

1937

Present : Poyser and Soertsz J.J.

TILLAINATHAN v. NAGALINGAM

68—D. C. Jaffna, 5,753

Prescription—Mortgage bond in favour of P and after his death his minor son—Death of P—Action brought by minor's next friend.

A mortgage bond dated January 12, 1934, whereby the mortgagee bound himself to pay P and, after his death, his son, T, did not specify the time when payment should be made. P died in September, 1930. T, who was a minor, sued on the bond through his next friend in February, 1934.

Held, that prescription commenced to run on the bond from the date of its execution and was not interrupted by the disability of T on the ground of minority.

Sinnatamby v. Viravy (1 S. C. C. 14) and *Sinnatamby v. Meera Levvai* (6 N. L. R. 50) followed.

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

H. V. Perera, for plaintiff, appellant.

Nadesan, for respondent.

Cur. adv. vult.

March 23, 1937. SOERTSZ J.—

This appeal was pressed on two grounds, one of law and one of fact. The point of law taken was that the plaintiff is not barred by the Statute of Limitations (Ordinance No. 22 of 1871), from maintaining this action on the bond, even if the two payments of interest alleged to have been made on the bond, in 1926 and 1929, are disregarded. The bond which is dated January 12, 1924, contained a clause to the effect that the mortgagor would "pay the said Pootatamby (i.e., the mortgagee) and after this lifetime to his son Tillainathan" (i.e., the plaintiff). Pootatamby died in September, 1930. At the time Tillainathan was a minor. He was a minor at the time this case was instituted too, i.e., on February 26, 1934.

On these facts Mr. Perera contends (a) that the cause of action so far as the plaintiff is concerned, arose only on failure of payments after Pootatamby's death in 1930, and that the plaintiff was well within time when he came into Court in 1934, (b) alternatively, that even if, in view of the terms of section 6 of the Prescription Ordinance, the cause of action on this particular bond, must be considered to have arisen on the very day the bond was executed, then prescription did not begin to run against the plaintiff in view of section 15 of the Ordinance, because he was a minor at the time. Mr. Nadesan for the respondent contended, that there was only one cause of action on the bond and that prescription having begun to run against the mortgagee Pootatamby was not interrupted by the minority of the plaintiff.

In my opinion, the appellant's contention is untenable. Section 6 of the Prescription Ordinance says that in the case of a hypothecation or mortgage payable at a definite time, an action to be maintainable should be commenced within ten years of the expiration of such time, and in all other cases within ten years of the date of such instrument of mortgage or hypothecation. The mortgage bond in this case did not provide for payment within any definite time. Therefore to use the common phrase, prescription began to run against Pootatamby from the date of the execution of the bond, and section 15 of the Ordinance does not avail the present plaintiff for the reason that that section is intended to serve a person who is under a disability at the time the cause of action first arose. In this case, when the cause of action or the right to sue first arose, the person entitled to sue upon it was Pootatamby and he was under no disability whatever. The words of section 15 are quite clear: "Provided that if at the time when the right of action in respect of any of the causes referred to in sections 6, 7, 8, 9, 11, and 12 . . . shall accrue, the person so entitled to sue shall be subject to any of the said disabilities, &c., then the several periods of limitation . . . shall not commence to run until the removal of such disability."

The Full Bench in the year 1878 considered a similar question in the case of *Sinnatamby v. Viravy*¹, and Clarence J. who delivered the judgment of the Court said: "It would certainly be a matter for surprise to find the Legislation enacting that prescription after once commencing to run against a party could be afterwards interrupted by the disability of his successor. On considering the clause, it appears to us that we

cannot interpret the words "time of the right of such action or such claim accruing" (the words in the present section 15 are the time when the right of action . . . shall accrue) to mean the time when the actual plaintiff or defendant became personally entitled to sue. It appears to us that the time meant is the time when the cause of action first accrued. The effect of the clause then is, that if at the time the party now claiming was the party to sue or be sued, and was then under disability, prescription does not begin to run until his disability has been removed. This appears to us to be the most rational interpretation of the clause. We cannot read it so as to stop the running of prescription already started, by reason of the disability of a person succeeding to the right" See also *Sinnatamby v. Meera Levvai*¹.

His Lordship, after discussing the question of fact, set aside the judgment and sent the case back for further trial on the issue of fact.

POYSER J.—I agree.

Case sent back.