to insolvencies. There is no provision in the Ordinance for an action such as this.

Hayley, K.C., in reply.—The argument that to constitute concealed fraud a fresh and distinct act is necessary after the fraud was dealt with by Jayewardene J. in *Punchi Hamine v. Ukku Menika*.[2]

The cause of action arises when it becomes clear that the effect of the deed will be to defraud creditors.

July 17, 1931. MACDONELL C.J.—

In this case the plaintiff as assignee of the insolvent Peter Guneratne sues to set aside certain two conveyances of land made by that insolvent to the defendant on the ground that they were voluntary conveyances by an insolvent within section 51 of the Insolvency Ordinance, 1853, alternatively that they were made in fraud of creditors and liable on the principles of a Paulian action to be set aside; see also section 7 of Ordinance No. 17 of 1853. The learned District Judge dismissed the action holding that adequate consideration had passed for the land conveyed and that there was no evidence of fraud. From that decree plaintiff appeals.

The facts are complicated, but the following outline may serve to make clear the relation between the parties and the points at issue. The insolvent, being possessed of several landed properties in the Island, had by March, 1921, granted mortgages over a considerable number of them for a total sum of Rs. 220,000. He had also agreed to hand over certain of the produce of other properties, that is, of portions of an estate called Lizziedale, to one of these mortgagees, a business firm in Colombo, to be sold on certain terms in reduction of their mortgage debt. The insolvent's position by March, 1921, was that he had mortgaged all his properties of any size, save the Lizziedale estate, in extent some 214 acres. On September 3, 1921, he mortgaged Lizziedale estate of this extent to Mr. vander Poorten and certain others for Rs. 100,000, subject to the right of the firm above mentioned to take certain of the produce. The insolvent says he received very little of this Rs. 100,000, as nearly all of it went to pay certain Chetty creditors who were pressing him. At any rate by September, 1921, the insolvent had mortgaged nearly all the landed property he possessed. On September 15, 1921, the insolvent by deed 944 conveyed to the defendant for the sum of Rs. 5,000 some 238 acres, all or nearly all of which had been already mortgaged a considerable while before this; this conveyance was duly registered,

[1] *20 N. L. R. 206.* [2] *28 N. L. R. 97, at p. 108.*

and is the first of the two that the plaintiff in this action seeks to set aside. There is evidence, which the learned District Judge accepts, that the consideration Rs. 5,000 was paid. On October 6, 1921, the insolvent made a notarial agreement with the defendant giving the former, or if he were dead his wife, the right within five years to repurchase for Rs. 5,000 the properties conveyed by the deed of September 15. This deed No. 445 was not registered until some time after insolvent had gone bankrupt. At this time, 1921, the insolvent was confessedly in embarrassed circumstances, though he affirms that he was solvent. In 1922 certain money decrees were obtained against him, and under one of these the judgment creditor, a Chetty, sold Lizziedale, which it will be remembered had been mortgaged to Mr. vander Poorten and others the previous September. On September 18, 1922, Mr. vander Poorten and his fellow-mortgagees brought an action against the insolvent on their mortgage bond. While this mortgage action was pending, the insolvent on October 29, 1922, conveyed by deed No. 140 to the defendant for Rs. 3,000 two more of his already mortgaged properties in extent some 358 acres; this conveyance also was duly registered and is the second of the two that plaintiff seeks to set aside. If I apprehend the matter correctly, there was only evidence of a small part of this Rs. 3,000 having passed. Next day, October 30, 1922, Mr. vander Poorten and his fellow-mortgagees obtained their decree, and in May, 1923, he bought in Lizziedale under the mortgage decree for Rs. 76,000. On September 27, 1923, the insolvent declared himself unable to pay his creditors, and his estate was sequestrated on October 9.

The insolvent had had a business known as Peterson & Co., which he had sold in 1920 to one Perera, who in turn sold it either in 1921 or 1922 to the defendant. The date when it was sold to defendant is the less material because, whoever nominally owned the business, the insolvent continued to manage it down to his insolvency and later. As managing that business, he also managed the estates that he had conveyed to defendant in September, 1921, and October, 1922. The produce of some of them had to go to the mortgagee firm mentioned above which, after deducting its mortgage interests and certain commission, had to return the balance. It did so, to the insolvent, and the evidence is strongly to the effect that it had no notion that insolvent's position with regard to these properties had changed, that not he any longer but defendant was the owner. The defendant took no part in the management of the properties he had acquired under deeds 944 and 140—there is a very *naif* letter from him disclaiming ability to manage them—and for all the outside world knew, the insolvent was exactly in the same relation to these properties after conveyance to the defendant as he had been before. This condition of things, taken with the deed 445 giving insolvent the right to repurchase the properties conveyed on deed 944 and the small amount of the consideration for the sale of each lot of properties, makes both and each of the transactions suspicious in the highest degree.

