

1947

Present : Howard C.J. and Wijeyewardene J.

PUNCHI APPUHAMY, Appellant, and HEWAPEDIGE
SEDERA *et al.*, Respondents.

65—D. C. Kegalla, 3,350.

Paulian action—Person who has a claim for unliquidated damages—Right of such person to be regarded as creditor.

Where A sues B on a claim for unliquidated damages and, pending the action, B fraudulently and collusively transfers his properties to a third party with the intention of defrauding creditors, a Paulian action would be available to A if, at the time he institutes the action, he has already obtained a decree in his favour in respect of the claim for unliquidated damages.

A PPEAL from a judgment of the District Judge of Kegalla.

L. A. Rajapakse, K.C. (with him *C. R. Guneratne*), for the plaintiff appellant.

N. Nadarajah, K.C. (with him *H. W. Jayewardene* and *G. T. Samarawickreme*), for the first defendant-respondent.

No appearance for the second defendant-respondent.

Cur. adv. vult.

March 20, 1947. WLJEYWARDENE J.—

This is an action under section 247 of the Civil Procedure Code combined with a Paulian action.

The plaintiff filed D. C. Kegalla, 2,091 on July 20, 1942, against the second defendant, claiming damages for defamation. Summons was issued ten days after and was served on the second defendant in September, 1942. Decree was entered on June 24, 1943, awarding the plaintiff Rs. 542.30 on account of damages and costs. In execution of the decree, the plaintiff caused the Fiscal to seize certain properties including paddy fields and rubber lands, and the first defendant claimed them on deed P1 of August 18, 1942, executed by the second defendant in his favour. That claim was upheld, and the plaintiff, thereupon, filed the present action against the two defendants. The District Judge dismissed the action with costs.

The second defendant is married to a sister of the first defendant. The properties transferred by P1 are all situated in the village of Dimbulagama where the second defendant and his wife live. The first defendant, on the other hand, lives in the village of Atugoda, ten miles away from Dimbulagama.

The deed P1 purports to be a transfer of twenty-two lands, including the residing house and garden of the second defendant, for Rs. 1,500 paid in the presence of the Notary. When the second defendant was examined in December, 1943, under section 219 of the Civil Procedure Code (*vide* P2), he said that he sold the land to the first defendant "for a debt" and that he was "insolvent today" and unable to pay the judgment debt. Giving evidence in the present case the first defendant gave a different version of the transaction. He said that the second defendant sold the lands to him for Rs. 1,500, as the second defendant desired to leave his village because he was afraid to live there as his brother had been murdered in that village. That murder was about ten months before the execution of P1. He admitted, however, that the second defendant did not leave the village after the transfer. The second defendant himself did not give any evidence. The properties in question have been valued by the plaintiff's witness, Mr. Sumana-sekere, a Court Auctioneer, at Rs. 6,742.50 and he submitted a detailed valuation report P5. That valuation is supported by the evidence given by the plaintiff and the Vel Duraya of the village and stands uncontradicted by the evidence of the first defendant who alone gave evidence for the defence. Even if the first defendant's statement is accepted that he paid Rs. 1,500 for the transfer, it is clear from the evidence that the properties were worth more than four times the consideration paid by him.

The oral evidence of the plaintiff and his witnesses is to the effect that the second defendant has continued to be in possession of the properties in spite of the deed P1. This evidence is supported strongly by the documents produced in the case. The extracts from the Acreage Tax Register of the village for the four years 1942 to 1945 (P6, P7, P8 and P9) mention the name of the second defendant as the owner of Yakadagalundurapuhena *alias* Kotilawatte which alone, among the

rubber lands transferred by P1, was liable to pay an Acreage Tax, being the only planted land over five acres in extent. The documents P11, P12, P13, and P14—copies of Form C referred to in section 8 of the Rubber Thefts Ordinance, and signed by the second defendant—show that the second defendant claimed to be the owner of that rubber land in 1944. The Superintendent of Gracelyn estate produced documents P15, P16, and P17 in support of his evidence that the second defendant sold the rubber from his lands in 1942, 1943 and 1944 and brought rubber sheets to the factory on Gracelyn estate for smoking in April, October, November and December, 1944. The first defendant attempted to take away the effect of all this evidence by stating that he asked the first defendant's wife to "take" the rubber and that "she gave (him) Rs. 25 or Rs. 20 for rubber". He was very vague about this arrangement and did not state when and how often these payments were made. As regards the paddy fields he said, "I told my sister (second defendant's wife) that I would possess the fields in my village". This could only mean that he possessed none of the paddy fields transferred by P1, as all the fields were in another village, ten miles away from his village. He admitted that the second defendant continued to live in the village Dimbulagama even after the execution of P1 and that the second defendant's wife was still residing in the house conveyed by P1. He admitted further, that before he obtained the transfer P1 he was aware that the plaintiff had filed an action against the second defendant for damages.

