Present : Dalton and Akbar JJ.

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SINNAMY AIYER *v.* BALAMPIKAI AMMA.

449—D.C. Jaffna, 22,734.

Bond—Agreement to convey land—Payment of damages in default—Period of prescription—Ordinance No. 22 of 1871, ss. 6 and 7.

A document setting out an agreement to convey land and in default, providing for the payment of a sum of money as the value of the land and a further sum by way of liquidated damages, is not a bond conditioned for the payment of money, within the meaning of section 6 of the Prescription Ordinance, No. 22 of 1871.

An action upon such an agreement is prescribed in six years.

APPEAL from a judgment of the District Judge of Jaffna.

Plaintiff brought this action to obtain specific performance of an agreement to convey certain lands or in the alternative to recover a sum of Rs. 750 and a further sum of Rs. 500 by way of liquidated damages. The material part of the document upon which the action was based was as follows:—

> I, the said party of the first part, do declare and undertake to convey by way of deed one-half share of the remaining property (immovable) inclusive of my acquisition belonging to me and my husband unto the party of the second part in equal shares and also to pay a sum of Rs. 250 to the first-named person of the second part for the remaining movable property within a period of one year since the time of the closing of the said last will and testament . . . . In the event of my failing to convey the said property as agreed upon within the stipulated time or within a period of two years from this date unto the respective persons or their respective heirs, &c., I undertake to pay a sum of Rs. 750 for the value of the immovable property . . . . . I also agree and bind my heirs, &c., to pay an additional sum of Rs. 500 as liquidated damages.

The date of the agreement was March 16, 1919, and the plaint in the action was filed on June 29, 1927. The agreement not being carried out, the cause of action arose on March 16, 1921 ; the defendant pleaded that the action was prescribed.

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The learned District Judge held that the instrument was a bond conditioned for the payment of money and that, under section 6 of the Prescription Ordinance, an action on it may be commenced within ten years of the cause of action.

H. V. Perera, for defendant, appellant—This action is framed as an action for specific performance of an agreement to transfer land.

In *Ismail v. Ismail* [1] it was decided that the period of prescription in the case of an agreement to transfer land is that laid down in section 7 of Ordinance No. 22 of 1871, viz., six years. In this case too the document is in substance an agreement to transfer land, and therefore section 7 would apply.

The mere provision in the document for damages and the value of the land to be paid in the event of a failure to perform the agreement to transfer the land does not give the document the character of a " bond " and make the period of prescription ten years.

A " bond conditioned for the payment of money " has a definite technical legal significance. Every undertaking to pay money on the failure to do something or give something contained in a document does not make that document a bond. This was the view taken in *Simon v. de Silva.*[2] That case discusses the legal topic fully and, it is submitted, contains a correct exposition of the law, viz., that it is not the mere form of the document that decides the question whether a document was a bond or not.

This is not a case where part payment will stop the statute.

Soertsz, for plaintiff, respondent.—" Bond " is not defined in Ordinance No. 22 of 1871, it is taken over from the English Act. In English law it has a definite technical meaning. See *3 Halsbury's Laws of England.* As the word " bond " has not been defined in our Ordinance, and as it cannot be given its full English law significance in our law, we must give it a meaning, that is, as approximate as possible to the English law meaning of the word. That is the view taken by Bonser C.J. in *Tissera v. Tissera.* [3]

As a deed attested by a Notary is the nearest to the English deed poll under seal, a promise to pay a debt contained in such an instrument must be construed as a bond. That is the view taken by Bonser C.J.

There is such a promise in this document which is notarially attested and, therefore, section 6 governs the case and the period of prescription is ten years.

Bonser C.J.'s view was adopted in *Supramaniam Pillai v. Kalicutty,* [4] *Semon v. Silva,* [5] although in some of the cases the Judges refused to accept C.J. Bonser's definition of " bond " as an

[1] *22 N. L. R. 476.*
[2] *1 C. W. R. 71.*
[3] *2 N. L. R. 238.*
[4] *11 N. L. R. 71.*
[5] *18 N. L. R. 397.*

exhaustive definition. They, however, admitted that the test proposed was a good one and that such a promise was one instance of a bond.

In this case there is also part payment which will stop the statute whether section 6 or section 7 of Ordinance No. 22 of 1871 be applied.[1]

July 1, 1929. DALTON J.—

This appeal raises a question under the Prescription of Actions Ordinance, No. 22 of 1871. Plaintiff (respondent) brought the action to obtain specific performance of an agreement to convey certain movable and immovable property or in the alternative to recover certain sums of Rs. 750 and Rs. 500, respectively, in terms of the agreement, and a further sum of Rs. 500 by way of liquidated damages.

