1962 *Present:* T. S. Fernando, J., and L. B. de Silva, J.

T. CONCANNON, Appellant, *and* H. VANDERPOORTEN, Respondent

*S. C. 537 of 1960—D. C. Kandy, 7431/MR*

*Jurisdiction—Valuation of* corpus *in a partition action—"Order" of Court that valuer's fee should be paid by defendant only—Action for recovery of the fee—Forum—Applicability of rule that creditor must seek out debtor—Computation of prescriptive period—Prescription Ordinance, s. 10.*

(i) Under the Roman-Dutch law a creditor is obliged to seek out the debtor.

(ii) Generally, obligations for the performance of which no definite time is specified are enforceable forthwith.

In a partition action instituted in the District Court of Kandy, V was the only defendant. In the course of that action the Court issued, on a motion filed by V, a commission to C "to visit and inspect the estate on behalf of the defendant to assess and submit a report of the valuation on 27th September 1954". After the valuation report was submitted to the Court by C on 25th September 1954, the Court made an "order" on 23rd October 1956 directing C to recover his fees from V only. On the 5th August 1958 the present action was filed by C in the District Court of Kandy against V, claiming to recover a sum of Rs. 14,265·02. V contended that (*a*) the District Court of Kandy had no jurisdiction to hear and determine the action, and (*b*) the plaintiff's claim, if any, was prescribed.

[1] *(1957) 58 N. L. R. 560.*

V was at all material times resident in Colombo. C's plaint did not contain any averment that any contract had been entered into at Kandy. It merely averred that the cause of action arose within the local limits of the Kandy Court. The cause of action alleged was the non-payment of the fee due in respect of the visit to the estate and for the making of the valuation report. There was no agreement as to the place of payment.

*Held*, that non-payment of the fee must be deemed to have been at Colombo, the residence of the debtor V. In the circumstances C was not entitled to institute action in the District Court of Kandy.

On the issue of prescription, there was no dispute that, as the work of valuation was really of a professional nature, section 10 of the Prescription Ordinance applied and the period of prescription was three years and not one year.

It was also common ground that demand was made only after the Court had made its order of 23rd October 1956.

*Held*, that, as payment could in law have been demanded by C immediately after 25th September 1954 (when the valuation report was furnished to the Court by C), and not after 23rd October 1956, the defendant V was entitled to succeed also on the issue of prescription.

APPEAL from a judgment of the District Court, Kandy.

*N. R. M. Daluwatte*, for plaintiff-appellant.

*G. T. Samerawickreme*, for defendant-respondent.

*Cur. adv. vult.*

November 7, 1962. T. S. FERNANDO, J.—

In partition action No. P 3922 of the District Court of Kandy, instituted under the provisions of the Partition Act of 1951, interlocutory decree was entered on 13th February 1953, and a commission was issued to a surveyor to survey and partition the land in terms of the decree. The surveyor submitted his scheme of partition on 26th June 1954 to the Court. Both the plaintiff and the defendant, who were the only two parties to the case, filed objections to the scheme so submitted. On 19th August 1954, the date fixed for consideration of the report and the scheme of partition of the surveyor, the Court, on a motion of the defendant who is the respondent to this appeal, issued a commission to the appellant before us " to visit and inspect the estate on behalf of the defendant to assess and submit a report of the valuation on 27th September 1954 ". A valuation report was submitted to the Court by the appellant on 25th September 1954.

On 27th September 1954 the appellant forwarded to the Court a letter requesting that he be paid a sum of Rs. 14,265·02 being his fee for making the valuation report. It may be mentioned here that the land sought to be partitioned in case No. P 3922 was over one thousand acres in extent. The fee represents about 1% of the value of the land.

The respondent took up the position that any fee payable to the appellant had to be paid not only by herself as defendant but by her and the plaintiff pro-rata. As the plaintiff was not willing to bear any share of the fee of the appellant, the District Judge held an inquiry and made an " order " on 23rd October 1956 in the following terms :—

> " I accordingly direct Mr. Concannon to recover his fees from the defendant in this case ".

Mr. Concannon is the appellant before us.

