April 7, 1911

Present: Lascelles C.J. and Van Langenberg A.J.

GOPALSAMY *v.* RAMASAMY PULLE *et al.*

47—*D. C. Kandy*, 20,267.

Action under s. 247, Civil Procedure Code, against purchasers for value from heirs of intestate—Heirs should not be made parties in the absence of any allegation of fraud—May creditor sell the land under his decree?—Effect of conveyance by heirs—Paulian action.

The second defendant, who was administratrix of the estate of one Erawady, on being called upon by Court to close the estate, conveyed the lands in dispute to the heirs (third to seventh defendants). The heirs sold the lands for value to the first defendant, who had notice that a decree against the intestate was unsatisfied.

In an action under section 247, Civil Procedure Code, by the decree-holder against the defendants for a declaration that the lands were liable to be sold under his decree—

Held, (1) that the second to the seventh defendants should not have been made parties to the action.

"This case is not analogous (to a Paulian action). Fraud was not suggested in the plaint. The only questions were, whether the first defendant's title was a defeasible one, and whether the plaintiff, for the payment of his debt, could go against the property conveyed to the first defendant. The second to the seventh defendants had no present interest in the decision of these questions, and the contest ought to have been confined to the plaintiff and the first defendant."

Held, further, (2) that the plaintiff was entitled to succeed against the first defendant to the extent to which the purchase money was not expended for the purposes of administration.

"There can be no question that a purchaser from an administrator who sells with the leave of the Court gets a title which cannot be attacked by the creditors of the estate, but the first defendant is not in that position.... A conveyance by the heirs is undoubtedly valid. But the personal representative still retains power to sell the land conveyed for the purposes of administration, and this includes the right of a creditor to follow the property for the payment of his debt, and it is not competent for the heirs to dispose of the assets of an estate to the detriment of the creditors."

The Paulian action lies for the revocation of whatever has been alienated in *frauden creditorum*, and it follows that when an alienation of this kind is attacked, both the grantor and the grantee should have an opportunity to defend it.

THE facts are fully set out in the judgment of the District Judge (F. R. Dias, Esq.) :—

This is an action under section 247 of the Civil Procedure Code for a declaration that certain lands seized by the plaintiff under a writ against the second defendant are liable to be sold thereunder, and that two deeds under which the first defendant claims title to those lands are

subject to that liability. The facts of the case are these. The lands belonged to one Ibrahim Saibo Erawady, who died some years ago, leaving his widow (the second defendant) and seven children (of whom the fourth, fifth, sixth, and seventh defendants were four). The widow obtained letters of administration, but without paying the estate debts (or rather a considerable portion of them) she transferred all the lands to herself and the seven children on November 10, 1908, by deed No. 1,545 (marked P 1). The third defendant in this case is the widow in her personal capacity, and on April 30, 1909, she and her four major children, the fourth, fifth, sixth, and seventh defendants, sold and conveyed their undivided 9/16th shares to the first defendant by deed No. 1,563 (P 2).

On March 20, 1908, one Carpen Chetty had obtained a decree against the administratrix for Rs. 666.25 and costs in case No. 18,510 of this Court, and the present plaintiff took an assignment of that decree and had himself substituted as plaintiff on the record on October 20, 1908. He issued execution and seized the lands, when the first defendant successfully claimed 9/16ths under his deed P 2 of April 30, 1909. The 7/16th shares of the minor children have been sold, but have not been sufficient to clear the debts. The question, therefore, we have to consider is, whether the title to the 9/16ths derived by the first defendant through the administratrix's deed of November, 1908, is free of liability to pay the estate debts.

In my opinion, there can be no defence, at all to this action, and I am surprised that one should have been offered or persisted in.

We may take it as an elementary principle of law that an heir only gets title to his ancestor's property subject to the payment of his debts, so that I fail to see how the first defendant or any one else has the right to object to the plaintiff following up this property for the payment of his claim, in the absence of proof that there is other property available for discussion. As was held by the Supreme Court in *Ekanayake v. Appu*,[1] when a creditor holds a judgment against an administrator, the assets of the intestate cannot be held or disposed of by the heirs to their advantage or to the creditor's detriment.

It was contended that the 7/16th shares not dealt with by the deed P 2 were more than sufficient to pay the plaintiff's claims, so that no objection can be raised to the validity of that deed. This is scarcely an argument which is open to these defendants, for the fact remains that at the Fiscal's sale they only realized a very small sum—a result very possibly due to the complication created by the execution of this impeached deed. Nor was this proceeding on the part of the major heirs one that could in any way be justified, for clearly it was an attempt by them to make the minor hiers alone pay their father's debts.

The first defendant has not even the merit of being an innocent purchaser of these 9/16th shares, for he appears to have plunged into this litigation with his eyes wide open. He was warned in time about the plaintiff's claims against the estate, but yet he conspired with the widow and the other defendants to have this deed executed in his favour in the hope of defrauding the plaintiff.