The document P1 upon which the action is based is headed "Instrument, Agreement, and Renunciation." It is dated March 16, 1919, is notarially executed, and is between the present defendant (appellant) on the one side and plaintiff and his since deceased brother on the other. After setting out several recitals the material part is as follows:—

> Know all men by these presents that I the said party of the first part do declare and undertake to convey by way of a deed one-half share of the remaining property (immovable) inclusive of my acquisition belonging to me and my husband unto the said second part in equal shares, and also to pay a sum of Rs. 250 to the first-named person of the second part for the remaining movable property (excluding the cattle that are to be shared as recited above) within a period of one year since the time of the closing of the said last will and testament. I also declare that the second part should bear the expenses of the execution of the said deed and that in the event of my failing to convey the said property as agreed upon within the said stipulated time or within a period of two years from this date in case of such time prolonged by chance unto the respective persons or their respective heirs, executors, and administrators, I undertake to pay a sum of Rs. 750 for the value of the immovable property which ought to be conveyed and also the said sum of Rs. 250 for the movable property, making a total sum of Rs. 1,000. I also agree and bind my heirs, executors, and administrators to pay an additional sum of Rs. 500 as liquidated damages together with the said sum of Rs. 1,000 on demand after date.

[1] *5 S. C. C. 62 ; 14 N. L. R. 1 ; 17 N. L. R. 156.*

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The original plaint in the action was filed on June 29, 1927, and the agreement not having been carried out, the cause of action arose on March 16, 1921. The question arises therefore whether the claim is prescribed.

The trial Judge has held that the instrument is a "bond conditioned for the payment of money." Under section 6 of the Ordinance an action upon such a bond must be commenced within ten years from the expiration of the time provided for the performance of the condition. It is urged for the appellant, however, that the instrument is not a bond, but falls under the provisions of section 7 of the Ordinance and the action is prescribed after six years.

We have heard a lengthy argument upon what has been described as "the vexed question as to what is a 'bond'", and numerous authorities have been cited to us, including *Tissera v. Tissera*,[1] *Suppramaniapillai v. Kalikuttu*, [2] *In re Section 38 of Stamp Ordinance, 1890*,[3] *Seman v. Silva*,[4] and *Selvanayagi Amma et al. v. Kandapper Upathar*.[5] Of these various decisions the decision of Ennis and de Sampayo JJ. in *Seman v. Silva* (*supra*) is the one which I would prefer to follow; the reasoning of de Sampayo J. as set out in his judgment seems to be equally applicable to the instrument in this case, as in the case before him. On the question of notarial execution he says: "The fact of notarial execution, if I may say so with respect, has nothing to do with the character of a document as a bond in Ceylon." He goes on to say that an instrument should be construed as a bond or the contrary according to its substance and real characteristics and not according to its form of execution. As he points out, in the case of bonds affecting an interest in land, the want of notarial execution will make it invalid to that extent under Ordinance No. 7 of 1840. He has in the course of his judgment considered the history of the legislation in Ceylon on the subject of prescription. It might also be pointed out that, if notarial attestation as I understand has taken the place of the Roman-Dutch law requirement of registration as provided for in the Placaat of 1665 and the payment of duty, there are instruments in Roman-Dutch law which clearly come within the term "bond" which required neither registration nor payment of duty for their validity. Amongst such are kustingen and bottomry bonds. [6]

The instrument P1 has been notarially executed because it affects an interest in land. It appears to be stamped as an agreement. Its primary purpose is the undertaking to convey the immovable property referred to. A value is placed upon that immovable property and also upon the movable property, and in the event of her failure to convey, within the time stated, she

[1] *2 N. L. R. 238.*
[2] *11 N. L. R. 71.*
[3] *12 N. L. R. 281.*
[4] *18 N. L. R. 397.*
[5] *5 A. C. R. 64.*
[6] *Nathan II., 1924.*

(the defendant) undertakes to pay these sums. She further agrees to pay the sum of Rs. 500 as liquidated damages in case she breaks her contract. I am quite unable to agree with the trial Judge that this is a "bond." It is not necessary to enter into the difficult question of deciding what is a "bond" in Ceylon, but I am satisfied that this document setting out an agreement to convey land, and providing for the payment of a sum as liquidated damages in the event of failure to convey, is not a "bond conditioned for the payment of money." The trial Judge's decision that it comes under section 6 of the Ordinance is therefore wrong, and the term of prescription is therefore six years as provided in section 7.

