

1906. *Present:* The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and  
October 18. Mr. Justice Middleton.

PONNIAH *v.* NUGU LEBBE *et al.*

*D. C., Kandy, 17,343.*

*Prescription—Person out of the Island represented by an attorney—Prescription Ordinance—Ordinance No. 22 of 1871, s. 14.*

The appointment of an attorney to act in Ceylon does not remove the disability constituted by absence beyond the seas under section 14 of Ordinance No. 22 of 1871.

**A**CTION *rei vindicatio*. The plaintiff alleged that the first defendant and one Samu Lebbe were the original owners of the land in dispute; that upon writ issued in *D. C., Kandy, 2,779*, against the first defendant and Samu Lebbe, the property was sold by the Fiscal and purchased by R. W. Boulton, who obtained Fiscal's transfer No. 13,626, dated 3rd September, 1892; that upon promise of the first defendant to re-purchase the land, he was allowed by R. W. Boulton to possess the land; that the first defendant having failed to purchase the land, as agreed, he was sued by Mr. Boulton, who obtained a decree in ejectment against him; and that Mr. Boulton by deed No. 6,840 dated 14th June, 1904, sold and transferred the land to the plaintiff.

The defendants denied that the first defendant was entitled to any share of the land, and alleged that it belonged to Samu Lebbe and Cader Saibo, both of whom having died intestate in 1885 and 1889 respectively, the defendants and added defendants, as their heirs, became entitled to the property. The defendants also denied that Samu Lebbe's share was sold in execution. The added parties

further alleged that they were never in the Island, and that their attorney, the fourth defendant, came to the Island only in 1894, and that therefore prescription could not run against them.

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The District Judge (J. H. de Saram, Esq.) gave judgment for the plaintiff. The defendants appealed.

*Bawa*, for the appellants.

*Walter Pereira, K.C., S.-G.*, for the respondent.

*Cur. adv. vult.*

18th October, 1906. LASCELLES A.C.J.—

The claim is for a parcel of land of about 25 acres known as Kirigalpottewatta or Makulgaharuppewatta, and is founded upon a Fiscal's sale and transfer in 1891 to a Mr. Boulton, the plaintiff's vendor, in execution of a judgment against the first defendant and the executrix *de son tort* of the estate of Samu Lebbe, the first defendant's brother. The plaintiff also alleges that his vendor, through the first defendant, had acquired title by prescription.

For the defence it is urged that the land belonged originally not to the first defendant and Samu Lebbe, but to Samu Lebbe and Abdul Kader Saibo, who are now represented by the added parties and their attorney, the fourth defendant, and issue was joined on the plea of prescription.

The District Judge has come to the conclusion that the plaintiff has gained title by prescription, and it is only with the question of prescription that we now have to deal.

Now, it is admitted that the added parties, who are the heirs of Samu Lebbe and Abdul Kader Saibo, have never been in Ceylon; but the plaintiff contends that prescription began to run against them from the 13th October, 1894, at which date the added parties appointed an attorney to act for them in Ceylon. This brings us at once to the question of law whether the appointment of an attorney to act in Ceylon will remove the disability constituted by absence beyond the seas. I have been unable to discover any authority as to the effect of the appointment of a local attorney either with reference to section 14 of Ordinance No. 22 of 1871 or to section 16 of the Real Property Limitation Act (3 and 4 Will IV., c. 27), which appears to have been the model on which our section was framed.

Section 14 of the Ceylon Ordinance provides that if at the time when the right of any person to sue for the recovery of immovable property accrues such person shall have been under certain disabilities—among which absence beyond the seas is named—then and

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so long as such disability shall continue the possession of such immovable property by any person shall not be taken as giving such person any right or title to the said immovable property as against the person subject to such disability or those claiming under him, but the period of ten years shall commence to be reckoned from the death of such last-named person or from the termination of the disability whichever first shall happen.

There the disability of the added parties consisted in absence beyond the seas. In default of any authority enabling me to do so, I cannot hold that absence from Ceylon is terminated by the appointment of an attorney in Ceylon. I can conceive of only one way by which absence from a place is terminated, namely, by going to that place. It can scarcely be argued that the right to sue for the recovery of the property first accrued to the attorney on his appointment in 1894. The right to sue had clearly accrued to the added parties on the sale to Mr. Boulton and on his occupation through the first defendant.

Further, I do not think that the right to sue can be said, in any proper sense of the expression, to accrue to the attorney. True, he may, if he is authorized to do so by the instrument by which he is appointed, sue on behalf of and in the name of his principal to recover property the title to which has accrued to the latter, yet the right to sue for the property can surely not be said to have accrued to the attorney himself.

It does not follow that because an absentee, who is represented by an attorney, is in some respects in the same legal position as if he were in the jurisdiction, he is therefore prevented from pleading "absence beyond the seas." Both in India [*A. Ayyan v. Kalingarayan* (1) and *Khodabux v. Budree Narain Singh* (2)] and in Ceylon [*Manuel Pillai v. Saveramuttu* (3)] it has been ruled that the fact that a minor has been represented by a guardian, who had sued to establish his right, will not debar him from pleading his minority against the operation of the law regarding the limitation of actions. Thirty years' adverse possession is of course conclusive proof of title against an absentee, but the shorter period of ten years, as I construe the Ordinance, will not begin to run against him, even though he be represented by an attorney, until he has terminated his disability in the only way in which physical absence can be terminated, namely by coming to Ceylon.

I would also add with regard to the facts of this particular case that, even on the assumption that the period of prescription began

(1) *I. L. R.* 4 *Mad.* 119.

(2) *I. L. R.* 7 *Cal.* 137.

(3) *Ram.* 1863-1868, p. 335.

to run against the added parties from the appointment of their attorney on 13th October, 1894, the plaintiff has nevertheless failed to acquire title by prescription.

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It is not contended that Mr. Boulton, the plaintiff's vendor, was ever in possession. It is said that he possessed vicariously by the first defendant, who was allowed to remain in possession on his promise to buy back the property. But on 1st October, 1901, Mr. Boulton obtained a decree for the ejection of the first defendant, who, notwithstanding the decree, remained in possession.

It is clear that the possession of the first defendant after the date of the decree was not under Mr. Boulton and therefore cannot accrue to the plaintiff's benefit. Thus, on the most favourable assumption to the plaintiff, he had possession only from 13th October, 1894, to the 1st October, 1901, and did not complete the period of ten years. In my opinion the plea of prescription fails, and the appeal must be allowed with costs and the action remitted for adjudication on the other issues.

MIDDLETON, J.—I agree.

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