

**JAYASENA
v.
DAYASENA**

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA NO. 1148/93
DC HAMBANTOTA NO. 1601/M
FEBRUARY 21, 2002

Prescription – Prescription Ordinance, sections 5, 13, 14 – Mortgage bond – Action filed after 12 years – Maintainability – Removal of disabilities – Civil Procedure Code, section 53.

The plaintiff-respondent's wife 'N' executed a mortgage bond on 13. 10. 1975. She died on 14. 12. 1998. The plaintiff-respondent filed a testamentary action on 22. 06. 1982, and letters of administration were granted on 27. 03. 1987. The plaintiff-respondent instituted the present action on 13. 10. 1987, after 12 years and 1 month of the execution of the mortgage bond. The District Court granted the reliefs prayed for.

On Appeal –

Held:

- (1) On the death of 'N' on 14. 12. 1980 her rights on the mortgage bond devolved not only on her husband the plaintiff-respondent but also on her children who were minors at that time.
- (2) Thus, sections 13 and 14 of the Prescription Ordinance came into operation and in terms of section 14 the right of action that accrues to a party entitled to sue shall be subject to the disabilities set out in section 13, until death or removal of such disability. The protection . . . under sections 13 and 14 is a statutory protection which cannot be taken away.
- (3) In terms of sections 13 and 14 until the disability of the children is removed either by children attaining majority or death, the running of prescription is suspended.

APPEAL from the judgment of the District Court of Hambantota.

D. S. Ashok with S. S. Herath, B. Jayasuriya and Kanchana Cuman for defendant-appellant.

Plaintiff-respondent absent and unrepresented.

Cur. adv. vult.

April 05, 2002

A. M. SOMAWANSA, J.

This is an appeal preferred from the judgment of the learned District Judge of Hambantota in case No. 1601/M delivered on 30th November, 1993, whereby the learned District Judge held in favour of the plaintiff-respondent and granted relief as prayed for in the prayer to the plaint to recover a sum of money due on the Mortgage Bond bearing No. 396 dated 13. 09. 1995 marked P1 but restricted the total sum recoverable from the defendant-appellant to double the sum lent and borrowed on the Mortgage Bond. The plaintiff-respondent's pleaded case was that the defendant-appellant borrowed and received a sum of Rs. 5,000 at 18% interest per annum from the plaintiff-respondent's deceased wife Nandawathi Dissanayake, payable on demand on the said Mortgage Bond marked P1, that this sum of money is justly due and owing from the date of the said Mortgage Bond P1 until payment in full and that the defendant-appellant has failed and neglected to pay any sum though thereto often demanded. These facts are admitted by the defendant-appellant in his answer.

Further, it is averred by the plaintiff-respondent that his wife Nandawathi died on 14. 12. 1980 and he applied for letters of administration on 22. 06. 1982 to the District Court of Hambantota

and the letters of administration were granted to him on 27. 03. 1987 and the instant action was instituted on 13. 10. 1987.

The defendant-appellant admitted in his answer the execution of the Bond and the receipt of the sum of Rs. 5,000 at 18% interest per annum as set out in the plaint. However the defendant-appellant, prayed for dismissal of the plaintiff-respondent's action on the basis that the action is prescribed in law as the action has been instituted 10 years after the execution of the Mortgage Bond marked P1.

At the trial on 31. 08. 1992, four issues were raised by the plaintiff-respondent while the defendant-appellant raised two issues on the basis that the action is prescribed in law. The two issues raised by the defendant-appellant were taken up as preliminary issues and the parties were directed to file written submissions and it appears that the written submissions were filed by both parties. 30

However, on an examination of the record it appears that no determination has been made on these two issues. According to the proceedings dated 23. 02. 1993, on an application by the parties, the learned District Judge has decided to take up the trial based on issues 1 to 7 raised on 31. 08. 1992 inclusive of the two issues raised by the defendant-appellant. 40

At the trial only the plaintiff-respondent gave evidence and the defendant-appellant did not lead any evidence. The learned District Judge by a very short judgment held in favour of the plaintiff-respondent stating that his predecessor in office had already determined that the action was not prescribed. It appears that this statement of the learned District Judge is incorrect, in that as I have observed earlier the two issues raised by the defendant-appellant on the basis that the action was prescribed was never answered by his predecessor in office. The learned Judge who delivered the judgment has presided

on 23. 02. 1993 and he himself has decided to take up the trial based ⁵⁰
on issues 01 to 07 raised on 31. 08. 1992 inclusive of issues 06
and 07 raised by the defendant-appellant on 31. 08. 1992. Therefore,
the learned District Judge has clearly erred on this point of fact.