In view of all the evidence referred to by me I hold that the defendants acted fraudulently and collusively in respect of the transfer with the intention of defrauding the creditors of the second defendant, and that the transfer did, in fact, prevent the plaintiff from obtaining satisfaction of his decree in D. C. Kegalla, 2,091.

The Counsel for the first defendant sought to support the judgment of the District Judge by contending that it was not open to the plaintiff to bring a Paulian action, as at the time of the execution of the transfer P1 the plaintiff had only filed an action in respect of his claim for unliquidated damages and had not obtained a decree. In support of his argument he relied on the following passage in the judgment of Jayewardene A.J. in *Fernando v. Fernando*¹.

"The action to set aside a transaction as being fraudulent, that is, the Paulian action, is given to creditors, to whose prejudice things have been fraudulently alienated. Voet XLII 8, 3. The defendant is not, in my opinion, in the position of a creditor of Manuel Joseph at the present time. There is no debt due to him, and his claim is one for unliquidated damages only. A person who has such a claim against another cannot be regarded as a creditor. A creditor connotes the existence of a debt and a debtor. It cannot be said that the claim for damages is a debt, or that the person against whom the claim is made is a debtor. It is only when the claim is found by the Court to be due and is embodied in a decree that the relation of creditor and debtor would arise in such a case."

¹ (1924) 26 *New Law Reports* 292.

The above passage appears to be in conflict with the decision in *Baronchi Appu v. Siyadoris Appu*¹. It is, however, sufficient for the purpose of the present action to state that the judgment of Jayewardene A.J. is, in fact, an authority against the contention of the defendant's Counsel that a person who had not obtained a decree at the time of the execution of the impugned deed cannot bring a Paulian action, even after he has obtained a decree on his claim for unliquidated damages. The facts in *Fernando v. Fernando* (*supra*) are briefly as follows:—A entered into an agreement with Manuel Joseph about January, 1924, for the use of a boat in connection with some fishing operations. Differences arose between A and Manuel Joseph after some time, and A filed an action against Manuel Joseph in March, 1924, to recover damages for an alleged breach of the agreement. Acting arbitrarily A seized and detained the boat during the pendency of the action without taking steps under Chapter 47 of the Civil Procedure Code to sequester the boat before judgment. Manuel Joseph transferred the boat to X in May, 1924, and X, thereafter, filed an action against A for the recovery of the boat. A who had not obtained a decree in his case filed answer pleading that the transfer of the boat to X was fraudulent and moved to add Manuel Joseph as a party to the action in order to prove his allegations of fraud. The Supreme Court held that A was not entitled to ask Manuel Joseph to be added as a party, as at that time A had not obtained a decree in the action brought by him against Manuel Joseph. After setting out the facts and considering various authorities Jayewardene A.J. concluded his judgment as follows:—

“In my opinion, therefore, the defendant (A) is not a creditor at present, and cannot ask for the cancellation of the transfer in favour of the plaintiff (X) on the ground of its being a fraudulent alienation. It may be that if he obtains a decree in his favour in his action against Manuel Joseph before the trial of the present action, he would be entitled to maintain his claim in reconvention. When that happens he can ask the Court to add Manuel Joseph as a party to the action. But, for the present, it would be useless to add him. This is the only question arising in the appeal.”

The judgment of Jayewardene A.J. does not, therefore, help the defendants, as the plaintiff had obtained a decree against the second defendant on his claim for unliquidated damages at the time he instituted the present action.

I allow the appeal and direct judgment to be entered in favour of the plaintiff in terms of the clauses (a) and (b) of the plaint. I award the plaintiff costs here and in the District Court.

HOWARD C.J.—I agree.

Appeal allowed.

¹ (1914) 4 *Court of Appeal Cases* 65.