

1940

Present : Soertsz and Hearne JJ.

DE SILVA *et al.* v. DE SILVA.

33—D. C. Galle, 36,337.

*Prescription—Action to recover legacy—Cause of action arises on death of testator.*

A cause of action to recover a legacy accrues on the death of the testator.

THIS was an action to recover the value of a legacy. The sole question argued in appeal was whether the action was prescribed.

L. A. Rajapakse (with him M. M. I. Kariapper and H. A. Wijemanne), for the plaintiffs, appellants.—The action is not prescribed. The question is whether the cause of action arose on the death of the testator or on the issue of probate or on the sale of the property. It cannot possibly be said that it accrued on the death of the testator. If, then, it arose either on the issue of probate or on the sale of the property, the minority of some of the plaintiffs would interrupt prescription in their favour.

The period of prescription in this case is ten years. Section 5 of the Prescription Ordinance (Cap. 55) is applicable. The executor is in the position of a trustee—*Eheliyagoda v. Samaradiwakara*<sup>1</sup>, *Assauw et al. v. J. W. Fernando*<sup>2</sup>. Further, when section 111 (1) (a) of the Trusts Ordinance is read with section 90, it can be argued that the defendant cannot plead prescription, because he is in the position of a trustee who has committed a fraud. See also *Soar v. Ashwell*<sup>3</sup>.

The District Judge's interpretation of *Fernando v. Soysa*<sup>4</sup> cannot be justified. Section 554 of the Civil Procedure Code regarding the personal liability of the executor one year after the issue of probate, and section 720 (b) are intended for the benefit of the devisee and cannot be used adversely to him. For English law on the point, see *14 Laws of England (Hailsham)* p. 339, para. 632.

Finally, the view is possible that prescription commences only at the date of the judicial settlement of the estate. The executor is the representative of the deceased. Prescription would begin to run from the date when notice is given to everybody that the estate is closed. Judicial settlement has not yet been reached in the testamentary case.

H. V. Perera, K.C. (with him G. P. J. Kurukulasooriya), for the defendant, respondent.—This case falls under section 9 of the Prescription Ordinance and the period of limitation is two years. Under section 9 prescription would run notwithstanding minority. At best, the case comes within section 10 and is barred in three years.

In the case of a legacy time begins to run from the date of the death of the testator—*14 Laws of England (Hailsham)* p. 341, para. 638. The devisee obtains title and can institute action soon after the testator's death, *Cassim v. Marikkar*<sup>5</sup>, *Silva v. Silva et al.*<sup>6</sup>. It is not necessary for him to wait until the executor obtains probate; it is for the executor to claim certain powers over the property when he is sued, *Fernando v. Soysa*

<sup>1</sup> (1919) 22 N. L. R. 179.<sup>2</sup> (1905) 1 Bal. Rep. 174.<sup>3</sup> (1893) 2 Q. B. D. 390.<sup>4</sup> (1896) 2 N. L. R. 40.<sup>5</sup> (1892) 1 S. C. R. 180.<sup>6</sup> (1907) 10 N. L. R. 234.

(*supra*). The words "no action shall be maintainable" in section 547 of the Civil Procedure Code does not amount to the same thing as "No action shall be instituted"—*Alagakawandi v. Muttumal*<sup>1</sup>.

The question of a trust under section 90 of the Trusts Ordinance cannot be raised on the present action. There is no averment in the plaint that the executor has gained an advantage for himself. Concealed fraud really gives rise to a new cause of action, *Dodwell & Co., Ltd., v. John et al.*<sup>2</sup>, *Fernando v. Peiris*<sup>3</sup>.

*L. A. Rajapakse* in reply.—The cause of action is the non-performance of the legal obligation imposed on the executor. An action cannot be brought against an executor till he either proves or intermeddles, *Lightwood on Limitations (1909 Ed.) 206; 14 Laws of England (Hailsham) p. 329, para. 612.* The passage in Halsbury cited on behalf of the respondent refers to an *immediate* legacy.

*Cur. adv. vult.*

April 15, 1940. SOERTSZ J.—

On the last occasion on which this case came up on appeal, Keuneman J. held that in the absence of a contrary intention in the Will, the executor was bound by our law to discharge a mortgage created by the testator over a land devised by him, so that the legatee might take the legacy free from encumbrances. Maartensz J. agreed.

The case was remitted to the trial Court for the determination of issue No. 8, namely, "Is the plaintiffs' claim prescribed?" The trial Judge has answered that issue in the affirmative, and the present appeal is from that finding.

Counsel for the appellants contended before us (a) that it was section 5 of the Prescription Ordinance that applied in this case because, he submitted, the action was one to compel the performance of a trust, and as such, was not barred till ten years had elapsed. In this instance, the action was instituted on October 25, 1937, and was, therefore, within time even if the correct view is that the cause of action to recover a legacy accrues to the legatee on the death of the testator. The testator died on April 3, 1931. He contended, however, (b) that the correct view is that the cause of action in a case like this accrues when the executor puts it beyond his power to pay the legacy. In this case that happened only in February, 1933, when the executor, although he had funds sufficient to pay the amount due on the mortgage to which the land devised was subject permitted it to be sold in execution. (c) Alternatively, he contended that no cause of action arose (1) till the executor obtained probate on October 18, 1932, or (2) till Final account was filed on February 11, 1936; or (3) till the estate was declared closed on October 28, 1937.

Counsel for the respondents submitted that this action was, in reality, an action for damage and, as such, barred by section 9 of the Prescription Ordinance in two years, or, at best, that it was within section 10, and was barred in three years. In either case, the plaintiff came into Court too late, for, he contended, the cause of action arose on the death of the testator.

<sup>1</sup> (1920) 22 N. L. R. 111.

<sup>2</sup> (1931) 33 N. L. R. 1.

<sup>3</sup> (1918) 20 N. L. R. 206.

After careful consideration of the questions raised by the appellants' Counsel, I have come to the conclusion that section 5 of the Prescription Ordinance has no application at all. There is no express trust here, no is there such a constructive trust as is put upon the footing of an Express Trust by the English Law. I am also of opinion that the cause of action cannot depend upon such uncertain, or at least such indefinite events as the obtaining of probate, or the filing of the Final account, or the so-called closing of estate. The correct view seems to be that taken by the trial Judge, and contended for by the respondent, namely, that a cause of action to obtain his legacy accrues to a legatee on the death of the testator. That certainly is the view taken by the English Law. See *14 Laws of England (Hailsham)* p. 341 and the cases cited there, and that is the view implied in the local cases, *Cassim v. Marikar*, *Silva v. Silva*, *Alagakawandi v. Muttumal*, *Fernando v. Soyza*.

In this view of the matter, prescription began to run when the testator died on April 3, 1931, that is to say, in the life time of legatee, and it was not interrupted by the fact of the minority of her children, at the time of her death some three weeks later.

The appeal, therefore, fails and must be dismissed with costs.

HEARNE J.—I agree.

*Appeal dismissed.*

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