

Present : Porter and Garvin JJ.

1922.

KETCHO v. WIJEWARDENE.

364—D. C. Colombo, 3,900.

Prescription—Absence beyond the seas—Does it presuppose a former presence in the Island? Ordinance No. 22 of 1871, s. 14—Power of attorney in favour of proctors—Action by proctors—Costs.

In section 14 of the Prescription Ordinance, 1871, the expression "absence beyond the seas" does not presuppose a former presence in the Island.

Where proctors who held a power of attorney instituted an action, they were held entitled to recover their costs as proctors.

THE plaintiff in this action, a British subject resident in Calcutta,

sold at Calcutta to the defendant rice, salt, and long pepper for Rs. 14,900 on December 7, 1918, drew on him a bill of exchange for the value of the said goods, and shipped the said goods to the plaintiff's agent in Colombo. The defendant failed to accept the bill and to take delivery of the said goods. The plaintiff thereupon caused the said goods to be sold by public auction at the risk of the defendant. After crediting the defendant with the proceeds of sale of the said goods, the plaintiff sued the defendant in the Court of Small Causes in Calcutta for the recovery of Rs. 760.33 being the amount of deficiency at such sale. On March 2, 1920, the plaintiff obtained judgment by default against the defendant for the said sum. On July 6, 1920, the plaintiff instituted an action in the District Court of Colombo against the defendant on the judgment obtained by him at Calcutta. This action was on December 3, 1920, dismissed, with costs, "with liberty to the plaintiff to bring a fresh action if so advised." The plaintiff having paid the costs, instituted the present action on February 1, 1922, on the count of goods sold and delivered at Calcutta and averring jurisdiction in the District Court of Colombo on the ground of the defendant residing within that jurisdiction. The defendant, among other pleas, stated that the claim of the plaintiff was prescribed in that the cause of action arose beyond the period allowed by law. The plaintiff had by a power of attorney dated November 29, 1921, appointed "Leslie Mack and Peter Daniel Anthonisz Mack (junior), solicitors of Colombo, jointly and severally, as his attorney and attorneys." The two actions in the District Court of Colombo were filed by P. D. A. Mack & Sons, a firm of proctors, consisting of the two attorneys as proctors having been authorised thereto by a proxy signed by P. D. A. Mack

1922. (junior), as the attorney of the plaintiff. The defendant in his answer pleaded that as the attorneys of the plaintiff were the *Ketcho v. Wijewanene* proctors for the plaintiff, he was not entitled to any costs. The following is the judgment of the District Judge (A. St. V. Jayawardene, Esq.) :—

I think the issue of prescription must also be decided against the defendant. Mr. Tisseverasinghe's contention is that section 15 of the Ordinance does not apply to this case, because the plaintiff has never been in Ceylon. His argument is that the plaintiff cannot avail himself of the disability of absence beyond the seas under the circumstances. He has not been able to produce any authority in support of this contention, and I do not think it is possible to uphold it without doing considerable violence to the plain language of section 15. This contention, I think, is entirely negatived by the judgment of the Supreme Court in *Erane v. Nusserwanjee*.¹ In my opinion the plaintiff is entitled to claim the benefit of the disability, viz., absence beyond the seas, and I hold that although the cause of action arose somewhere in 1918, this present action is within time.

Mr. Tisseverasinghe then contends that the plaintiff is not entitled to costs, because the plaintiff appointed as his attorney or attorneys Messrs. Leslie Mack & P. D. A. Mack (junior), solicitors, the proctors in the case. These proctors, who appear in the case for the plaintiff, he says, are themselves the attorneys, and therefore no costs should be given. In the first place, the power of attorney I find has been given in favour of two persons, and the proxy is also in favour of the same two persons, but it is signed by only one of them, Mr. P. D. A. Mack (junior), so that I do not think it could be said that the attorneys appointed themselves proctors for the purpose of instituting the action. It is signed by only one of the attorneys, as attorney, and I think that enables them as proctors appointed by the attorney to recover their costs. Even if it were otherwise I would apply the principle enunciated in the English case of the *London Scottish Benefit Society v. Cherley*² which laid down the rule that a solicitor appearing in person is entitled to costs as if he had employed a solicitor, except with regard to items which the fact of his acting directly renders necessary. This decision was followed in the case of *H. Tolputt & Company, Ltd., v. Mole*,³ but I would rather base my order on the ground that as the proxy is signed by one of the attorneys only, the attorneys were not appointing themselves proctors for the plaintiff.