Let us now consider the question of prescription raised by the
defendant-appellant in his two issues. The relevant facts are, the
plaintiff-respondent's wife Nandawathi executed the Mortgage Bond
marked P1 on 13. 10. 1975. She died on 14. 12. 1980. The plaintiff-
respondent filed testamentary action No. 92/T in the District Court of
Hambantota on 22. 06. 1982 marked P2 and the letters of administration
were granted on 27. 03. 1987 marked P3 and the plaintiff-respondent ⁶⁰
instituted this action on 13. 10. 1987. Hence, the action has been
instituted 12 years and 01 month after the execution of the Mortgage
Bond. However, on the death of Nandawathi the executrix of the
Mortgage Bond on 14. 12. 1980 her rights on the Mortgage Bond
devolved not only on her husband the plaintiff- respondent but on
her children also who were minors at that time. Hence, it appears
sections 13 and 14 of the Prescription Ordinance came into operation.
In terms of section 14, the right of action that accrues to a party entitled
to sue shall be subject to the disabilities set out in section 13 until
death or removal of such disability. ⁷⁰

Sections 5, 13 and 14 of the Prescription Ordinance referred to
by counsel for the defendant-appellant read as follows:

Section 5. "No action shall be maintainable for the recovery
of any sum due upon any hypothecation or mortgage of any
property, or upon any bond conditioned for the payment of money,
or the performance of any agreement or trust, or the payment of
penalty, unless the same be commenced in the case of an instrument
payable at, or providing for the performance of its condition within
a definite time, within ten years from the expiration of such time,

and in all other cases within ten years from the date of such instrument of mortgage or hypothecation, or of last payment of interest thereon, or of the breach of the condition. 80

Section 13. Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say –

- (a) infancy,
- (b) idiocy,
- (c) unsoundness of mind, 90
- (d) lunacy, or
- (e) absence beyond the seas,

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed 100 in respect of the disabilities of any other person:

Provided also, that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant.

Section 14. Provided also, that if at the time when the right of action in respect of any of the causes referred to in sections 5, 6, 7, 8, 10 and 11 of this Ordinance shall accrue, the person so entitled to sue shall be subject to any of the said hereinbefore mentioned disabilities, then the several periods of limitation hereinbefore provided shall not commence to run until the removal of such disability or the death of such person, whichever first shall happen; but no further time shall be allowed in respect of the disability of any other person."

It is contended by counsel for the defendant-appellant that the plaintiff-respondent had the opportunity to file action within a period of 10 years from the date of the said Mortgage Bond marked P1 by taking steps as provided by law for such purpose in section 539 (g) of the Civil Procedure Code and thus defeat any plea of prescription. However, the plaintiff-respondent has not been vigilant and have slept over his rights and in such circumstances Courts do not grant relief to such persons. It appears that the plaintiff-respondent has taken refuge under these provisions to explain his delay in filing action within a period of ten years. Be that as it may I am inclined to take the view that provisions contained in sections 13 and 14 of the Prescription Ordinance justify the explanation given by the plaintiff-respondent as to the delay in instituting this action.

I might also add that if the plaintiff-respondent so desired he could have even waited much longer by making use of the provisions contained in sections 13 and 14 of the Prescription Ordinance so as to defeat any plea of prescription as the protection he receives under sections 13 and 14 of the Prescription Ordinance is a statutory protection which cannot be taken away.

In the instant case on the death of Nandawathi the executrix her rights on the Mortgage Bond devolved on her husband the plaintiff-

respondent as well as the minor children. In the circumstances, in terms of sections 13 and 14 of the Prescription Ordinance until the disability of the children are removed either by children attaining majority or by death, the running of prescription is suspended. I might also add that the two cases cited by the defendant-appellant have no application to the facts of the instant case as the question dealt in one case was whether an administrator is entitled to sell the landed property of an intestate when the letters of administration contain no such limitation of his powers, and the other dealt with the use of the word 'bond' in Ordinance, No. 22 of 1871. ¹⁴⁰

In the light of the above reasoning I am of the view that to send the case back after nearly 15 years to the original Court for the District Judge to answer the issues would be an unfruitful exercise and in any event, it appears to me that the defendant-appellant could never succeed in his plea of prescription. In the circumstances, I dismiss the appeal. ¹⁵⁰

DISSANAYAKE, J. – I agree.

Appeal dismissed.