

1956

Present : H. N. G. Fernando, J.

A. H. M. ABDUL CADER, Appellant, *and* MRS. B. MUNASINGHE,
Respondent

S. C. 253—C. R. Colombo, 42,697

Paulian action—Decree setting aside alienation in fraud of creditors—How far it extinguishes title of transferee.

The setting aside of a deed of transfer in consequence of a decree entered in a Paulian action does not revert the property, which was the subject of the transfer, in the transferor. The fraudulent deed is not annulled but is only declared void so far as it is necessary to make the property available for execution. The title to so much of the property as is not required to be sold in execution remains in the transferee.

¹ (1946) 47 N. L. R. 62.

² (1955) 57 N. L. R. 110.

APPEAL from a judgment of the Court of Requests, Colombo.

E. B. Wikramanayake, Q.C., with *M. Somasunderam*, for the plaintiff-appellant.

A. Nugendra, for the defendant-respondent.

Cur. adv. vult.

November 2, 1956. H. N. G. FERNANDO, J.—

The property which is the subject of this action belonged at one time to a Doctor Ferdinando, now deceased. By his last will he devised a life interest in this and other properties to his widow subject to a condition that the widow should pay a sum of Rs. 150 a month plus any such medical expenses as may be incurred, to the deceased's sister.

In action No. 18,650 D. C. Colombo, instituted in 1947, the sister sued the widow for monies due under the terms of the last will, and decree was entered on 1st September 1949 ordering the widow to pay to the sister a sum of Rs. 1,885 odd together with costs of the suit. Two days later the widow transferred her life interest in all the properties to the present appellant by deed No. 2,322 and when the property in question was seized in execution of the decree in that action, it was successfully claimed by the present appellant. In consequence the sister had to file a Paulian action combined with an action under section 247 of the Civil Procedure Code, (No. 386-Z) for an order setting aside the deed No. 2,322 as having been executed in fraud of the sister as judgment creditor, and for a declaration that the property was liable to be seized and sold under the writ in the action No. 18,650. For obvious reasons the sister was successful in this second action, and decree was entered setting aside the deed No. 2,322 as having been executed in fraud of creditors and ordering that all the lands and premises described in the schedule to the plaint are liable to be seized and sold under the writ in case No. 18,650. Some time after the decree was entered the present plaintiff deposited in Court to the credit of case No. 18,650 the amount decreed to be due to the plaintiff (the sister of the deceased) in that case and the amount so deposited was subsequently withdrawn by the sister.

While action under 386-Z was pending, the sister instituted another action (D. C. 24,925) against the widow claiming a further sum of Rs. 5,000 odd from the widow as being due under the terms of the last will of Doctor Ferdinando, and decree was entered in favour of the sister for that sum and costs in September 1954. Subsequently writ was issued in execution of that decree and the premises now in suit were seized and sold under the writ to one Mr. Mendis.

In the present action the plaintiff (who had purchased the premises in suit by deed No. 2,322 on October 2nd 1949) has sued the defendant for rent and ejection on the ground that the defendant is the tenant of the plaintiff and failed to pay rent for the months of October and November 1952. The defendant had attorned to the present plaintiff

after his purchase of the property and was clearly the tenant of the plaintiff. In the ejectment action consent decree was entered, one term of which was that the defendant would pay rent to the plaintiff in accordance with the consent order. She failed however to pay rents after November 1953 and, in terms of the consent decree, the plaintiff has asked for writ against the defendant on the ground of non-compliance with the consent decree. In her objections to the application for writ the defendant takes up the position that the sale to Mr. Mendis in D. C. No. 24,925 and the declaration in the Paulian action No. 386-Z have extinguished the title of the present plaintiff. The defendant accordingly claims that she can now deny the title of the plaintiff and is paying the rent to Mr. Mendis. The learned Commissioner has agreed with this contention and held that the defendant now rightly claims to occupy the premises as the tenant of Mr. Mendis.

In my opinion the decision of the learned Commissioner is based on a misconception of the effect of the decree in the Paulian action. It was decided by de Sampayo J. in *Gunawardene v. Bilindahamy*¹ that "a fraudulent deed is not annulled but is only declared void so far as it is necessary to make the property available for execution". Citing this dictum with approval in *Punchi Banda v. Perera et al.*² Fischer C. J. held that the title to so much of the property as is not required to be sold in execution remains in the transferee. Applying these principles to the present case it will be seen that the decrees in the Paulian action No. 386-Z only rendered the transfer to the present plaintiff void in so far as it was necessary to make the property available for execution of the decree in fraud of which the transfer took place, that is of the decree in action No. 18,650. If, therefore, the property had been sold in execution of that decree, the title in the property would have passed from the present plaintiff to whoever may have purchased it at the execution sale. But in fact this property was not required to be taken in satisfaction of the decree because the plaintiff paid the amount of the decree into Court, and because in any event no further proceedings have been taken to execute that decree. All that has happened is that *another* action (24,925), to which the present plaintiff was not even a party, was instituted by Doctor Ferdinando's sister against his widow for the recovery of further arrears due from the widow. Although decree was entered in that action in favour of the sister, the deed of transfer in favour of the plaintiff was never set aside *quoad* that decree; and indeed I do not see how that transfer could, in law, have been set aside for the purpose of satisfying a claim which had not accrued due at the time of the transfer. In any event what was sold in execution of the decree in Case No. D. C. 24,925 and purchased in execution by Mr. Mendis was the right, title and interest of the widow, and what was precisely held in the case of *Punchi Banda v. Perera* was that the setting aside of the deed in a Paulian action does not re-vest the property in the person who originally conveyed in fraud of creditors. That being so, the widow did not at the time of the execution sale under D. C. 24,925 enjoy any interest in the premises in suit nor also did any such interest pass to Mr. Mendis, the execution purchaser:

¹ 1 C. W. R. 25.

² (1928) 30 N. L. T. 355.

The order appealed from must therefore be set aside and the case will be remitted to the Court of Requests for writ to be issued in terms of the plaintiff's application therefor. The defendant will pay to the plaintiff the costs of this appeal and the costs of the proceedings in which the order appealed against was made.

Appeal allowed.

