

PODISINGHO APPUHAMY v. LOKUSINGHO *et al.*  
*D. C., Negombo, 3,294.*

1900.  
July 5 and 9.

*Prescription—Actio Pauliana—Accruing of cause of action—Ordinance No. 22 of 1871, s. 11.*

No action of a creditor, claiming a declaration that the deed of transfer made by his debtor in favour of the defendants be declared fraudulent and void, can be maintained, unless the same be commenced within three years of the accruing of the cause of action.

In such a case, the cause of action arises when it becomes clear that the effect of the deed will be to defraud creditors. It does not necessarily arise at the time of the execution of the deed.

It arises after all the rest of the property of the debtor not included in the impeached deed has been exhausted by executors, when it becomes quite certain that unless the deed is set aside there will not be the means of satisfying the debts.

THE facts of this case are as follows:—The plaintiff instituted an action No. 2,385 in the Court of Requests of Negombo in July, 1894, against one Migotchihamy, the mother of the first, second, and fourth defendants, for the recovery of a certain sum

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of money alleged to be due on a promissory note, and obtained judgment on the 9th May, 1895. He then caused the Fiscal to seize and sell Migotchihamy's interest in two lands, and himself became the purchaser thereof on the 29th August, 1895. He obtained a conveyance from the Fiscal on the 30th November following. During the pendency of the action No. 2,385, Migotchihamy conveyed her interest in the two lands subsequently purchased by the plaintiff to the first, second, and fourth defendants, by deed dated 31st January, 1895. In regard to this deed plaintiff alleged that there was no consideration, and that it was executed by Migotchihamy in collusion with the first, second, and fourth defendants with the view of preventing the plaintiff from recovering the debt due by Migotchihamy. He prayed that the deed be declared fraudulent and void in respect of the lands purchased by him at the Fiscal's sale on the 29th August, 1895.

The present action was filed on 30th November, 1898.

The issues settled by Court were these :—

First,—Was the deed of 31st January, 1895, executed in fraud of creditors?

Second,—Is plaintiff's action barred by prescription under section 11 of Ordinance No. 22 of 1871?

As regards the first issue, the District Judge held that the deed was executed in fraud of plaintiff.

And as regards the second issue, he held as follows :—“ The action “ does not fall under any of the heads mentioned in the sections “ preceding section 11 of the Ordinance No. 22 of 1871, and should “ have commenced within three years as laid down in section 11 “ from the time the cause of action accrued. Defendant's counsel “ urged that the cause of action accrued on the 9th May, 1895, “ the date of the decree in case No. 2,385, for at that time plaintiff “ was aware of the execution of the impeached deed by his debtor, “ and not on the 29th August, 1895, the date of the sale by the “ Fiscal of the lands in question. With this contention I am “ unable to agree. Plaintiff could not claim to be entitled to “ those lands till after he had obtained the Fiscal's transfer. It “ was only after he had obtained the transfer and had been “ prevented by the defendants from taking possession of them that “ his cause of action accrued. The present action was instituted “ on the 30th November, 1898. The Fiscal's transfer is dated 30th “ November, 1895. I hold that the action is not prescribed.”

He therefore entered decree for plaintiff.

Defendants appealed.

*Wendt, Acting A.-G.*, for appellant.—The cause of action arises as soon as creditor discovers that he was injured (*Voet ad Pand*, XLII. 8, 13). Plaintiff says that the impeached deed of conveyance comprises all the property of the judgment-debtor, and that he knew of the alienation. The reckoning of the date should commence from the date of the deed of conveyance. Plaintiff sues as purchaser, and not as creditor. *Qua* purchaser, he has no right to bring this action. [BONSER, C.J.—Who can bring the *actio Pauliana*? Only a creditor (*Voet*, XLII. 8, 3.) Yes, only a creditor. Debt is the foundation of the action. [BONSER, C.J.—If a defrauded creditor succeeds to the right, title, and interest of the fraudulent debtor, he cannot maintain an action to set aside the previous deed.]