I accept unhesitatingly all that the plaintiff has stated on this part of the case, which reveals a remarkable state of things. Before the administratrix executed her deed P 1 in November, 1908, the plaintiff

[1] *(1899) 3 N. L. R. 350.*

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held three money decrees against the estate for some Rs. 1,200, and a mortgage decree for Rs. 1,313, making a total of something over Rs. 2,500, plus interest and costs. He seized two of the estate lands under the mortgage decree, and the sale was fixed for May 1, 1909. In the meantime he heard that the first defendant was preparing to buy up the lands or take a mortgage of them, and told him of his claims against the estate, and even offered to assign all his judgment to him. The first defendant then said that he was not going to touch the properties. This took place about two weeks before he took the transfer P 2 of April 30, 1909. On that day the plaintiff chanced to be in Kandy, and heard from his proctor that the amount of the mortgage decree had been paid to him that morning, and that he had been got to write to the Fiscal to release the seizure and stop the sale that had been fixed for the next day.

The plaintiff had hoped that, when the sale took place under his mortgage decree, sufficient would be realized for the payment of his money decree also, but as that sale was now stopped he was naturally alarmed, and went at once to Mr. Beven, his proctor in the other cases, to get the lands seized again. For some reason or other Mr. Beven did not issue the writ as requested by the plaintiff, but to his horror the plaintiff discovered that at that very moment the first defendant and the other defendants were engaged in Mr. Beven's office in executing this deed P 2.

The plaintiff protested against it and made a great noise, and proceeded forthwith to the Registrar's Office and entered a caveat against the registration of that deed. These are facts which have been proved even out of the mouth of the administratrix herself, and it is therefore idle for the first defendant to say that he was an innocent purchaser. The price paid by the first defendant was Rs. 2,500, out of which a sum of Rs. 1,362.49 was certainly paid in respect of the plaintiff's mortgage decree, but not a cent of the balance has been used for the payment of any of his unsecured claims. If the first defendant was the honest purchaser he professes to be, it was at least his duty to see that the balance was appropriated for the settlement of the other claims, of which he had notice. Far from being that, it appears quite clear to me that he deliberately lent himself to the perpetration of a fraud on the plaintiff, but miscalculated the value of the title he was taking from these people.

I find, therefore, that both the deeds P 1 and P 2 are subject to the payment of the debts of the late K. Ibrahim Saibo Erawady, and that the 9/16th shares of lands seized by the plaintiff under his writ in case No. 18,510 are liable to be sold thereunder.

Let decree be entered for plaintiff as prayed for, with costs as against all the defendants except the sixth, and let a decree *nisi* be entered as against the sixth.

H. J. C. Pereira, for the defendants, appellants.—The second to the seventh defendants should not have been made parties to this case. This is not a Paulian action. No relief is claimed as against these defendants. The first defendant purchased the lands for value from the heirs, who had a conveyance from the administratrix. A creditor of the estate cannot under these circumstances follow the

property in the hands of the first defendant (*Nugent v. Gifford*[1]). The first defendant was not bound to see whether the purchase money was applied for the payment of debts of the estate (*Corser v. Cartwright*[2]). Counsel also referred to *Fernando v. Perera*,[3] *Silva v. Silva*.[4]

Seneviratna (with him *H. A. Jayewardene*), for the respondent.—There is no misjoinder of parties ; although no relief is claimed against the second to the seventh defendants, they are necessary parties to the action. In an action under section 247 of the Civil Procedure Code the judgment-debtor is always a party. The second to the seventh defendants are the heirs of the intestate (debtor). The District Judge, moreover, holds that the first defendant and the other defendants conspired to defraud plaintiff.

The facts of this case show clearly that the first defendant was aware of the fact that debts of the intestate remained unpaid at the time of his purchase. He was, therefore, bound to see that the purchase money was applied to satisfy creditors. The judgment of Clarence J. in *Fernando v. Perera* supports that view. See also *Ekanayake v. Appu*.[5]

Pereira, in reply.

Cur. adv. vult.

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The second defendant is the widow and administratrix of one Erawady, who died intestate, and in her personal capacity she is the third defendant. The fourth, fifth, sixth, and seventh defendants are some of her children. She and these defendants were entitled to 9/16th shares of Erawady's estate, which consisted of both movable and immovable property. As administratrix she was called upon to close the estate, and on the orders of the Court she, on November 10, 1908, executed a conveyance of all the lands that formed part of Erawady's estate in favour of herself and the other heirs of Erawady. On April 30, 1909, she and the fourth, fifth, sixth, and seventh defendants conveyed their interests in these lands to the first defendant. Erawady and another had granted a promissory note to one Carpen Chetty, who sued on it in D. C. Kandy, 18,510, and obtained a judgment against the second defendant as administratrix for Rs. 666·25 and costs. The decree was assigned to the plaintiff, who issued writ and seized the shares of the lands which had been conveyed to the first defendant, who claimed the same. The claim being upheld, the plaintiff brought this action under section 247 of the Code, and a decree has been entered declaring that the transfer by the administrator to the heirs and that in favour of the first defendant are subject to the payment

[1] *(1738) 1 Atkyns 462.*
[2] *(1875) L. R. 7 Eng. and Ir. App. 731.*
[3] *(1887) 8 S. C. C. 54.*
[4] *(1907) 10 N. L. R. 234.*
[5] *(1899) 3 N. L. R. 350.*

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of the debts of Erawady's estate, and that the shares in question are liable to be sold under the writ issued in the promissory note case.

