

*Present* : Ennis A.C.J. and Schneider A.J.

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EHELIYAGODA *et al.* v. SAMARADIWAKARA.

84—D. C. Colombo, 50,652.

*Same person appointed executor and curator—Sale of land after obtaining leave of Court in curatorship case—Claim by widow and children of testator—Prescription.*

By his last will A left his property to his minor children, and gave a life interest in the property to his wife. B was appointed executor under the will, and curator of the minor children. By leave of the Court obtained in the curatorship case B sold the property. In an action by the widow and minor children, the District Judge held that as the widow had the life interest, the claim for interest was prescribed for the period in excess of three years.

*Held*, that as the executor was a trustee prescription did not run against the widow.

THE facts appear from the judgment of the District Judge :—

This is an action by the widow and children of the late Mr. Eheliyagoda, who died on February 7, 1903.

The plaintiffs allege that the late Mr. James Samaradiwakara proved Mr. Eheliyagoda's will and obtained probate in case No. 1,898 of the District Court of Colombo. He was also appointed curator of the property of the second and fourth plaintiffs in case No. 395, D. C. Colombo.

On September 1, 1904, Mr. Samaradiwakara obtained leave to sell a number of lands belonging to the estate, and sold them between October 8, 1904, and April 10, 1915, but never rendered an account, and plaintiffs estimate the amount realized by the sale of the lands at Rs. 16,435. Part of the sum realized he invested in the purchase of lands described in the schedule to the plaint.

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Mr. Samaradiwakara died on May 26, 1916, and probate issued to the defendant, his executrix and residuary legatee.

The plaintiffs pray for judgment against the defendant, directing her to convey the lands to plaintiffs and pay over the balance proceeds of sale, and for an accounting of the rents and profits. In the alternative, they pray for judgment against the defendant for the sum of Rs. 16,435, and for a sum of Rs. 11,445·34 being legal interest on the said sum from the date of realization to the date of action.

The defendant admits liability to the extent of Rs. 8,181·56 as principal and Rs. 2,331·72 as interest.

The defendant alleges that only a sum of Rs. 13,981 was realized by the sale of the goods, from which she claims to deduct a sum of Rs. 5,800 spent by the late Mr. Samaradiwakara in legal expenses and in the maintenance of the second and fourth plaintiffs.

The defendant denies that the proceeds of sale were invested in the purchase of lands referred to in the plaint.

I framed the following issues :—

(1) For what amount were the lands mentioned in Schedule A to the plaint sold ?

(2) What sum, if any, is due as interest on the said amount ?

(3) Is any portion of the interest prescribed ?

(4) (a) Did the late James Samaradiwakara incur any expenses on account of the maintenance and education of second and fourth plaintiffs and for protection of this estate in the curatorship case ?

(b) If so, how much ?

(c) Is defendant entitled to such amount ?

The plaintiffs did not press their claim for a conveyance of the lands alleged to have been purchased with the proceeds of sale.

The defendant did not press her claim for the sum of Rs. 5,800 alleged to have been incurred in maintaining the children and in legal expenses, and I answer the fourth issue in the negative.

Two questions remain :—

(1) Whether the amount realized was Rs. 16,435 or Rs. 13,981.

(2) What interest the plaintiffs are entitled to.

In proof of the amount realized, the plaintiffs called Mr. Gunaratne, the auctioneer employed by Mr. Samaradiwakara to sell the lands. He established that he had sold the lands he was commissioned to sell for Rs. 16,435 . . . . .

I find on the first issue that the lands mentioned in Schedule A to the plaint were sold for Rs. 16,345.

As regards the interest, the plaintiffs contend that Mr. Samaradiwakara was in the position of a trustee, and that the defendant cannot plead that the claim for interest is prescribed. This argument might have had some weight if the persons entitled to the interest were the late Mr. Eheliyagoda's children, the second and fourth plaintiffs. But, under the terms of Mr. Eheliyagoda's will, the first plaintiff, his widow, was entitled to a life interest in the lands sold, and the person entitled to claim the interest is the first plaintiff. With regard to her, Mr. Samaradiwakara was not in the position of a trustee, and I am of opinion that the claim for interest prior to July 5, 1915, is prescribed, and I answer the second and third issue accordingly. I enter judgments (1) in favour of the second and fourth plaintiffs for the sum of

Rs. 16,435, subject to a life interest in favour of the first plaintiff; (2) in favour of the first plaintiff for interest at the rate of 9 per cent. per annum from July 5, 1915, on the said sum of Rs. 16,435.

The defendant will pay plaintiffs their costs.

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*A. St. V. Jayawardene*, for the first plaintiff, appellant.—The order of the District Judge, that the first plaintiff was not entitled to recover life interest for a period exceeding three years, is wrong. The executor was in the position of a trustee, and prescription does not run in his favour as against the heirs. Counsel cited *15 N. L. R. 398*; *15 N. L. R. 403*; *1 N. L. R. 120*; *3 S. C. R. 63*; *3 Gren. (1874) 49*.

*Bawa, K.C.*, for the respondent.—The properties were sold by Samaradiwakara in his capacity as curator, and not as executor. In his capacity as curator he was holding the interest due on money as against the widow. There is nothing to stop the running of prescription as against the widow.

July 14, 1919. ENNIS A.C.J.—

In this case it appears that one Richard Eheliyagoda died on February 14, 1903, and by his last will and testament left as his executor one James Samaradiwakara, and also nominated the same person curator of his two minor children. He gave a life interest in his property to his wife, who is the first plaintiff. The second and fourth plaintiffs are the minor children, and the third plaintiff is the husband of the second plaintiff. James Samaradiwakara died on May 26, 1916, having appointed by his last will and testament the defendant to be the executrix of his will. The plaintiffs claimed that, the deceased executor had sold certain lands belonging to the estate, and had invested the money again in his own name in the purchase of other property. They claimed a conveyance of the estate and an account of the proceeds, or in the alternative a sum of Rs. 16,435 and interest at the rate of 9 per cent. The learned Judge entered decree in favour of the plaintiffs for the sum of Rs. 16,435, and allowed interest to the wife as from July 5, 1915, namely, three years before the institution of action. The appeal is from the refusal to grant interest to the first plaintiff as prayed.

The appellant contends that the original executor, James Samaradiwakara, had never divested himself of his capacity as executor, and had never, closed the testamentary proceedings, and that therefore, prescription could not run in his favour. The respondent to the appeal urged that the judgment was right on two grounds: first, that the income in the property was taken by James Samaradiwakara in his capacity as curator of the minor children and not as executor, and that the first plaintiff had a cause of action when the money was received; secondly, that it has not been

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proved that any interest accrued prior to July 5, 1915. It is impossible to hold that James Samaradiwakara took the income of the property in his capacity as curator, because he obtained the leave of the Court to sell in the curatorship case. He would be liable as executor until he had proved that he had laid down his office of executor. With regard to the second point raised by the respondent, this does not appear to have been in issue. The plaintiffs asked for an account, or in the alternative for interest at 9 per cent. The defendant in answer claimed the benefit of the Prescription Ordinance, and admitted that interest at that rate was due from July 5, 1915. Inasmuch as the defendant was prepared to pay 9 per cent. on the amount realized at the sale of the property she practically conceded that 9 per cent. was the interest which she would be liable to pay. It seems to me that the second objection fails, not only because it was not raised as an issue in the case, but also because it has no substance. In regard to the first issue, it is a well-established principle that a trustee cannot prescribe against a *cestui que trust*. I would, therefore, allow the appeal, with costs.

SCHNEIDER A.J.—I agree.

*Appeal allowed.*