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*H. Jayawardana*, for plaintiff, respondent.—The present action is a *rei vindicatio*. Plaintiff first brought a partition suit, and was then referred to another action. The cause of action here is the fraud of the debtor. Conveyances by persons in pecuniary difficulties will not be supported as against creditors, unless they are free from suspicion of fraud. *Komali v. Appuhamy* (7 S. C. C. 73). [BONSER, C.J.—Supposing a third party bought this land at the Fiscal's sale, what would have been the cause of action? He only bought the interest of the judgment-debtor, which turns out to be nothing.] Plaintiff says that the judgment-debtor did not divest herself of her title by the deed in question.

*Wendt*, in reply.—Section 284 of the Civil Procedure Code enables the plaintiff to apply to the District Court by petition to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. If the debtor had other property, the creditor should realize it all and then take steps to set aside the deed, but such an *actio Pauliana* would be prescribed under section 11 of Ordinance No. 22 of 1871 in three years. The time is to be computed from the date of the deed. In May, 1895, plaintiff knew that the judgment-debtor had no property left to be discussed.

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The plaintiff is the purchaser at a Fiscal's sale of the interest of his debtor in certain lands which had before the sale been transferred by the debtor to the defendants under circumstances which, the plaintiff alleges, show that the alienation was fraudulent, as being intended to defraud the debtor's creditors. The conveyance was made on the 31st January, 1895. The debtor was then indebted to the plaintiff in the sum of Rs. 75. The plaintiff

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recovered judgment for that sum and costs, amounting together to Rs. 105. It is proved that the plaintiff at the time he recovered this judgment was aware of this transfer, and was also aware that it comprised the whole of the property of his debtor, and that apart from this property the debtor had nothing wherewith to satisfy his debt, so that it seems to me that if (as the District Judge found) the deed was made without consideration, it was undoubtedly fraudulent as against the debtor's creditors. The plaintiff, however, did not, as he might have done, bring a Paulian action to get this transfer set aside, but he pointed out part of the property comprised in the transfer to the Fiscal as being the debtor's property, and had it seized and put up for sale, although the transferees were in possession. They did not put in a claim, and I understand that it has been held by this Court that the title of a true owner is not affected by his abstaining from making a claim. The sale was accordingly proceeded with, and the plaintiff became the purchaser of the property for the sum of Rs. 85.

He appears to have made a very good bargain; for it is now alleged that the property which he purchased for Rs. 85 is worth Rs. 300. He did not obtain possession of his purchase, and after an ineffectual attempt to do so by instituting a partition suit, which was dismissed, he on the 30th November, 1898, brought the present action, in which he claimed a declaration that the deed of transfer be declared to be fraudulent and void. That is the ordinary prayer in a Paulian action. It is not necessary to decide whether a purchaser at a Fiscal's sale is competent to bring a Paulian action, because the plaintiff in the present case was still a creditor, the execution having failed to realize the full amount of his debt, and it might be contended that the action could be supported on that ground.

But the defendants raised the defence that the action was proscribed. Section 11 of Ordinance No. 22 of 1871 provides that "no action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued." These Paulian actions are not specially mentioned in the Ordinance, and they therefore fall within the three years' prescription. The question arises then, When did the cause of action accrue in the present case? Voet (*XLII. 8, 13*) deals with this question, and he lays down the rule that it arises at the time when it is clear that the effect of the deed will be to defraud creditors. It does not necessarily

arise at the time of the execution of the deed, because *non constat* that the deed will affect creditors; but he says that it arises after all the rest of the property of the debtor not included, in the impeached deed has been exhausted by execution; when it becomes quite certain that unless the deed is set aside there will not be the means of satisfying the debts. In the present case, as I mentioned before, it was certain at the date of the deed, inasmuch as it comprised the whole of the debtor's property, that its effect would be to defraud her creditors, and it is proved that on the 9th May, 1895, the creditor, the plaintiff in this case, had knowledge of that fact. It seems to me that from that date, at all events, the time began to run as against him, and that the action is prescribed. The District Judge held that the time did not begin to run until the plaintiff got the Fiscal's transfer on the 30th November, 1895. But I must say that I cannot follow his reasoning. I cannot understand how the time can be extended by the fact that the purchaser at the Fiscal's sale delayed to obtain a transfer of the property purchased.

MONCREIFF, J.—Concurred.

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