1940 *Present :* **Howard C.J.**

THAMOTHERAMPILLAI *v.* KANAPATHIPILLAI.

162—C. R., Point Pedro, 30,577.

Action to recover purchase-money—Conveyance of undivided shares of land pending partition—failure of consideration—Cause of action—Prescription—Right to maintain action.

Where the plaintiff brought an action for the rcovery of the purchase price of certain undivided shares of land sold to him by the defendant, pending an action for the partition of the land, on the ground that there has been a failure of consideration,—

***Held,* that the action was prescribed in three years and the cause of action arose as from the date on which the conveyance was made and the purchase money paid.**

***Bandara v. Punchi Banda* (*34 N. L. R. 262*) followed.**

***Held, further,* that the plaintiff was not entitled to maintain the action until he had been judicially evicted, as the conveyance in his favour did not contain a warranty of title express or implied.**

THIS was an action brought by the plaintiff to recover from the defendant a sum of Rs. 300, with interest and costs. The action arose out of deed No. 2193 dated February 14, 1934, by which the defendant, his wife and another person sold to the plaintiff for Rs. 750 certain undivided shares of land belonging to them. After he had entered into possession the plaintiff discovered that the land sold to him was the subject of a partition action No. 13,199.

The plaintiff claimed from the defendant the price of the share conveyed by him.

The defendant pleaded that the plaintiff could not maintain the action until he had been judicially evicted from the land. The defendant also contended that the action was prescribed.

The Commissioner of Requests held that the deed of conveyance having proved invalid, the plaintiff was entitled to sue for the recovery of the purchase money without judicial eviction.

He also held that the plaintiff's claim was based on a written agreement and was prescribed in six years.

L. A. Rajapakse, for defendant, appellant.—Assuming that a cause of action accrued to the plaintiff, for the refund of the consideration, it is prescribed. The claim is not based on the written contract P 1, but in *spite* of it. *Thommassie v. Kanapathipillai Murugasoe et al.*[1]; *Bandara v. Punchi Banda*[2]. It is prescribed in three years. See sections 7 and 10 of the Prescription Ordinance.

But in fact plaintiff has no cause of action. The plaintiff and defendant were both parties to the old partition action and the defendant has fulfilled his agreement by executing the deed P 1 and giving the plaintiff vacant possession. The plaintiff is admittedly still in possession. Even

[1] *5 S. C. C. 174.* [2] *34 N. L. R. 262.*

if the title on P 1 is bad, as *between* them the plaintiff has no cause of action until he is judicially evicted. *Ratwatte v. Dullewe*[1]; *James v. Suppa Umma*[2].

A warranty of title (*i.e.*, that the vendor has a good title), is distinct from a covenant to *warrant and defend title* in the future if the vendee is judicially evicted. The former may not be implied, it must be expressly stated; but the latter may be implied though not expressly stated. In P 1 there being no express warranty of title under the Roman-Dutch law (unlike the English law) all that the vendee need give is vacant possession. *Chellappah v. Mc Heyzer*[3]; *Ramalingam v. Adjoowad*[4].

In the Roman-Dutch law a person may sell a property that does not belong to him.

N. Nadarajah (with him *H. W. Thambiah* and *V. F. Gunaratna*), for plaintiff, respondent.—The transfer is void under section 17 of the Partition Ordinance, No. 10 of 1863. There is a prohibition against such transfers. It is something that is *extra commercium*, viz., that cannot be sold, such as *res religiosae* or *res sacrae* See *Berwick's Voet, p. 18.* The consideration paid for the transfer of such a thing is recoverable. Even in the case of a mortgage pending partition proceedings the creditor is not barred from recovering his money on the bond. See *Jayawardene on Partition, p. 311.* One may infer the existence of a warranty of title in P 1; if so, action will lie without a judicial eviction. *Misso v. Hadjiar*[5]; see also *Fernando v. Jayawardene*[6].

The cause of action is based on the deed P 1 and is therefore not prescribed till six years. Section 6 of the Prescription Ordinance. See also *Dawbarn v. Ryall*[7]; *Lama Etana v. Rahaman Doole*[8]; which distinguishes *Thommassie v. Kanapathipillai* (*supra*). There is an implied promise in the document to refund the consideration if the agreement is not implemented. See *Sonnandara v. Weerasinghe*[9].

