*Present :* De Sampayo J.

1922.

KIRTHISINGHE *v.* PERERA *et al.*

*307—C. R. Negombo, 29,308.*

*Prescription—Concealed fraud—When cause of action arises.*

In 1915 plaintiff executed deed in favour of second defendant for a certain land. In 1921 he brought this action for the cancellation of the deed, on the ground that the deed was executed in consequence of a fraudulent misrepresentation. Plaintiff became aware of the misrepresentation in 1920.

*Held*, that the action was not barred by prescription.

In the case of concealed fraud of this description an action is available from the time of the discovery of the fraud, or from the time the party defrauded might by due diligence have come to know of it.

THE facts appear from the judgment.

*Zoysa*, for defendants, appellants.

*Croos-Dabrera*, for plaintiff, respondent.

January 17, 1922. DE SAMPAYO J.—

This is an action for the cancellation of the deed No. 2,231 dated October 29, 1915, executed by the plaintiff in favour of the second defendant for a certain land, on the ground that the deed was executed in consequence of a fraudulent misrepresentation by the first defendant. The only question for consideration in appeal is whether the action is barred by limitation of time. The action was brought in February, 1921, so that if the cause of action accrued at the date of the execution of the deed, the action would clearly be prescribed, but if it accrued when the plaintiff discovered the fraud, the action is

1922.

DE SAMPAYO J.

*Kirthisinghe v. Perera*

within time. It appears that the land belonged to certain members of the Rodrigo family, and was mortgaged by them to the plaintiff. The mortgage bond was put in suit, and under a decree obtained thereon the land was sold, and was purchased by the plaintiff's brother, Dr. Kirthisinghe, on behalf of the plaintiff in 1903. The Fiscal's transfer was in Dr. Kirthisinghe's name. It would seem that the mortgagors were, in a sense, dependents of the Kirthisinghes, or, at all events, were persons whom they wished to help as far as possible, and as the money due to the plaintiff was fully paid by the sale of another mortgaged land, the plaintiff wanted them to have this land, though it was sold in execution against them. In pursuance of this intention, neither the plaintiff nor his brother, Dr. Kirthisinghe, took possession of the land, but allowed the mortgagors to possess it as their own property. In the meantime Dr. Kirthisinghe died leaving a last will, under which his daughter Henrietta Kirthisinghe was sole heir and executrix. In 1915 the first defendant, who is also a member of the family of the mortgagors, approached the plaintiff and falsely represented to him that the mortgagors had conveyed to him their interest in the land, and begged him to obtain a deed from the executrix of Dr. Kirthisinghe and to transfer the land to him, so that his title might be perfected. The plaintiff was particular about the mortgagors or their family having the land, and inquired if they had sold it to any outsider. The first defendant assured him that they had not, and the plaintiff being willing to help the first defendant in those circumstances obtained a deed from the executrix of Dr. Kirthisinghe, and executed the deed No. 2,231 in question without any consideration in favour of the first defendant's relative and nominee, the second defendant. The truth was that the mortgagors, to the knowledge of the first defendant, had sold the land to an outsider, one Don Gordiano, under whom D. P. Fernando now claims the land. It is apparent, and the Commissioner has, in fact, held, that the plaintiff was induced to execute the deed No. 2,231 by the false representation of the first defendant, and that the first defendant's object was to defeat the mortgagors' transfer to Don Gordiano, and to claim title to the land himself. The plaintiff was not aware of the deceit until D. P. Fernando disclosed the true facts about a year before action. The occasion for this disclosure was his attempt to take possession from the mortgagors, who resisted him.

This then is an action in the nature of *actio doli*, of which *Usubu Lebbe v. Gabriel*[1] is an example. It is a well-known principle of English equity that in the case of concealed fraud of this description, an action is available from the time of the discovery of the fraud, or from the time the party defrauded might by due diligence have come to know of it. In this case there is no want of diligence on the

[1] *(1914) 17 N. L. R. 181.*

plaintiff's part. As the parties whom he wanted to help were all the time in possession, he had no occasion to make any inquiry as to any disposal of the property by them. The result of the first defendant's conduct, to which the second defendant was necessarily a party, was that the plaintiff was prejudiced in any claim he might himself make to the land or allow the claimant under the mortgagors to make. There are not many cases showing the applicability of the doctrine of English equity to Ceylon on the question of prescription. But in *Dodwell v. John*, both the Supreme Court (*18 N. L. R. 133*) and the Privy Council (*20 N. L. R. 206*) recognized the principle as applicable to Ceylon under the same conditions as in England. The plea of prescription therefore fails.

The appeal is dismissed, with costs.

*Appeal dismissed.*