1912.

Present: Middleton J. and Grenier J.

FERNANDO *et al. v.* FONSEKA *et al.*

368—D. C. Kalutara, 4,616.

Prescription—Trust—Ordinance No. 22 of 1871. ss. 6 and 7.

So long as a fiduciary relationship continues, a trustee cannot set a plea of prescription in bar of a claim by the *cestui que trust.*

Where the relationship ceases, a bond for the performance of any agreement of trust is prescribed in ten years under section 6 of the Prescription Ordinance.

Assauw et al. v. Fernando [1] commented upon.

THIS is an appeal from the following judgment of the District Judge of Kalutara (T. B. Russell, Esq.):—

The question I have to decide is whether prescription has run in bar of the plaintiffs' claim. More than six years have elapsed since the last of the plaintiffs attained majority, and under ordinary circumstances the claim would be prescribed. Plaintiffs' proctor, however, urged that Cathonis, the second husband of Christina, was in the position of a trustee, and that as between a trustee and a *cestui que trust* prescription

[1] (1905) 1 *Bal.* 174.

cannot run, unless it can be clearly shown that the relationship has come to an end. Cathonis, in fact, only died a few months ago. Mr. de Abrew, for defendants, however, pointed out that the agreement itself sets a term to the trust, if that is the light in which the agreement is to be regarded. This fact certainly seems to me to distinguish the present case from the one quoted by defendants' proctor (*1 N. L. R. 120*). The 3rd paragraph of the plaint shows that the trustee or "curator," as Cathonis is there called, was only to hold his office until the minors attained the age of majority.

I think, therefore, that I am justified in assuming that the relationship between them came to an end more than six years ago.

I cannot accept Mr. Orr's argument that in any case prescription does not begin to run till a demand is made and refused. It surely begins to run from the time when a demand might have been made, but was not made.

Plaintiffs' action is dismissed with costs.

The following is the clause of the deed of agreement (dated July 28, 1884) material to this report:—

The said movable and immovable property, all mentioned herein, all having been valued at Rs. 1,930.33 in the presence and within the knowledge of Mututantrige Jacovis Fernando, father of Christina Fernando, all the said rights, till they are divided and partitioned, were taken in charge of by me, Gampolage Cathonis Fonseka, of the village of Wekada aforesaid, to be taken care of and protected by me subjecting my own property, and we, the aforesaid two persons, Gampolage Philippu Fonseka of Wekada aforesaid, my father, and Mututantrige Jacovis Fernando, father of Christina Fernando, of Kehelwatta aforesaid, have subscribed as sureties for the same. Consequently, when the said five children attain their majority, an exact one-half share of the movable and immovable property herein mentioned of the amounts due from the said mortgage bonds of the amounts due for the aticles mortgaged, or if they be forfeited from them from all these things and from furniture and other household things then existing after damage and loss from use shall be apportioned and delivered to the said children, and the one-half share of Christina Fernando shall be dealt according to pleasure, and if the said articles or a portion of them were to be lost or disposed of otherwise, cash should be paid according to the value of the said article or articles; and further, we, the three persons, Cathonis Fonseka, who subscribed as trustee for the said rights on behalf of the said minors, and the sureties, Philippu Fonseka and Jacovis Fernando, have firmly bound ourselves regarding the same.

Sampayo, K.C., for the plaintiffs, appellants.—Cathonis Fonseka was a trustee for the plaintiffs in respect of the movable property in dispute in this case. In the case of a trust, prescription does not run in favour of a trustee unless something is done by the trustee to change his fiduciary position. See *Antho Pulle v. Christoffel Pulle*;[1] *Wannigasuriya v. Balasuriya* (124—D. C. Matara, 4,805); *Lightwood on Time Limit of Actions 272; Godefroi on Trusts 712, 718.* The trustee has not changed his position. Even if he had got rid of

[1] *(1889) 1 N. L. R. 120.*

1912.

Fernando v. Fonseka

his character as trustee the action is not barred, as it is not ten years since all the plaintiffs have attained majority. Section 6 of the Prescription Ordinance applies to the case of a breach of the agreement of trust. *Assauw et al. v. Fernando* [1] has been commented upon in *Wannigasuriya v. Balasuriya*. The words "for the performance of an agreement of trust" in section 6 must be read in conjunction with the earlier clause, "any bond conditioned." The words "agreement of trust" in the present edition of the Ordinances reads "agreement or trust" in the earlier edition.

Bawa, for the defendants, respondents.—The action is barred in six years, as the case falls under section 7 of the Prescription Ordinance.

Prescription does not run against a *cestui que* trust under the English law, as it has been expressly so enacted by Statute. As there was no privity of contract between the plaintiffs and Cathonis Fonseka, this action is not maintainable.

Sampayo, K.C., in reply.

