

Present : Schneider J.

1923.

SILVA v. CORNELIA et al.

61—C. R. Galle, 11,360.

Paulian action—Civil Procedure Code, s. 247—Sale by uncle to niece—Possession by uncle—Primâ facie proof of fraud—Burden of proof of bona fides—Debtor owning another land after sale of impeached deed—Sale of the other land also to daughter within thirteen days of the date of first deed.

Plaintiff brought an action under section 247 of the Civil Procedure Code against the successful claimant (first defendant) and the judgment-debtor (second defendant), praying, *inter alia* that the deed by the second defendant in favour of his niece, the first defendant, be set aside as having been executed in fraud of creditors. The Commissioner of Requests dismissed the action without allowing evidence to be led, as the judgment-debtor owned another land at the time he executed the impeached deed, and as, therefore, he could not be said to have made himself insolvent. The judgment-debtor sold this land also within thirteen days of the date of the impeached deed to his daughter.

The Supreme Court sent the case back for further evidence.

SCHNEIDER J.—“The fact that the second defendant has sold the house to his own daughter within thirteen days of the date of the impeached deed appears to me to point to both transfers as being attempts to put his assets beyond the reach of his creditors.”

“The fact that the first defendant is the niece of the second defendant, and that the second defendant has continued to live upon one of the lands sold, are *primâ facie* indications that the sale was fraudulent. Those facts being proved it was incumbent on the first defendant to prove the *bona fides* of the transaction.”

THE facts are set out in the judgment.

E. G. P. Jayatileke, for appellant.

M. W. H. de Silva, for respondents.

June 22, 1923. SCHNEIDER J.—

The plaintiff, appellant, being the judgment-creditor in action No. 1,054 of the Additional Court of Requests of Galle, seized certain undivided shares in three allotments of land as being the property of his judgment-debtor, the second defendant. The first defendant claimed the shares seized by virtue of a deed No. 24,790 executed by the second defendant in her favour dated January 27, 1919. Her claim was upheld, and the plaintiff brought this action under section 247 of the Civil Procedure Code to have the said deed set aside upon the ground that it had been executed in order to defraud the plaintiff, and that it was executed without consideration and in collusion between the second defendant and the first defendant.

In her answer the first defendant denied the allegations as to fraud and collusion, and pleaded that the second defendant had not rendered himself insolvent by the impeached sale. The trial

1923.

SCHNEIDER
J.*Silva v.
Cornelia*

proceeded upon the two following issues agreed upon by both parties :—

- (1) Was the deed in question executed fraudulently in collusion with the first defendant in order to defraud the plaintiff ?
- (2) Did the second defendant render himself insolvent by granting this deed ?

The evidence on behalf of the plaintiff is that the second defendant is the uncle of the first defendant, and that the second defendant is living on one of the lands, the shares in which were seized, and is still taking the produce. The manager of the plaintiff's business valued the house, in which the second defendant was living at Rs. 100 to Rs. 150. The Fiscal's Arachchi, who was next called, valued it at Rs. 250. At this stage of the trial when plaintiff's counsel moved to read deed No. 24,805 in evidence to show that the house had been conveyed by the judgment-debtor to Johana, his own daughter, the learned Commissioner would not allow further evidence to be called, as he thought it was unnecessary to do so. He gave a week's time to produce the deed, and recorded that if the deed was subsequent in date to the sale of the shares to the first defendant that the plaintiff, loses his case. The deed was subsequently produced. It is said to be dated January 19, 1921. There is no translation of the deed. The Commissioner thereupon dismissed the plaintiff's case. He has appealed. The Commissioner does not say why he thought it unnecessary that further evidence should be called. I am inclined to think that he thought that as the judgment-debtor owned the house, which was valued at Rs. 250 at the time he executed the deed impeached in this action, he could not be said to have made himself insolvent by the execution of the impeached deed. The Commissioner was not justified in refusing to allow the plaintiff to lead further evidence. There are two distinct issues. The issue as regards fraud could not be determined before the plaintiff had placed all his evidence before the Court. The fact that the first defendant is the niece of the second defendant, and that the second defendant has continued to live upon one of the lands sold, are *prima facie* indications that the sale was fraudulent. Those facts being proved, it was incumbent on the first defendant to prove the *bona fides* of the transaction. The plaintiff, therefore, was entitled to lead evidence upon this issue. The learned Commissioner was also wrong in shutting out further evidence on the second issue. The evidence as to the value of the house was conflicting, it being said that it was worth Rs. 100 or Rs. 250. The plaintiff held a judgment for Rs. 200, with writ and costs. What that amounted to at the time of the trial was proceeding has not been ascertained. If a house was worth Rs. 100, or its value was insufficient to satisfy the first defendant's claim, the plaintiff would be justified in saying that the execution of the impeached deed rendered his debtor insolvent,

because by the execution of that deed he was left without sufficient assets to satisfy his debt. The fact that the second defendant has sold the house to his own daughter within thirteen days of the date of the impeached deed appears to me to point to both transfers as being attempts to put his assets beyond the reach of his creditors.

I set aside the judgment appealed from on the ground that the plaintiff should have had an opportunity to place all his evidence before the Court. The first and third defendants must pay the plaintiff his costs of the trial already had and of this appeal. The record is remitted for trial as from the stage at which the plaintiff was stopped from leading further evidence. If the Commissioner who tried the case is not able to proceed with the further evidence, there should be a trial *de novo*.

Set aside.

1923.

SCHNEIDER
J.

*Silva v.
Cornelia*