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Present: Dalton and Drieberg JJ.

DHARMASENA *v.* LEWIS *et al.*

272—D. C. Kalutara, 14,193.

Prescription—Joint debtors in solido*—Action instituted against one—Judicial demand—Interruption of prescription.*

The institution of an action against one of several debtors *in solido* interrupts the course of prescription against the others.

APPEAL from a judgment of the District Judge of Kalutara.

The plaintiff sued the defendants for the recovery of money due upon a mortgage bond dated August 1, 1917. The mortgage was executed by the first and second defendants and their mother, Nona Rodrigo, jointly and severally. The plaint was filed on July 27, 1927, two days before the expiration of ten years. Nona Rodrigo had died six months before action, and the third defendant was described as her legal representative. On December 12, 1927, on the application of the plaintiff the third defendant was appointed as a fit person to be the legal representative of the deceased mortgagor. It was contended for the defence that the action was prescribed as it must be regarded as having been instituted on December 12. The learned District Judge held that the action was instituted on July 27, and gave judgment for the plaintiff.

Croos Dabrera, for defendants, appellants.—The issue of prescription should have been decided in the appellants' favour. The filing of the plaint against two of the mortgagors did not effect the third, who was dead. The filing of papers for the appointment of a representative, is not enough. A representative must in fact be appointed. Until then the action is not properly constituted as against him, and he is not before the Court. The action as against him at least is prescribed.

Weerasooriya, for the plaintiff, respondent.—Assuming that the third mortgagor was not represented until the appointment of representative, the filing of the action against the other mortgagors is sufficient to interrupt the running of prescription. On terms of the bond the obligation is one *in solidum*. A judicial demand against one of two co-principal debtors interrupts the running of prescription against the others as well (*Pothier on Obligations (Evan's Trans. Vol. I., p. 144, 150); Walter Pereira, 1913 ed., p. 588, &c.*).

Croos Dabrera, in reply.

February 3, 1930. DALTON J.—

This case raises an interesting point under the Prescription Ordinance. It does not appear to have arisen before in Ceylon.

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The plaintiff sued three defendants for the recovery of an amount due upon mortgage dated August 1, 1917. The mortgage was executed by the first and second defendants and their mother, Dias Nona Rodrigo, who bound themselves jointly and severally to pay the principal amount of the debt with interest. It is conceded that all three mortgagors had shares in the property hypothecated by the bond.

The plaint was filed on July 29, 1927, two days before the expiration of the period of ten years, the term of prescription enacted by section 6 of the Prescription Ordinance, 1871. Dias Nona Rodrigo died about six months before the action was brought, and the third defendant in the action, who is stated in the plaint to be a son of hers, is described as " the legal representative " of the deceased mortgagor. With the plaint the plaintiff filed a petition supported by affidavit moving for an *order nisi* for the appointment of the third defendant or any other fit person as legal representative of the deceased's estate for all the purposes of the action. This was in conformity with the provisions of section 642 of the Civil Procedure Code.

The plaint bears a rubber stamp of the District Court dated July 29, but the District Judge apparently dealt with the petition on August 4, for on that date he granted an *order nisi* returnable for September 29. This order was eventually made absolute on December 12, 1927, no one putting in an appearance to contest the order. After some delay on May 31, 1928, the third defendant's proctor filed his proxy, and stated he abides by the answer of the first and second defendants, who amongst other things had pleaded prescription. The trial came on eventually on May 28, 1929, when two issues were tried, one the question of consideration and the other the question of prescription. The learned Judge found for the plaintiff on both issues, and gave judgment for the amount claimed.

The argument on the appeal only dealt with the question of prescription, it being urged for the defendants that the date of the commencement of the action at the earliest was December 8, when the third defendant was appointed administrator of the deceased mortgagor for the purposes of the action. The learned Judge however declined to accept that view, holding that the action must be considered to have been instituted on July 29, when the plaint was filed. There seems to be no doubt whatsoever that the plaint was filed and accepted on that date, the Court only withholding the issue of summons on the first and second defendants until an administrator be appointed of their deceased mother, as a matter of convenience. The learned Judge's conclusion was, in my opinion, correct as regards the action brought against the first and second defendants, but wrong in respect of the third defendant. There was in fact at that date no such person in existence as the third

defendant is described, and he did not come into existence until December 8. I am unable to accept the view of the learned Judge that the appointment dated back to the date of the petition.

In the result, however, in my opinion, it is not really material in the circumstances here that the third defendant has only been sued after the lapse of ten years for the following reasons. Since there has been an interruption of the term of prescription by the plaintiff against two of the co-principal debtors, namely, the first and second defendants, the authorities lay it down that the prescription is considered as having been interrupted with respect to all the remaining co-principal debtors. The same principle is also applicable in the case of one or more co-principal creditors making a claim against a debtor. *Voet* (*bk. XLV., tit. 2, s. 6*) sets the law out in the following terms:—

> Again it is beyond doubt that, just as is the case generally, so also here, the obligations of correal debtors and creditors can be cancelled by prescription . . . . For if even one of correal creditors by stipulation has timeously made a legal claim against the debtor, or conversely one of several correal debtors has been called to account by the creditor, the prescription is considered as having been interrupted not only with reference to him who makes the claim or against whom it is made, but also with regard to all the remaining correal debtors or creditors.

In section 1 of the same title he defines what is meant by joint or correal stipulations. Upon the facts here there is no doubt of the legal claim made by the plaintiff in good time against two of the correal debtors.

The same matter is dealt with in the authority cited by Mr. Weerasooria in the course of his argument (*Potheir on Obligations, Evan's Trans. vol. I., p. 150*), where the effects of solidity between several debtors are dealt with. This authority is referred to in detail by Pereira J. in his *Laws of Ceylon* (*1913 ed. at p. 588* and following pages). Just as the acknowledgment of debt made to any one of the creditors interrupts the prescription as to the whole of the debt and consequently ensures to the benefit of the other creditors (*Pothier, vol. I., p. 144*), so also the judicial demand which is made against one, the debtors *in solido* interrupts the course of prescription against all the others. The words "Judicial demand" in the original are "l'interpellation," and Pothier goes on to state that the creditor "by instituting this proceeding" or in the original "en l'interpellant" has instituted it for the whole of the debt. This has exactly the same meaning as the words "*promissorem interpellaverit*" of Voet which have been translated as "has made a legal claim" against the debtor. What exactly these words include it is not necessary here to decide, for there is no doubt in my

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mind that the institution of this section on July 29 with the acceptance of the plaint against two of the defendants on that date was a legal claim or judicial demand within the meaning of the authorities cited.

For these reasons the plaintiff must succeed upon the issue of prescription.

I would therefore dismiss this appeal with costs.

DRIEBERG J.—I agree.

Appeal dismissed.