The appellant on 5th August 1958 filed recovery action No. 7431/MR in the District Court of Kandy against the defendant claiming to recover from her a sum of Rs. 14,265·02. The defendant by her answer contended, inter alia, that (*a*) the District Court of Kandy had no jurisdiction to hear and determine the action, and (*b*) the appellant's claim, if any, was prescribed.

After evidence had been taken on behalf of both parties, the learned District Judge ruled in favour of the defendant on issue (*a*), and in favour of the appellant on issue (*b*). As he held that the District Court had no jurisdiction to hear the action, he dismissed it with costs fixed at 20 guineas. At the argument before us, learned Counsel for the defendant, while maintaining that the trial judge correctly decided the issue as to jurisdiction, argued that the issue relating to prescription had been wrongly decided. The course followed by counsel for the defendant was in accordance with section 772 (1) of the Civil Procedure Code which permits a respondent to an appeal to support the decree on any of the grounds decided against him in the court below.

The defendant was at all material times resident in Colombo and, therefore, to justify the filing of the action for recovery against her at Kandy the appellant had to satisfy the Court either that the cause of action arose within the local limits of the jurisdiction of the District Court of Kandy or that any contract sought to be enforced was made within such limits. Even the appellant's second amended plaint—the plaint had been twice amended—did not contain any averment that any contract had been entered into at Kandy. It merely averred that the cause of action arose within the local limits of the Kandy court. The cause of action was the non-payment of the fee due in respect of the visit to the estate and for the making of the valuation report. There was no agreement as to place of payment. There is no dispute that the matter is governed by the Roman-Dutch law, and that under that system of law the creditor is obliged to seek out the debtor. Non-payment must therefore be deemed to have been at Colombo, the residence of the debtor, and it is plain that the appellant could not in the circumstances have instituted this action in the District Court of Kandy.

Two cases decided in South African courts were cited by learned counsel for the appellant as applications of the general rule laid down by Voet (46.3.12) that payment must be made in the place in which the

obligation was contracted, unless another place has been expressly or tacitly fixed for the fulfilment of the contract, but it seems to me unnecessary to enter into an examination here of these two cases as the sole cause of action relied on by the appellant was the failure to pay his fee. That failure occurred nowhere else but at the place where the defendant was resident, and it follows that the learned trial judge was right in his answer to the issue of jurisdiction.

While this conclusion on the question of jurisdiction disposes of the appeal, I think we might usefully deal also with the argument of the defendant's counsel that the question of prescription was wrongly answered at the trial. There is no dispute between counsel that the trial judge was right in his opinion that, as the work of valuation is really of a professional nature, it is section 10 of the Prescription Ordinance that applies, and that the period of prescription is three years and not one year.

The valuation report of the appellant was submitted to court on 25th September 1954. The action for recovery was instituted in court on 5th August 1958, i.e., after 3 years had elapsed. It was contended on behalf of the appellant that the period of 3 years had to be reckoned from the date of failure to pay after demand made. It is common ground that demand was made only after the court had made its order of 23rd October 1956 referred to above. If the contention made on behalf of the appellant is sound then the action was not statute-barred. The learned trial judge took the view that, as the parties had not agreed upon a date for payment, the period of prescription did not commence till demand for payment was made by the creditor. Certain local cases have been referred to in his judgment in support of the view he took, but, with respect, the cases cited are not applicable to the facts of the present case. The appellant's counsel submitted to us that his client could have sued the defendant only after the District Court had made its order of 23rd October 1956, his contention being that liability was determined only on that day. I find myself quite unable to agree with that submission. The Court's order of 23rd October 1956 did not have effect of creating any liability in the defendant to pay. That liability arose when, at her instance, the appellant visited the estate and made a valuation report which was furnished to the court on 25th September 1954. The general rule of law is that obligations for the performance of which no definite time is specified are enforceable forthwith—see *Mackay v. Naylor* [1]. Payment could in law have been demanded by the appellant immediately after 25th September 1954, and the period of prescription began to run from that date. I am of opinion that the defendant was entitled to succeed also on the issue of prescription.

The appeal is dismissed with costs.

L. B. DE SILVA, J.—I agree.

*Appeal dismissed.*

[1] *(1917) T. P. D. 533 at 537.*