If one came to the conclusion on the evidence, which being mainly documentary is nearly as much open to this Court as it was to the learned trial Judge, that it had been proved that the insolvent, the grantor of deeds 944 and 140, was insolvent at the time when he made either the

one or the other of them, then it would be necessary to analyze that evidence at greater length. But I am not satisfied that this has been proved in either case. To prove this should not have been difficult. It is known what landed properties the insolvent possessed when he executed deed 944 and again when he executed deed 140, and the incumbrances thereon, and it was not suggested, here or below, that the insolvent had any other assets of appreciable value. It should not have been impossible for the plaintiff to have produced a witness whose business it was to deal in properties of this description in the years 1921 and 1922 and who could say from what he had done in those years, the properties he had bought and sold or been agent or broker for the purchase and sale of, that such and such was the value of land of that character in that district during each of those years. Deducting the mortgage amounts, the Court would then have had clear evidence before it of the value of the insolvent's assets in either of those years and at the dates in those years when the conveyances impugned were executed. But the insolvent also owed monies to unsecured creditors who duly proved in his insolvency and a list of these creditors with the amount owing to each was before the Court. Unfortunately there was no evidence of the date when each of these debts was incurred and the insolvent, giving evidence in this case, was astute enough to minimize the portion of them owing at the crucial dates, namely, September 15, 1921, when he executed deed 944, and October 29, 1922, when he executed deed 140, and no evidence was before the Court adequately to contradict him. He was cross-examined rigorously on these statements and his evidence badly shaken. Still, it seems to me impossible to conclude with any certainty from his admissions what precisely was his position as regards his solvency or the reverse on either of the crucial dates. Yet this was of the very essence of the plaintiff's case, to show affirmatively the fact of insolvency at the time of one or both of the transfers, for short of showing this he could not succeed. The fact, if it were one, could surely have been shown, and without much difficulty. If the proctors for the plaintiff had sent a competent clerk to inspect the proofs filed by the unsecured creditors and to prepare from them a statement showing how much the insolvent owed to unsecured creditors on each of the two crucial dates, then it would have been possible to say definitely what his position was. Put in concrete terms:—The evidence of the supposed witness whose business it was to deal in properties of that nature in the years 1921 and 1922 would have enabled the Court to conclude that the insolvent's assets were worth, at either of the crucial dates, Rupees X and that they were mortgaged for Rupees Y, then the value of the insolvent's assets on either of the crucial dates would have been Rupees X minus Y. The evidence of the clerk who had gone through the schedule of unsecured debts with the date when each was incurred, would have enabled the Court to conclude that on either of the crucial dates the insolvent owed unsecured debts to the value of Rupees Z. If Z was a larger amount than X minus Y, then the insolvent would have been in an insolvent position on that date; if it was a smaller amount, then he would not. It could thus have been seen in a moment whether he made himself insolvent on September 15, 1921, by depriving himself of the assets conveyed by deed 944, and whether he did the same

thing on October 29, 1922, by depriving himself of the assets conveyed by deed 140. But wanting this evidence, or evidence to a like effect, I do not find it possible to say that either of these deeds was a voluntary conveyance within section 51 or that it was executed in fraud of creditors. I therefore come to the same conclusion as the learned trial Judge and also on the facts, but the reasoning on them by which he concludes that the plaintiff—here appellant—must fail does not convince me, and I must not be understood as associating myself with that reasoning in any way.

Being of opinion that this appeal can be determined on the facts, any pronouncement on the various important points of law raised and most ably argued before us, *inter alia*, the precise scope of a Paulian action at the present day, as contrasted with its scope as defined by Voet and other authorities on Roman-Dutch law, the question of whether it is available under our Insolvency Statute to an assignee in insolvency, as also the date when it accrues and from which prescription begins to run, would be *obiter*. But the points raised before us may well need a considered judgment of the full Court some day for their satisfactory decision.

For the foregoing reasons I am of opinion that this appeal must be dismissed with costs.

