

1950

Present: Nagalingam J.

PERERA, Appellant, and JOHN APPUHAMY, Respondent

*S. C. 147—C. R. Gampaha, 4,249**Prescription Ordinance (Cap. 55)—Sale of immovable property—Claim to recover balance purchase money—Sections 6 and 7.*

Where in a deed of sale there is a recital that the full consideration has been paid and there is no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered, an action brought to recover an alleged balance of the consideration is prescribed in three years. The cause of action, in such a case, arises not upon a written contract but upon a simple money debt.

APPPEAL from a judgment of the Commissioner of Requests, Gampaha.

Frederick W. Obeyesekera, for defendant appellant.

S. W. Jayasuriya, for plaintiff respondent.

Cur. adv. vult.

January 18, 1950. NAGALINGAM J.—

A point under the law of prescription arises for decision on this appeal. The plaintiff sued the defendant for the recovery of a sum of Rs. 100 and interest being the balance purchase price in respect of a sale of land by him to the defendant. The sale, according to the deed of conveyance, was for the price of Rs. 300.

The plaintiff's case is that a sum of Rs. 200 out of the consideration was paid leaving a balance sum of Rs. 100 yet due to him. He also claimed interest on the unpaid sum. The defendant, on the other hand, took up the position that the consideration for the deed was in reality a sum of Rs. 200 and that the full amount had been paid to the plaintiff and nothing more was due to him.

The defendant also raised a plea of prescription. The deed of conveyance was executed on 20th March, 1945, and the action was commenced by the plaintiff on the 2nd November, 1948, that is to say, after the expiry of more than three years from the date of the execution of the deed. The contention of the defendant is that the plaintiff's action became prescribed in three years in terms of the present section 7 of the prescription Ordinance (Cap. 55), while the plaintiff contends that the section of the Prescription Ordinance which governs the case is the present section 6.

Before it could be said that the action falls under section 6 of the Ordinance, it must be shown that the action is based upon a written promise or contract. The plaintiff relies upon the cases of *Lamatena v. Rahaman Doole*¹ and *Ausadahamy v. Kiribanda*². In the former case the facts were very similar to those in the case before me, subject, however, to one important variation. It does not appear that in the deed of conveyance executed in that case there was any recital or averment that the full consideration for the deed had been paid to or received by the vendor. The deed, however, did contain in the attestation clause a statement by

¹ (1924) 26 N. L. R. 406.

² (1936) 15 C. L. Rec. 153.

the notary that out of the sum of Rs. 200, which was the consideration for the deed, a sum of Rs. 100 was paid in his presence. Jayewardene A.J. held that "by a deed of sale the vendor transfers the land, and the vendee agrees to pay the price. The action to recover the unpaid balance of the price grows directly out of the deed of sale, it is dependent on it, and derives its vital force from it." That this statement of the learned Judge must be confined to those cases where the deed does not recite that the full consideration has been paid by the vendee or received by the vendor is apparent from the fact that the learned Judge himself does not doubt the correctness of the principle laid down in the earlier case of *Thomassie v. Kanapathipillai*¹ where it was held that where the deed recited that the full consideration had been received by the vendee an action by him to recover an alleged balance of the consideration was prescribed in three years as the cause of action did not arise upon a written contract but upon a simple money debt. In the later case of *Ausadahamy v. Kiribanda (supra)*, though in the body of the deed the receipt of the consideration by the vendee was specifically stated, the attestation of the notary, however, contradicted it, for in the attestation it was explicitly stated that the vendor had retained part of the purchase price to discharge certain mortgage encumbrances subsisting on the land conveyed. On the plaintiff instituting the action for recovery of the balance retained by the vendor to pay off the mortgage on the basis that the latter had failed to implement his undertaking to pay the mortgage debt, it was held that the attestation clause of the notary operated as a written undertaking given by the vendor by his agent, the notary, and that the action was therefore not prescribed in three years but would only be prescribed in terms of section 6 after the expiry of a period of six years.

In the present case, there is a declaration in the body of the deed that the vendor has received the consideration, for the deed not merely sets out that the vendor transferred the land "in consideration of the sum of Rs. 300 of the lawful money of Ceylon well and truly paid to me" by the vendee, but expressly goes on to say that the vendor does admit and acknowledge the receipt of the consideration. The attestation clause in the deed which is relied upon by the respondent does not assist him, for unlike in the case of *Ausadahamy v. Kiribanda (supra)* there is no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered. The attestation merely states that out of the consideration only a sum of Rs. 200 was paid in the presence of the notary. Counsel for respondent attempted to lay emphasis on the word "only" and contended that therefore the balance was not paid, and he went on to seek to read into the document a promise on the part of the vendor to pay that balance. I do not agree that these words in the attestation are capable of that interpretation. While the attestation does not show that the balance had previously been paid to or acknowledged to have been received by the vendee, it gives no indication that the balance was yet outstanding or that the vendor made a promise to pay the balance in the future. In other words, while it is not possible to say that the balance had previously

¹ (1883) 5 S. C. C. 174.

been received, it is equally not possible to say that the balance was agreed to be paid thereafter. There is therefore in this case no conflict between the attestation and the statement in the body of the deed that the full consideration had been paid, for the attestation is consistent with the view that the balance had previously been paid or settled in some way acceptable to the vendee. It is therefore difficult to say that the attestation clause contains an agreement or undertaking to pay the balance. The present case, therefore, falls within the principle laid down in *Thomassie v. Kanapathipillai (supra)* which was followed in the later case of *Thamotherampillai v. Kanapathipillai*¹.

I hold, therefore, that the plaintiff's action having been instituted after the lapse of three years of the accrual of the cause of action is prescribed. Plaintiff's action fails and is dismissed with costs both of this court and of the lower court.

Appeal allowed.

1950

Present: Windham J.

MOHAMED CASSIM, Petitioner, and ABDUL HAMEED, Respondent,

*S. C. 348.—Application for a Writ of Quo Warranto on
M. Y. Abdul Hameed.*

Quo Warranto—*Licensed process server—Right to be member or Chairman of Village Committee—Meaning of "holder of any public office under the Crown"—Fiscals Ordinance (Cap. 8), s. 4—Local Authorities Elections Ordinance, No. 53 of 1946, s. 10 (1) (d).*

A process server licensed as a Fiscal's Officer under section 4 of the Fiscal's Ordinance is not the holder of a public office under the Crown within the meaning of section 10 of the Local Authorities Elections Ordinance, No. 53 of 1946, and is, therefore, not disqualified to be elected as a member of a local authority.

APPPLICATION for a writ of *quo warranto* challenging the right of the respondent to be elected Chairman of the Village Committee, Sainthamaruthu, Karawaku South.

C. S. Barr Kumarakulasinghe, with *A. I. Rajasingham*, for petitioner.

S. Nadesan, with *S. Mahadeva* and *M. A. M. Hussein*, for respondent.

Cur. adv. vult.

February 9, 1950. WINDHAM J.—

The petitioner is a registered voter for Ward No. 7, Sainthamaruthu, Karawaku South Village Committee. At the election to the Village Committee on June 11, 1949, the respondent was elected a member of the Committee for Ward No. 7. On July 13, 1949, the respondent was elected Chairman of the Village Committee, and since then has functioned as such.

¹ (1940) 41 N. L. R. 265.