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*Present:* Wood Renton C.J. and De Sampayo J.RAMAN CHETTY *et al.* v. MOHIDEEN.

408—D. C. Kurunegala, 5,347.

*Action under s. 247 by judgment-creditor against claimant—Prescriptive possession of judgment-debtor.*

In an action under section 247 of the Civil Procedure Code against a successful claimant the judgment-creditor cannot prove the title by prescription of the judgment-debtor unless the judgment-debtor is a party to the action.

THE facts are set out in the judgment.

*A. St. V. Jayewardene* (with him *M. W. H. de Silva*), for defendant, appellant.

*Bawa, K.C.* (with him *Keuneman*), for plaintiffs, respondents.

December 3, 1915. Wood RENTON C.J.—

On August 24, 1902, Caruppen Chetty obtained a mortgage decree against Noor Saibo and his wife, Asiya Umma, in District Court, Kurunegala, No. 2,143, for Rs. 4,725. Caruppen Chetty died, and the respondents were substituted as plaintiffs on the record. Writ issued in the case on February 19, 1912, for the judgment debt and interest, which in the interval had nearly doubled itself in amount. The mortgage and other properties were seized and sold, and a sum of Rs. 6,713.50 was realized thereby. A balance of two thousand odd rupees remained due, and the respondents seized certain other lands with a view to its recovery. The appellant

<sup>1</sup> 18 M. & W. 682.

<sup>2</sup> (1906) 5 Tam. 137.

<sup>3</sup> (1906) 1 A. C. R. 48.

claimed two of the allotments, A and B. His claim was upheld, and the respondents thereupon brought this action, under section 247 of the Civil Procedure Code, to have the lots in question declared executable under their decree. Both the respondents and the appellant pleaded prescriptive title, and an issue as to the prescriptive title of the latter was framed at the trial. There was, however, no issue as to the alleged prescriptive title of the former. The learned District Judge held that the respondents had established title by prescription through Noor Saibo, one of the judgment-debtors, and entered up decree in their favour as prayed for in the plaint. Hence this appeal.

It was decided by the Full Court in *Terunnanse v. Menika*<sup>1</sup> that it is not competent for a plaintiff or for a defendant to set up a third person's title under section 3 of the Prescription Ordinance, 1871,<sup>2</sup> but that the possession to be proved must be that of a party to the suit or of his predecessor in title, and that the judgment to be given under that section must be declaratory of the right of a party to the action, not of a stranger. In *Pedro Costa v. Fernando*<sup>3</sup> Sir Joseph Hutchinson C.J., expressed the opinion that, in an action under section 247 of the Civil Procedure Code, the execution-creditor may prove the prescriptive rights of the execution-debtor to the property, and that, for that purpose, the execution-debtor may be added as a party plaintiff or party defendant, as the case may be. In *Pedro Costa v. Fernando*<sup>3</sup> the execution-debtor was in fact the first defendant to the action. In the later case of *David v. Ibrahim*<sup>4</sup> Mr. Justice Granier and I held that the onus of bringing a third party, on whose prescriptive possession it was proposed to rely, into the proceedings rested on the plaintiff or the defendant, as the case might be, by whom such title had to be established. Now, here, Noor Saibo was only made a party to the proceedings in the District Court. On the contrary, as I have already mentioned, although the plaint set up title by prescription, no issue was framed in support of the allegation. In these circumstances the rule laid down in *Terunnanse v. Menika*<sup>1</sup> applies, and the respondents' action fails. Their counsel invited us to have the decision in *Terunnansa v. Menika*<sup>1</sup> reconsidered on the ground that that case was decided at a time when the prevalent view of the Courts was that the Prescription Ordinance, 1871,<sup>2</sup> was an enactment of limitation of suits, and did not contemplate the acquisition of title. But I do not think that we ought to accede to this suggestion. The language of section 3 of the Prescription Ordinance, 1871, make it quite clear that it is only the possession of the plaintiff or the defendant, or of some party under whom the plaintiff or the defendant claims, that can be relied upon for the purpose of establishing title by prescription. On

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Mohideen*<sup>1</sup> (1895) 1 N. L. R. 200.<sup>2</sup> No. 22 of 1871.<sup>3</sup> (1908) 11 N. L. R. 210.<sup>4</sup> (1910) 13 N. L. R. 318.

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these grounds I would allow the appeal, and direct decree to be entered up dismissing the respondents' action, with the costs of the action and of the appeal.

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DE SAMPAYO J.—

The plaintiff obtained a decree for money in a previous action against one Noor Saibo and his wife, Asiya Umma, and seized a certain land in execution. Upon that seizure the defendant successfully claimed the land as his property. The plaintiff has brought the present action, under section 247 of the Civil Procedure Code, to have it declared that the land was the property of his judgment-debtor Asiya Umma, and was liable to be seized and sold under his decree. The District Judge has found on the evidence that, though the defendant had good documentary title, Noor Saibo has had prescriptive possession, and he has given judgment in favour of the plaintiff. The District Judge has not noticed that the plaintiff's prayer is that Asiya Umma be declared entitled to the land. But in the view I take of the case the distinction need not be further considered.

The objection taken on behalf of the defendant-appellant, that the plaintiff cannot seek to depend on the prescriptive title of his debtor, is entitled to succeed. The point is covered by the authority of *Terumanase v. Menika*<sup>1</sup>. The defendant might possibly be precluded from raising the question, if an issue as to the prescriptive right of Noor Saibo had been stated at the trial and evidence had been allowed to be given on such an issue without objection. But no such issue was stated, and evidence of possession was given only incidentally in the course of proof of title. Again, though an action under section 247 of the Code is primarily between the execution-creditor and the claimant, this Court has recognized the propriety of adding other necessary parties according to circumstances under the provisions of section 18. For example, if the case involves the declaration that a grant by the judgment-debtor to the claimant is fraudulent and void, the judgment-debtor may be added as a party. *Haramanis v. Haramanis*.<sup>2</sup> A more direct authority on the specific question raised is that of *Pedro Costa v. Fernando*<sup>3</sup>, in which it was decided that in an action under section 247 the plaintiff as execution-creditor might well prove his judgment-debtor's prescriptive title, if the latter were joined even as a defendant. In this case, however, Noor Saibo is not a party at all. A suggestion was made on behalf of the plaintiff that we should send the case back for the purpose of joining Noor Saibo, and for further proceedings. But I do not think that the circumstances of the case justify such an indulgence being granted at this late stage.

I think the judgment appealed from should be set aside, and the plaintiff's action dismissed, with costs in both Courts.

*Set aside.*

<sup>1</sup> (1895) 1 N. L. R. 200.

<sup>2</sup> (1907) 10 N. L. R. 322.

<sup>3</sup> (1908) 11 N. L. R. 210.