GARVIN S.P.J.—

This is an appeal by a plaintiff whose action was dismissed by the learned District Judge. The purpose of the action was to obtain a decree setting aside two deeds by which one Peter Guneratne conveyed to the defendant the various allotments of land specified therein. The transaction was impeached—

(*a*) as being an alienation in fraud of creditors;

(*b*) as a fraudulent conveyance within the meaning of section 7 of the Insolvency Ordinance, No. 17 of 1853;

(*c*) as a voluntary settlement and as such obnoxious to section 51 of the said Ordinance.

At the hearing of the appeal the case was presented as a proceeding to set aside these deeds as alienations in fraud of creditors.

The action was instituted on July 4, 1929, and the impeached deeds are (1) No. 944 dated September 15, 1921, attested by B. O. Pullenayagam, Notary Public, and (2) No. 140 dated October 29, 1922, attested by N. Ramachandra, Notary Public. The transferor Peter Guneratne was adjudicated insolvent on September 27, 1923. The plaintiff is his assignee in insolvency and was so appointed in January, 1924. The evidence did not satisfy the learned District Judge that these deeds were executed by Peter Guneratne when he was in insolvent circumstances or that they were executed with intent to defraud his creditors and he accordingly dismissed the plaintiff's action. He did not, however, make any reference to two points submitted as matters of defence—first, that the action was barred by lapse of time, and secondly, that the action is not one which is maintainable by an assignee in insolvency.

The case of an action to set aside an alienation as being in fraud of creditors is not specially provided for in Ordinance No. 22 of 1871; it

therefore falls within the general section 11 and is barred in 3 years from the date when the cause of action arises. When does the cause of action arise? It was urged that in such a case the cause of action arises at the date when the alienation which it is sought to impeach was made or when it came to the knowledge of the creditor that his debtor had executed the deed by which he made the alienation which it is sought to impeach. There appears to be but one case in which this question was considered (*Podisingho Appuhamy v. Lokusingho et al.*[1]) where a bench of two Judges held that the cause of action in such a case arises " when it becomes clear that the effect of the deed will be to defraud creditors. " Bonser C.J. who delivered the judgment of the Court relies on *Voet, XLII. 8, 13* :—

" These two actions—the Paulian and recissory actions—have many points of resemblance . . . . the first is that they are both praetorian and should be instituted within a year from the time the right of action first arises; the year to be reckoned not from the time of effecting the alienation but of the sale of the whole estate; as it is then that the right of action first arises; for, before that, it cannot be ascertained whether the creditors cannot be satisfied out of the rest of the property which has remained in the patrimony of the insolvent and thus whether or not creditors have been defrauded by the alienation."

In basing himself on this passage, that learned Judge has taken no note of the change which has taken place in the character of the action as it obtains to-day, as compared with the *Actio pauliana* of the time at which Voet wrote and out of which it has grown. The *Actio pauliana* to which Voet refers is a cumulative action given to the creditors to whose prejudice things have been fraudulently alienated and to a curator appointed to the estate, and is only available after *missio in possessionem*—that is after the creditors have entered into possession of their debtor's estate.

The law relating to *missio in possessionem* is now obsolete. The *Actio pauliana*, as it obtains in Ceylon, has ceased to be a cumulative action and may be instituted without any obligation to await the adjudication of the debtor or even a declaration by him of insolvency; nor is there any obligation to wait till after the remainder of the property of the debtor has been exhausted by execution. In short, its only resemblance to the *Actio pauliana* out of which it has grown is in the *facta probanda* which remains the same, viz., that the alienation impeached was intended to defeat the claim of creditors, that it left the alienor without sufficient property to meet the claims of his creditors, and that a creditor had been prevented by the alienation from recovering what was due. Whenever a creditor is in a position to establish these facts an action may successfully be maintained and is, in fact, most frequently met with where a creditor who has obtained a judgment and in execution seizes property as that of a debtor, is opposed by a person who claims the property by virtue of a conveyance from the debtor.