L. A. Rajapakse, in reply.—*Dawbarn v. Ryall* and *Lama Etana v. Rahaman Doole* (*supra*) are both in my favour. One is to recover a deficiency in extent, the other to recover a deficiency in the consideration. They are both actions based upon the written contract and grow directly from the deed.

In the case of a mortgage bond there are two distinct and severable parts: the part hypothecating the land is bad as it was executed pending partition, but not the promise to pay the loan. The latter is enforcible.

Cur. adv. vult.

February 21, 1940. HOWARD C.J.—

This is an appeal by the defendant from a judgment of the Commissioner of Requests, Point Pedro, of April 17, 1939, ordering that the defendant pay to the plaintiff the sum of Rs. 300 with interest and costs. The action arose out of deed No. 2193 dated February 14, 1934, by which the defendant and his wife and one other sold to the plaintiff for the sum of Rs. 750 certain undivided shares of land belonging to the vendors. Subsequently, after entering into possession of the said shares, the plaintiff

[1] *10 N. L. R. 304*
[2] *17 N. L. R. 33.*
[3] *38 N. L. R. 393.*
[4] *15 C. L. W. 124.*
[5] *19 N. L. R. 277.*
[6] *2 N. L. R. 309.*
[7] *17 N. L. R. 372.*
[8] *26 N. L. R. 406.*
[9] *1 C. L. W. 328.*

discovered that the land sold to him was the subject of a partition action No. 13,199 of 1909. On the defendant and other parties undertaking to execute a valid transfer in favour of the plaintiff, the latter applied in the said action No. 13,199 of 1909 to have the said land partitioned. This application was dismissed by the Court and the plaintiff was referred to his remedy by separate action. The plaintiff maintains that he has a cause of action against the defendant from whom he claims a sum of Rs. 300 made up of a sum of Rs. 325 being the price of the share conveyed by the defendant to the plaintiff less Rs. 25 waived to bring the action within the jurisdiction of the Court of Requests.

In the Court of Requests two points were made on behalf of the defendant. It was contended that the plaintiff could not maintain this action inasmuch as he had not been judicially evicted from the said land. It was further contended that even if the action was maintainable, it was prescribed. The Commissioner of Requests has held that the plaintiff's claim is based on a written agreement and therefore not prescribed as made within a period of six years. Moreover, as the plaintiff came to know that the deed P 1 was of no use to him only in January, 1937, his cause of action can be considered to have arisen from then only. With regard to the first point, the learned Commissioner has held that the deed P 1 being proved to be invalid the plaintiff is entitled to sue the defendant for the recovery of the money without judicial eviction.

In this Court the defendant relies on the contentions submitted to the Commissioner. I propose to deal first with the question of prescription. The plaintiff contends that his claim arises out of P 1, is, therefore, based on a written agreement and comes within section 6 of the Prescription Ordinance and not prescribed as the claim is made within six years. The defendant on the other hand argues that the claim is not based on P 1 and hence the action, not having been commenced within two years from the time when the cause of action arose is in accordance with the provisions of section 9 of the Ordinance not maintainable. Various authorities have been brought to my notice. In *Thommassie v. Kanapathipillai Murugasoe and another* [1], the owner of land in 1879 conveyed the land to a purchaser, the conveyance purporting to be made for a pecuniary consideration recited as previously paid. More than three years after the date of the conveyance the vendor sued the purchaser for the purchase money averring that it had not been paid. It was held that the plaintiff's action is a simple action of debt and was consequently barred by the lapse of three years before action brought. The decision in *Thommassie v. Kanapathipillai Murugasoe* (*supra*) was followed in *Bandara v. Punchi Banda* [2], where it was held by Macdonell C.J., that an action to recover purchase money which was expressed in the conveyance to have been previously paid, is prescribed in three years. In that case the Chief Justice held that the plaintiff so far from suing on a written document was suing against one. Moreover, that his claim was rather upon an executed consideration inasmuch as he had conveyed the land now seeks payment for it and to ascertain what the amount of that payment must be he refers to a written contract but does not claim