Let judgment be entered for the plaintiff as prayed for with costs.

The defendant appealed from this judgment.

Tisseverasinghe (with him *Weerasinghe*), for defendant, appellant.— In this case the goods were sold on December 7, 1918, and the action was brought on February 1, 1922. The case for the plaintiff is that he always was and still is "absent beyond the seas." The plaintiff cannot avail himself of this plea. He has always been a resident of Calcutta, has never been in the Island, and cannot therefore be said to be "absent beyond the seas." "Absence"

¹ (1908) 11 N. L. R. 95.

² 13 Q. B. D. 372.

³ (1911) 1 K. B. D. 87.

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connotes previous presence. It has been held by the American Courts that a citizen of another State who has never been in the Commonwealth is not a person "beyond the seas" without any of the United States, and therefore is not within the saving clause of the Statute (*Angell on Limitations*, p. 209). The decisions of the English Courts, of which *Townsend v. Deacon*¹ is typical, are against appellant's contention. But the clause of the English Statute, 21 James I. c. 16, s. 17, on which they are based has the words "be beyond the seas." Whereas our section has "absence beyond the seas."

Under 4 & 5 Anne c. 16, s. 19, there is a provision preventing time running in cases where defendant is "beyond the seas." There is no similar provision in our Ordinance. If defendant had, therefore, a cause of action over a counter claim against the plaintiff, time will begin to run against him, even if plaintiff is beyond the seas during the whole time of limitation. No doubt the "disability of absence beyond the seas" has been abolished in England by the *Mercantile Law Amendment Act, 19 & 20 Vic. c. 97, s. 10*, but a one-sided disability still remains in Ceylon. Such a clause, therefore, in Ceylon should be construed most strictly against the person claiming it. It has been held that the appointment of an attorney by an absent principal does not deprive the principal of availing himself of this saving clause. But our Courts have not gone to the extent of holding that the institution of an action by the plaintiff through his attorney does not deprive him of the benefit. Time will commence to run against the plaintiff at least from the date of the institution of the first action by him, viz., on July 6, 1920. The present action has even then become prescribed. The saving clause applies only in a case where the plaintiff will be wholly deprived of his remedy if he had not the benefit of the clause. It imposes no disability on him. He could bring the action even while under disability. If he did, then it is clear that at least from that date he had either renounced the benefit or the clause had ceased to operate in his favour.

Garvin (with him *Canakeratne*), for respondent.

There is no difference in substance between the English Statute and ours, and the decisions of the English Courts are decisive. The Supreme Court has followed the English law on the subject in *Erane v. Nusserwanjee* (*supra*).

March 7, 1923. PORTER J.—

This is an appeal from a judgment of the learned District Judge of Colombo. He deals fully with all the facts, and I agree fully with his finding of law. It has been argued before us, as it was

¹ (1849) 3 Ex. Ch. 706.

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before him, that "absence beyond the seas" in section 14 of Ordinance No. 22 of 1871 presupposes a former presence in this Colony. No authority has been adduced in favour of this, of what appears to me to be a startling proposition. The second question raised by the appellant was that this matter was *res judicata* by reason of a former action brought in Colombo. It appears, however, that in that case the decree specially allowed the bringing of this action. The third point is that as the proctors in this case had held the powers of attorney from the plaintiff, that they were not entitled to recover their costs. With that also I cannot agree.

I think this appeal should be dismissed, with costs.

GARVIN J.—I agree.

Appeal dismissed.