If the rule in *Voet, XLII. 8, 13* is the correct test of when the cause of action arises, then many, if not most, of the Paulian actions prosecuted in these Courts must have been instituted and entertained before the

[1] *(1900)*.

cause of action arose for the basis upon which such actions proceed is that the act of the debtor by which an alienation of property in fraud of creditors is effected gives a creditor a cause of action to have the alienation set aside. The practice is in accordance with the ordinary rule that a cause of action arises at the date when the wrong was committed in respect of which the remedy is sought and it is no longer possible to determine the time at which the cause of action arises by a rule which has no relation to and is inappropriate to the changes which the action has undergone. In the case of a Paulian action as it obtains to-day, the wrong is the alienation which it is sought to impeach as a fraud upon creditors, and this action which was instituted on July 4, 1929, to have the alienations made in September 15, 1921, and October 20, 1922, respectively, would be barred by section 11 of Ordinance No. 22 of 1871. It was urged that this action being based on fraud was not affected by the Prescription Ordinance so long as the plaintiff remained in ignorance of the fraud. Now the law on the point with special reference to Ceylon is stated by Lord Haldane in *Dodwell & Co., Ltd. v. John et al.*[1] thus:—

"In the present case there is a statute of limitation, and in order to escape from its application it is necessary to show that there is a subsequent and independent cause of action, which arises from the concealment of the fraud. Such a separate cause of action arises, as their Lordships have already said, only out of the conduct of a person who is held to have been responsible for the fraud, and has in breach of his duty concealed it."

By this test the plaintiff's action is barred unless he can show that such a fresh cause of action accrued to him subsequently and within three years of the date of institution of this action.

The defence that the plaintiff's action was barred was expressly taken in the answer, but neither in the plaint nor in any further pleading has the plaintiff pleaded concealed fraud or stated when he discovered that the alienation alleged to be fraudulent was made or that he had no reasonable means of discovering it earlier. Moreover, the evidence establishes a series of facts of which the plaintiff had knowledge from which it may be inferred that the "discovery" by him of the fraud, if any, took place at a date over three years from the date of action.

The Mercantile Bank who held a mortgage over the land conveyed to the defendant instituted an action joining as defendants, the mortgagor, his assignee in insolvency, the present plaintiff, and the present defendant as the then owner of the premises subject to the mortgage. The two deeds which it is now sought to impeach are expressly referred to in the plaint and the various allotments of land described fully in the schedule. Judgment was entered of consent and the present plaintiff signed the minute of consent in person on February 3, 1925. He, therefore, had the fullest knowledge of the fact that the present defendant held a conveyance from Peter Gunaratne who had been declared insolvent and whose assignee he was. He had been told of this previously by the insolvent, and he was present during the examination of the insolvent on April 30, 1925, and June 4, 1925, when the insolvent spoke at length of the sale of these lands, the mortgages to which they were subject and the consideration paid.

[1] *(1918) 20 N. L. R. 206.*

He was again present with his proctor at the Certificate Meeting on December 15, 1925, when a creditor, Mr. vander Poorten, opposed the grant of a certificate to the insolvent on the ground that the transfers in favour of the defendants were in fraud of creditors, and when evidence was given to establish this ground of opposition. Therefore by the end of 1925 the present plaintiff knew that Peter Guneratne was insolvent and that his remaining assets were utterly insufficient to pay the creditors more than a small fraction of the debts due to them; he knew that in 1921 and 1922 the insolvent had conveyed valuable landed property to the present defendant for what on the face of the deeds appeared to be insufficient consideration he knew also that a creditor opposed the grant of a certificate to the insolvent on the ground that these alienations were fraudulent and led evidence to show that the lands, even when allowance was made for the mortgages with which they were burdened, were worth more than was paid in consideration. In this state of his knowlege of the transactions which he now seeks to impeach he cannot be heard to say that the fraud, if any, was concealed from him and that he only "discovered" it at some date subsequent thereto. Even if it be assumed that the plea of concealed fraud is available in the case of an action to set aside a deed as being an alienation in fraud of creditors and that this is a case of concealed fraud, the evidence shows that by the end of the year 1925 the plaintiff had knowledge of the alienation and of such facts and circumstances as gave him the means of discovering the fraud, if any.

Since I am clearly of the opinion that this action is barred by time it is hardly necessary to consider whether the action is one which it is competent for the assignee in insolvency to maintain; nor is it necessary to consider whether the learned District Judge was wrong in holding that the plaintiff has failed to establish a case for the relief he claims. It is sufficient to say that, although I cannot feel the same measure of confidence in the testimony of Peter Guneratne, I agree with the District Judge that the plaintiff has failed to show that this conveyance was made at a time when Peter Guneratne was in insolvent circumstances and with intent to defraud his creditors.

The appeal is accordingly dismissed with costs.

Appeal dismissed.