[1] *5 S. C. C. 174.*

[2] *2 34 N. L. R. 262.*

under it but against it. I have been referred by Counsel for the respondent to the cases of *Lama Etana v. Rahaman Doole*[1] and *Dawbarn v. Ryall*[2] both of which were cited in *Bandara v. Punchi Banda* (*supra*). In *Lama Etana v. Rahaman Doole* it was held that a claim to recover the unpaid balance of the purchase price of land transferred by a deed of sale grows directly out of the deed of sale, is dependent on it and derives its vital force from it. It is, therefore, a claim arising from an agreement in writing and prescribed in six years. In *Dawbarn v. Ryall* the vendee sued the vendor to recover compensation for a deficiency in the extent of the land sold to him by a notarial conveyance and it was held that the claim was based on a written agreement and would be prescribed after the expiration of six years. In that case the obligation was contractual and the claim was based on the written contract of sale between the parties. To my mind the present case falls within the principle laid down in *Bandara v. Punchi Banda* and *Thommassie v. Kanapathipillai Murugasoe* and is distinguishable from *Lama Etana v. Rahaman Doole* and *Dawbarn v. Ryall.* The obligation arises as in those cases not out of the written agreement, but in spite of it. It is not dependent on it nor does it derive any force from it. Reference is made to it merely to ascertain for what sum the property was conveyed. The action, therefore, falls within either section 7 or section 10 of the Prescription Ordinance and is not maintainable if not commenced within three years from the time after the cause of action shall have arisen. The Commissioner has also held that the plaintiff's cause of action can be considered to have arisen only in January, 1937, when he came to know that the deed P 1 was of no use to him. On this point also I am of opinion that the Commissioner has come to a wrong conclusion. The claim for the recovery of the purchase money is based on the ground that the transfer of the property being prohibited by law was invalid and hence the purchase money was given without consideration. The cause of action, therefore, arose as from February 14, 1934, the date on which the conveyance was made and the purchase money paid. The plaintiff was not suffering from any of the disabilities referred to in sections 13 and 14 of the Prescription Ordinance. The fact that he became aware in January, 1937, that P 1 was of no use to him is immaterial and cannot be regarded as prolonging the period allowed for bringing his claim. The cause of action, therefore, arose on February 14, 1934, and having been instituted only on November 16, 1938, is barred.

Counsel for the defendant also contended that this cause of action, even if not barred under the provisions of the Prescription Ordinance, was premature and could not arise until the plaintiff had been ousted by a third party with a superior title. In this connection my attention was invited to the terms of P 1 which contained no warranty of title. In *Ratwatte v. Dullewe*[3] it was held that a vendor of immovable property was bound to deliver vacant possession and on his failure to do so the vendee is entitled to a rescission of the sale and a refund of the purchase money. Mr. Rajapakse has contended that, apart from the obligation to give vacant possession, no other obligation either express or implied

[1] *26 N. L. R. 406.* [2] *17 N. L. R. 372.* [3] *10 N. L. R. 304.*

arises from P 1. In *Jamis v. Suppa Umma et al.*[1], it was held by Wood Renton A.C.J., that, in the absence of fraud or of an express warranty of title, the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession", that is to say possession unmolested by the claim of any other person in possession of the property and to warrant and defend the title which he conveys, after the purchaser, once placed in possession, has been judicially evicted. In *Misso v. Hadjiar*[2], it was held that in Roman-Dutch law there is no implied obligation on the part of the vendor to convey good title. His obligation is to give vacant possession and to warrant against eviction. The principle that a purchaser has his remedy only after judicial eviction receives support also from Berwick's Voet, page 173. Counsel for the plaintiff has contended that there can be no contract in respect of something the sale of which is prohibited by law. In this case the sale by virtue of section 17 of the Partition Ordinance was unlawful, null and void. The transfer was therefore void and the purchase money handed over to perform an impossibility. The sale price was, therefore, recoverable even though the plaintiff had assumed undisturbed possession and had not been evicted. No authority was cited in favour of this proposition. I was, however, referred to certain passages on pages 18 and 19 of Berwick's Voet relating to the sale of such things as are excluded from commerce by nature, by the *jus gentium* or by the usages of the State. I do not think these passages assist the plaintiff in his presentation of this case. No warranty of title was given in nor can it be implied from P 1. The plaintiff has been given vacant possession and has not been judicially evicted. The action, therefore, even if maintainable, is premature.

For the various reasons I have given in this judgment the plaintiff's action must fail. The judgment of the Commissioner is set aside and there must be judgment for the defendant with costs in this Court and the Court below.

Appeal allowed.