Here, however, a difficulty arises in disposing of the case, for the trial Judge having held that the term of ten years was applicable, did not find it necessary to consider whether there had been at any time an acknowledgment of the debt, by part payment or otherwise, as to take the case out of the Ordinance. There is evidence of a payment by the defendant at some point of time apparently after the cause of action arose. The endorsement of receipt by plaintiff on the instrument P1 is dated January 10, 1925. It has been urged before us that no question on this point was raised in the lower Court, but it seems to me that plaintiff might have raised it on the issue of prescription, although of course it would have been much better to have had an express issue on the point. The trial Judge however decided before any evidence was led that the instrument was a bond under section 6, and hence the question of acknowledgment of the debt to take it out of section 7 did not arise. The case must therefore go back for this question to be decided. The trial Judge should frame a definite issue to cover it. The appeal is allowed and the order of the lower Court will be set aside, and the case sent back for the hearing to continue on this issue. Costs incurred in the lower Court will abide the event, but appellant is entitled to costs of the appeal.

AKBAR J.—

The plaintiff brought this action for specific performance of an agreement made by the defendant who is the widow of one Ayaturai Aiyar asking for the transfer of certain lands or in the alternative for the recovery of a sum of Rs. 750 and a further sum of Rs. 500 as liquidated damages. After Ayaturai's death there was a dispute between the defendant on the one side and the plaintiff and his brother (who are the brothers of the deceased Ayaturai) on the other. This dispute, however, was adjusted between them by the parties entering into the document marked P1 dated March 16, 1919. The material parts of this deed are as follows:—

> "Know all men by these presents that I the said party of the first part do declare and undertake to convey by way of a deed one half of the share of the remaining property (immovable)

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inclusive of my acquisition belonging to me and my husband unto the said second part in equal shares and also to pay a sum of Rs. 250 to the first-named person of the second part of the remaining movable property (excluding the cattle that are to be shared as recited above) within a period of one year since the time of the closing of the said last will and testament. I also declare that the second part should bear the expenses of the execution of the said deed and that in the event of my failing to convey the said property as agreed upon within the said stipulated time or within a period of two years from this date in case of such time prolonged by chance unto the respective persons or their respective heirs, executors, and administrators, I undertake to pay a sum of Rs. 750 for the value of the immovable property which ought to be conveyed and also the said sum of Rs. 250 for the movable property, making a total sum of Rs. 1,000. I also agree and bind my heirs, executors, and administrators to pay an additional sum of Rs. 500 as liquidated damages together with the said sum of Rs. 1,000 on demand after date."

The estate was closed on April 16, 1920, and the plaintiff admits that the defendant has paid the sum of Rs. 250 provided for in the agreement above, but states that the defendant has failed to transfer the lands or to pay the alternative sum of Rs. 750. He therefore (his brother having died and he being the sole heir of his dead brother) claims for specific performance of the agreement or for the alternative payment of the two sums mentioned in the agreement. The defendant pleaded that she had paid the full sum of Rs. 1,000, and she also raised the issue that the claim was prescribed. On the facts the District Judge has held that only a sum of Rs. 250 has been paid as alleged in the plaint, and I see no reason why this finding of fact should be interfered with. On the issue of prescription several interesting points have arisen in this case which require consideration. The District Judge held early in the case before any evidence was led that this case was governed by section 6 of Ordinance No. 22 of 1871 and that therefore the claim was not prescribed. He came to this conclusion because in his words "the agreement is an agreement to transfer land, or alternatively a bond conditioned for the payment of money in lieu of a transfer and therefore section 6 is apposite." The first question for decision is whether the District Judge is right in holding that the document in question is a bond within the meaning of section 6 of the Prescription Ordinance. As de Sampayo J. says in the case of *Don Seman v. de Silva*[1] "the vexed question as to what is a 'bond' was argued in this case too". It was urged for the respondent that as this document was notarially attested it was a bond on the authority of *Tissera v. Tissera*.[2]