All the defendants save the sixth have appealed. It was contended for the appellants (1) that there has been a misjoinder of parties, the objection being that the second to the seventh defendants have been wrongly joined ; (2) that the first defendant being a purchaser for value and holding a title derived from the administratrix, the shares he bought were not liable to be seized and sold on the plaintiff's writ. On the first point the Judge made the following order :—

> I must rule against the defendants on the first issue, and hold that the second to seventh defendants have been properly added as party defendants. There is no difference between this and a Paulian action, and the plaintiff cannot very well attack the deed on which the first defendant bases his title without at the same time attacking the deed under which his vendors derived title.

I am of opinion that this ruling is wrong. The Paulian action lies for the revocation of whatever has been alienated *in fraudem creditorum*, and it follows that, when an alienation of this kind is attacked, both the grantor and the grantee should have an opportunity to defend it. This case is not analogous. Fraud was not suggested in the plaint. The only questions were, whether the first defendant's title was a defeasible one, and whether the plaintiff, for the payment of his debt, could go against the property conveyed to the first defendant. The second to the seventh defendants had no present interest in the decision of these questions, and the contest ought to have been confined to the plaintiff and the first defendant. I would set aside the decree so far as it affects the second, third, fourth, fifth, and seventh defendants, and dismiss the action as against them with costs.

On the second point the facts material are as follows. The first defendant paid Rs. 2,500 for the shares he bought. Two of the lands sold to him had been mortgaged by Erawady to the plaintiff, who obtained a mortgage decree and seized these lands, and they were under seizure at the time of the first defendant's purchase. He redeemed them by paying to the plaintiff the full amount of the writ, namely, Rs. 1,376·99, out of the Rs. 2,500. The first defendant paid Rs. 37·50 to the Fiscal as his charges in connection with the seizure under the mortgage decree, and the balance Rs. 1,085·51 was in effect paid to the second defendant. There is no proof that any portion of this amount went in payment of any debts due by Erawady's estate, and it must be taken that she personally benefited by it. I accept it as proved that the first defendant paid full value for the shares he bought. It has also been established that the first defendant, when he bought, had notice that the decree in D. C. Kandy, 18,510, had not been satisfied. It was argued by Mr. Pereira, for the first defendant, that the title from an administrator is paramount, and that there was no duty cast on the first

defendant to see to the application of the money paid by him. There can be no question that a purchaser from an administrator who sells with the leave of the Court gets a title which cannot be attacked by the creditors of the estate, but the first defendant is not in that position. It may be, too, that a purchaser from heirs who hold a conveyance from an administrator may assume that everything has been rightly done, and is not put upon inquiry as to whether the debts of the estate have been paid. In this case, however, the first defendant, as I have stated, had notice of the outstanding decree, and the question is whether, in these circumstances, it was not incumbent on him to see that all the money paid by him was rightly applied. A conveyance by the heirs is undoubtedly valid (vide *Silva v. Silva* [1]). But, as observed by Hutchinson C.J., the personal representative still retains power to sell the land conveyed for the purposes of administration, and this includes the right, of a creditor to follow the property for the payment of his debt, and it is not competent for the heirs to dispose of the assets of an estate to the detriment of the creditors (vide *Ekanayake v. Appu* [2]). In the case of *Fernando v. Perera* [3] the contest was between the administrator as plaintiff and the purchasers from the heirs. The latter succeeded on the ground that the consideration for the purchase was wholly applied for the benefit of the estate. In my opinion the onus lay on the first defendant to show that the whole of the purchase money was expended for the purposes of administration, and as he has failed to discharge this burden as regards the sum of Rs. 1,085.51, the plaintiff, I think, is entitled to levy execution to this amount. I am unaware what the exact sum is which is due to the plaintiff, but if it exceeds this sum, he cannot proceed for the excess against the shares seized. Perhaps the parties will agree as to the amount which is due. The plaintiff is entitled to the costs of the action and of this appeal as against the first defendant, but he will pay to the other appellants the costs of this appeal. I have already mentioned that in the plaint there was no allegation of fraud, but at the trial the plaintiff's counsel is recorded as having characterized the whole transaction as a fraud, and this charge seems to have been entertained to some extent by the learned Judge. It seems to me that if the plaintiff desired to attack the transfers on this ground, the defendants had a right to insist on a proper amendment of the plaint and the framing of appropriate issues. From the facts disclosed on the record, I am unable to agree with the learned Judge in his finding that the first defendant conspired with the widow and other defendants to have the deed executed in his favour in the hope of defrauding the plaintiff.

LASCELLES C.J.—I concur.

Varied.

[1] *(1907) 10 N. L. R. 234.*

[2] *(1899) 3 N. L. R. 350.*

[3] *(1887) 8 S. C. C. 54*