

1922.*Present: De Sampayo and Schneider JJ.*HANIFFA *v.* MOHAMADO.366—*D. C. Matara, 9,432*

Alienation in fraud of creditors—Action by purchaser from judgment-debtor against purchaser at Fiscal's sale—Can purchaser at Fiscal's sale set up the defence that transfer in favour of plaintiff was tainted with fraud?—Transfer of all debtor's property on three successive days—Did debtor make himself insolvent before the last transfer?—Bond given by debtor and surety—Alienation by principal debtor—Is creditor defrauded?

A as principal debtor and B as surety granted a bond in favour of C. A did not mortgage any property, but B mortgaged some property of his own. On a decree obtained on the bond, a property was seized as the property of A, and was purchased by defendant at the sale in execution. Before the sale, A transferred all his property by three deeds executed on three successive days; the property purchased by defendant at the execution sale was transferred on the second day to the plaintiff. Plaintiff instituted an action for declaration of title to the property against defendant.

Held, that it was open to the defendant to show that the deed in favour of the plaintiff was executed in fraud of creditors.

Plaintiff contended that as the deed in his favour was the second of the series of three deeds, A had not made himself insolvent by executing the deed.

Held, that the three deeds must be taken to be one and the same act of alienation "To hold that before the execution of the last of the three deeds A was not insolvent, as he had some property left, would be to give effect to a mere subterfuge."

It was contended that A in alienating his property in favour of the plaintiff could be said to have intended to defraud the surety and not the creditor.

Held, that as the principal debtor's property was first liable, the creditor was intended to be defrauded by the alienation, especially as it was not shown that the property mortgaged by the surety would have been sufficient to pay the debt in full.

THE facts appear from the judgment.

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Samarawickreme (with him *Chas. de Silva*), for plaintiff, appellant.

Bawa, K.C. (with him *E. W. Jayawardene*), for defendant, respondent.

November 3, 1922. DE SAMPAYO J.—

The plaintiff brought this action to vindicate title to two lands: (1) Modingewila Mahakuttiya and (2) Modingewila Punchikuttiya and Okanda. The defendant disclaimed title to the second of these lands, and the dispute was therefore confined to the first land. The land admittedly belonged to one Ismail Lebbe. The plaintiff's claim is founded upon a deed No. 15,028 executed by Ismail Lebbe in his favour on January 20, 1919. The defendant impeaches this deed as being fraudulent and collusive, and executed to defraud Ismail Lebbe's creditors. At that time Ismail Lebbe appears, in fact, to have been in pecuniary difficulties, and by three deeds executed about the same time he transferred away all his property in favour of his close relatives. The first deed was executed on January 18, 1919, for some lands, the second was the deed in favour of the plaintiff for this and two other lands, and the third deed dated the next day was for the rest of Ismail Lebbe's property. It is proved that notwithstanding these deeds of transfer Ismail Lebbe continued to be in possession of the lands. In the meantime he had been sued by one of his creditors, and under writ issued in that case the land now in dispute was sold in April, 1919, and purchased by the defendant. The Fiscal granted a transfer to the defendant on July 10, 1919. The learned Judge held that the deeds executed by Ismail Lebbe were intended to defeat his creditors, and dismissed the plaintiff's action.

One or two questions of law are raised on behalf of the defendant. It is contended that the defendant, not being a creditor of Ismail Lebbe, but only a purchaser at the execution sale, was not entitled under the Roman-Dutch law to have the plaintiff's deed set aside on the ground that it was an alienation in fraud of creditors. Defendant, however, is not seeking to have that deed set aside—he is on the defensive, and sets up superior title on the ground that the plaintiff's deed is tainted with fraud. The point in any case is covered by judicial authority. *Suppiah Naidu v. Meera Saibu*,¹ where Hutchinson C.J. observed that “if a creditor could claim on that ground to have the deeds declared void as against him, any one claiming, as this plaintiff does, through the creditor, has the same right.” See also *Mohamado v. Manupillai*.² Mr. Samarawickreme invited us to review these decisions, but I think that, constituting as we do, a bench of two Judges, we must follow them.

¹ 3 Bal. 129.

² 3 C. W. R. 19.

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It appears that the action in which the land was sold and purchased by the defendant was on a bond granted by Ismail Lebbe as principal debtor and by another party as surety. The surety mortgaged some property of his own, but there was no mortgage of any property by Ismail Lebbe himself. It was contended that in these circumstances Ismail Lebbe, in alienating his property in favour of the plaintiff, could be said to have intended to defraud the surety and not the creditor. But the law required, and it was expressly declared in the decree in the action, that the property of Ismail Lebbe as principal debtor should be first discussed, and that the property mortgaged by the surety should be liable to be sold only for any deficiency. If Ismail Lebbe's property was put out of the way to prevent its being so discussed, I think the creditor was intended to be defrauded, especially as it is not shown that the property mortgaged by the surety would have been sufficient to pay the debt in full.

As shown above, the deed in favour of the plaintiff was the second in the series of three deeds by which Ismail Lebbe alienated all his property. This being so, it is contended that by the execution of the deed in plaintiff's favour Ismail Lebbe could not be said to have made himself insolvent, because Ismail Lebbe still had the lands alienated by the third deed which was executed the next day. But it is quite clear that all the three deeds, though executed one after the other within three days, had one object in view, and were executed in pursuance of an intention conceived at the same time, namely, to defeat Ismail Lebbe's creditors. In my opinion the fact of the three deeds being executed in three consecutive days and not on one and the same day makes no real difference. They must be taken as one and the same act of alienation, and to hold that before the execution of the last of the three deeds Ismail Lebbe was not insolvent, as he had some property left, would be to give effect to a mere subterfuge.

In my opinion the judgment of the District Judge was right, and I would dismiss this appeal, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.