[1] *1 C. W. R. 71.* [2] *(1897) 2 N. L. R. 238.*

The following cases were also cited during the course of the argument:—*Mohamadaly Marikar v. Assen Naina Marikar*,[1] *Suppramaniapillai v. Kalikutty*,[2] the case reported in *XII. N. L. R. p. 281, Suthukkummah v. Vachchiravage*,[3] *Selvanayagi Amma v. Kandapper Upathar*, [4] and the case of *Don Seman v. de Silva* (*supra*). It will be seen from document P1 that it is not in the form ordinarily known as a bond in which class of documents the obligor binds himself to pay a certain sum of money with a condition that the bond is to be void on the payment of a certain sum of money or on the performance of a certain act. The form of P1 is nothing more than that of an agreement with the additional formality of a notarial attestation. The attestation clause shows that the document was stamped with a stamp of Rs. 10.50 showing that the parties themselves recognized the document as nothing more than an agreement to transfer land and also as an agreement to pay money. It has not been stamped under any of the sub-heads of item 15 of the schedule to the Stamp Ordinance.

In volume III of Halsbury's *Laws of England* a " bond " is defined as an instrument under seal, whereby one person binds himself to another for the payment of a specified sum of money and when the form of the bond is accompanied by a condition in the nature of a defeasance it is called a double or conditional bond.

The question that I have to consider is not the meaning of the word " bond " but the exact meaning of the words " bond conditioned for the payment of money or the performance of any agreement or trust or payment of penalty " in section 6 of Ordinance, 1871. An exactly similar bond was the subject-matter of the action in *Don Seman v. de Silva* (*supra*), in which this Court held that an agreement to pay rent in a notarially attested lease was not a bond. I prefer to follow the opinion of this Court as expressed in *Don Seman v. de Silva* (*supra*) in preference to the earlier contrary opinion. The notarial attestation was required in this case because P1 was essentially an agreement to transfer land which required notarial attestation for its validity under Ordinance No. 7 of 1840.

This case, therefore, in my opinion falls under section 7 of Ordinance, 1871, and not under section 6. In view of this opinion a further question arises in this case which has not been considered by the District Judge. This question is whether the payment of the Rs. 250 was a part payment, which had the effect of giving a new lease of life to the prescriptive period. According to the defendant's case, which was disbelieved by the District Judge, she paid the full Rs. 1,000 before the year mentioned in document P1 expired, but according to the plaintiff (and he is corroborated by an endorsement of the fact of payment attested by two witnesses made

[1] *1 C. L. R. 40.*
[2] *(1909) 11 N. L. R. 71.*
[3] *(1910) 12 N. L. R. 289.*
[4] *5 A. C. R. 64.*

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on the document (P1) dated January 10, 1925) the payment was on January 10, 1925. If this payment was made on that date the question arises whether this part payment does not stop prescription from running till that date. As I have stated, the District Judge has not considered this question, in view of his order made early in the case that the prescriptive period was ten years. As I hold that the prescriptive period is only six years, the question of part payment is vital to the case. In my opinion document P1 is an agreement under which the defendant agreed to transfer the land and to pay a sum of Rs. 250 within a period of one year of the closing of the estate and a further agreement that if she made default in carrying out the above obligation within this period of one year or within a period of two years from the date of the agreement (March 16, 1919) she would pay a sum of Rs. 750 as the value of the immovable property and also the sum of Rs. 250 above mentioned and a further sum of Rs. 500 " as liquidated damages." So that this agreement after the lapse of the period fixed by P1 is really an agreement to pay Rs. 1,000 and further damages of Rs. 500. The payment of the Rs. 250 in circumstances from which an acknowledgment of the debt can be implied can, therefore, be taken as a part payment of the agreement to pay Rs. 1,000 which will have the effect of stopping prescription beginning till the date of payment.

It has been held by this Court in the following cases, *Sawanna Pana Lana Sathappa Chetty v. Kawana Payana Muttu Ramen Chetty*,[1] *Bacho Appu v. Ramblan*, [2] and *Arunasalam v. Ramasamy*, [3] that part payment has the effect under section 13 of Ordinance No. 22 of 1871 of breaking the prescriptive period, *i.e.*, a part payment from which an acknowledgment of the debt can be implied. It will be thus seen that the questions whether there was such a part payment and if there was, the date of payment of the Rs. 250 are crucial to this case and the case must, therefore, go back for the determination of these issues. The burden of proving them will of course be on the plaintiff, and the parties will be at liberty to lead such further evidence as they may think proper. I agree with the order proposed by my brother Dalton. As the appellant has succeeded on the main point she is entitled to the costs of appeal. The costs in the lower Court up to date will abide the final results of this case.

[1] *5 S. C. C. 62.*

[2] *(1912) 14 N. L. R. 1.*

[3] *(1915) 17 N. L. R. 156.*

Appeal allowed.