1913.

Present: Pereira J. and Ennis J.

SOYSA *v.* SOYSA.

227—D. C. Kalutara, 5,119.

Claim prescribed on the face of plaint—Action dismissed without consideration of averments in the answer.

If on the footing of the averments in a plaint the claim made therein is clearly prescribed, the claim is liable to be dismissed without evidence being gone into or consideration of the averments in the answer.

THE facts appear from the judgment.

A. St. V. Jayewardene, for plaintiff, appellant.

H. J. C. Pereira, for defendant, respondent.

Cur. adv. vult.

September 11, 1913. PEREIRA J.—

In this case the question is whether the plaintiff's claim is prescribed. For the purposes of this question we have, in my opinion, to consider the claim as set forth in the plaint. It has been suggested that there is some obscurity in the plaint, and that evidence should have been gone into before the question as to prescription was decided, and further, that the averments in the answer should have been considered. I can see no obscurity in the plaint, and the policy of our procedure appears to be to look at the question as to whether a claim is prescribed in the light of only the averments made by the plaintiff. Section 46 of the Civil Procedure Code

enacts that when a plaint is presented, if the action appears " from the statement in the plaint " to be barred by any positive rule of law, the Court should reject the plaint. So that in this case the Court should, strictly speaking, have decided the question of prescription at the very commencement of the action, and this Court has held that when a Court omits to do what the Code requires it to do on a plaint being presented, it might do it at any time when the omission is brought to its notice (see *Read v. Samsudeen* [1]); that is to say, it might act on the material that it had before it when the thing should, according to the Code, have been done. Now, paragraphs 6 and 7 of the plaint make it quite clear that the whole of the plaintiff's claim relates to transactions in connection with Talagala estate. In the first paragraph of the plaint the plaintiff says that the defendant was his agent and attorney until the year 1908, but he gives no definite time for the commencement of the agency. He puts it as having been " about the year 1891. " He then says that " during the said period " he collected certain rents and profits. In the second paragraph it is stated that " during the said period " the defendant having been the owner of Talagala estate purchased a portion of land adjoining the estate with moneys belonging to the plaintiff and lying in the defendant's hands " in manner aforesaid. " No definite time is mentioned as the date of this purchase. It is given as " in or about the year 1890, " but it is manifest from the expressions " during the said period " and " in manner aforesaid " that the purchase was made during the period when the defendant was the plaintiff's attorney and agent. In this connection the fact that there is a distinct and special averment, forming a paragraph by itself, to the effect that the defendant ceased to be the plaintiff's attorney in the year 1908 is significant. Now, the plaintiff claims (1) an account of the rents and profits of the estate, and (2) that the defendant be directed to convey to the plaintiff a half share of the estate. Clearly, the cause of action for an account accrued at or before the termination of the agency. As to the claim for a conveyance of a half share of the estate it is glaringly untenable. It is based on an invalid agreement ; but assuming that the agreement is valid, its meaning is that the defendant should convey to the plaintiff what he had bought out of moneys belonging to the plaintiff and as the plaintiff's attorney. The plaintiff's right to claim this conveyance also accrued at the termination of the agency, if not before. I cannot follow the argument, the effect of which, as observed by the District Judge, would be to enable the plaintiff to bring his action, say, fifty years hence. I would affirm the judgment appealed from with costs.

ENNIS J.—

I am of the same opinion, and would make the same order.

Affirmed.

[1] *1 N. L. R. 292, 295.*