

1938

*Present : Maartensz and Hearne JJ.*VELAUTHER *et al.* v. ARUMOGAM.

289—D. C. Jaffna, 9,081.

Prescription—Action for declaration of a right to a status—Period of limitation—Ordinance No. 22 of 1871, s. 11.

An action for declaration of a right to a status is barred unless it is brought within three years from the time when the cause of action arose.

Rewata Unnanse v. Ratnajothi Unnanse (3 C. W. R. 193) followed.

A PPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah (with him *G. E. Chitty*), for defendants, appellants.

S. J. V. Chelvanayagam (with him *E. B. Wikramanayake*), for second plaintiff, respondent.

Cur. adv. vult.

March 30, 1938. MAARTENSZ J.—

The plaintiffs sued the defendants in this action for a declaration that they were entitled as hereditary poosaries to half the Pooja rights of the temple called Esura Vinajagakovil (hereafter referred to as "the temple") and to possess and enjoy the income of half the temple properties described in the schedule to the plaint. They alleged as a cause of action that the defendants did in the month of July, 1934, and thereafter prevent them from exercising the rights sued for.

The defendants in their answer admitted that the plaintiffs were hereditary poosaries but pleaded that the plaintiffs were not entitled to the relief claimed as they had renounced whatever rights they had in the year 1924. There was no plea in the answer that the action was barred by lapse of time or that the defendants had acquired the rights of the plaintiffs by prescriptive possession. But one of the issues on which the case was tried was: "5. Have the defendants acquired by prescription the poojah rights belonging to plaintiffs by virtue of decree in case No. 10,861, D. C. Jaffna".

The case was decided on this issue. The District Judge held that the first plaintiff had given up his rights in 1924 and not exercised them for over ten years and had therefore lost whatever rights he had.

The second plaintiff he held had attained his majority in 1928 and had not given up his rights for ten years before the action was filed which was in 1936. The second plaintiff was accordingly declared entitled to one-third of the rights sued for.

It was contended for the defendants, who have appealed from this order, that the action was one for declaration of a status which was barred in three years and that the District Judge was wrong in deciding the issue on the footing that the period of prescription was ten years.

It was urged on behalf of the respondent that as the action was fought in the Court below on the footing that the period of prescription was ten years it must be presumed that title to the temple property was vested in the poosaries. I am unable to accept this contention. There is nothing in the decree in case No. 10,861 (P 1) upon which the plaintiffs

base their claim to be hereditary poosaries from which it can be inferred that the title to the temple properties was vested in them; and they do not in their plaint attribute their claim to possession of the temple properties to any other right than that of poosaries. I accordingly hold that the action was one for the declaration of a status. The appellants' contention that the right to bring an action for a declaration of a status is barred by the lapse of three years from the date the right to sue accrued is supported by authority. In the cases of *Rewata Unnanse v. Ratnajothi Unnanse*¹ and *Terunanse v. Terunanse*², it was held that an action for declaration of a status is governed by section 11 of the Prescription Ordinance, No. 22 of 1871, and barred unless brought within three years from the time when the cause of action arose.

It was contended for the respondent in the first place that we should not entertain the plea as it was not raised in the Court below, and in the second place, that the defendants had not established that the action was not brought within three years from the time the cause of action arose.

In my judgment both contentions must be upheld.

The appellant's contention certainly does not fall within the ambit of issue 5 which I have quoted nor was such a contention put forward in the Court below as arising under that issue. I cannot agree that it was urged in the words "plaintiffs rights have been prescribed" appearing in the notes of Counsel's arguments on page 106 of the record. If section 11 had been cited and a plea in bar relied on the Judge could not have ignored it and I think all doubts as to whether the contention was raised or not are disposed of by the fact that no reference is made to section 11 in the petition of appeal nor exception taken to the District Judge deciding the 5th issue on the footing that the period of prescription was ten years.

In the cases cited there was a definite issue in each case raising the question whether the action was barred by lapse of time. The plaintiffs and the disputing defendants were rival claimants and there was definite evidence regarding the date when the plaintiff's right was disputed and evidence that the defendants exercised the right instead of the plaintiff for over three years.

In this case the defendants were also entitled to perform the rights of a poosari and the fact that they exercised the rights did not *per se* amount to a denial of the rights of the plaintiffs. In 1922 there was some dispute because the 1st defendant did not let the plaintiffs cultivate some land. They complained to the Maniagar who held an inquiry. The first defendant's evidence is that at the inquiry the first plaintiff said he could not perform the ceremonies and that the second plaintiff would look after them. Some paddy was given to the second plaintiff to settle the dispute. That was in March, 1924. The dispute must have ended then, for in June, 1924, the second plaintiff performed the poojah ceremonies. He then left the Island and according to the defendants did not come back to the temple till 1934. In June 1934, he assisted the second defendant in performing the ceremonies. When the second plaintiff's turn came round in the next month, he was told he had no rights and he was not allowed to perform the rights.

¹ (1916) 3 C. W. R. 193.

² (1927) 5 *Times of Ceylon Law Reports*, p. 1.

This is the first occasion on which the second plaintiff's right was disputed by the defendants and as the action was filed in 1936 it is not barred by lapse of time.

There remains the question whether the second plaintiff is entitled to a one-third share of the rights he was declared entitled to or only to one-fourth, as alleged by the appellants.

The District Judge has not held that the defendants acquired the rights of the first plaintiff. What he found was that the first plaintiff gave up his rights and lost them by non-user for over ten years. Whether this ruling is correct or not is not in question as the 1st plaintiff has not appealed. On this finding the first plaintiff's one-fourth devolved on the other hereditary possesors and the second plaintiff thus becomes entitled to one-third as declared by the District Judge.

The appeal is dismissed with costs.

HEARNE J.—I agree.

Appeal dismissed.