Cur. adv. vult.

January 17, 1912. MIDDLETON J.—

The facts of this case are set out in the judgment of my brother Grenier, with which I agree.

The deed of agreement, No. 5,028, is in my opinion clearly the constitution of a trust undertaken by Cathonis Fonseka, guaranteed by Philippu Fonseka and Jacovis Fernando, as regards certain property, including that in dispute, belonging to the plaintiffs.

Upon the principle laid down in *Burdick v. Garrick*,[2] referred to and followed by Clarence J. in *Antho Pulle v. Christoffel Pulle*,[3] so long as the fiduciary relationship continues the trustee cannot set up Ordinance No. 22 of 1871 in bar of a claim by the *cestui que* trust. When that relationship ceases, the case would come under section 6 of the Ordinance, and a ten-years' limit would be given.

So far as I can see there is no evidence to show that the fiduciary relationship has terminated. The fact that the trustee had not strictly carried out his obligations under the trust deed at the time the *cestui que trusts* attained their majority cannot be relied upon by him as proving a termination of his fiduciary position. Even if so, the time limit as laid down by section 6 has not elapsed.

As regards Mr. Bawa's argument that there was no privity of contract so as to enable the plaintiffs to sue and enforce the deed of agreement, in my opinion the case comes within the exception to the rule he relies on, as being a case in which it appears that the true intent and effect of the contract was to give a person, not a party, some beneficial right as *cestui que trust* under it. See the cases cited in *Godefroi on Trusts, 2nd ed., p. 106.*

[1] *(1905) 1 Bal. 174.* [2] *L. R. 5 Ch. 233.*

[3] *(1889) 1 N. L. R. 120.*

In *Assauw et al. v. Fernando*,[1] I desire to say that my judgment in its reference to the Statute Law of Limitations in Ceylon as affecting trusts was based on a copy of the Ordinances then in use and extant, in which the word " or " appears instead of " of " in the fourth line of section 6 between the words " agreement " and " trust. " The words " or trust " have also been omitted in the reported judgment in *Balasingham* after the words " any agreement " in the fourth line of the last paragraph, page 176. The word " of " has been substituted for the word " or " in the present edition of the Ordinances.

I agree to the order proposed by my brother.

GRENIER J.—

The plaint in this case, which contains a full statement of the material facts relied upon by the plaintiffs, shows that one Manuel Perera was the owner of certain movable and immovable property enumerated in the deed of agreement No. 5,038 dated July 28, 1848. Manuel Perera died intestate about the year 1882, leaving him surviving his widow, Christina Fernando, and five children, who are all plaintiffs on the record. Christina Fernando contracted a second marriage with one Cathonis Fonseka, who died on June 17, 1911, Christina having predeceased him. The defendants are the heirs and next of kin of Cathonis Fonseka, and the plaintiffs alleged that they had adiated the inheritance, and that the value of Cathonis Fonseka's estate was under Rs. 1,000. The plaintiffs, as the children of the first marriage, claimed that in the agreement of July 28, 1884, Cathonis Fonseka was constituted a trustee for them by Christina in respect of a half share of the movable and immovable property belonging to the first community until they had attained their majority. The plaintiffs' cause of action was that, although they had attained their majority, the defendants are in possession of the movable property, with the exception of an almirah, which they have disposed of. The plaintiffs admitted that they had possession of the immovable property. The plaintiffs estimated the value of the movable property at Rs. 434.65, and they prayed for judgment for this amount. The defendants in their answer raised some points of law without traversing the material facts stated in the plaint, and at the trial the following issues were framed:—

(1) Is the plaintiffs claim now prescribed ?

(2) Is the deed of agreement No. 5,028 binding on the defendants ?

(3) Does the plaint disclose a valid cause of action against the defendants ?

[1] *(1905) 1 Bal. 174.*

1912.

GRENIER J.

Fernando v. Fonseka

(4) Has Cathonis Fonseka during his lifetime settled the plaintiffs' claim ?

(5) Is the movable property enumerated in the deed now in possession of the defendants, except one almirah ?

It was agreed that all the plaintiffs attained their majority over six years ago. It was argued for the defendants in the Court below, as it was argued before us in appeal, that as more than six years had elapsed since the plaintiffs attained their majority their remedy was barred under section 7 of Ordinance No. 22 of 1871. The learned District Judge adopted this view and dismissed the plaintiffs' action. The plaintiffs have appealed. I think there can be little doubt that Cathonis Fonseka was constituted a trustee for the plaintiffs by the deed of agreement in question. The deed is in Sinhalese, and Cathonis Fonseka is described therein as curator, but the word must be understood to mean the same thing as trustee. Indeed, in the Court below no question was raised as to the character which Cathonis Fonseka assumed under the deed. If he were trustee, then it is manifest that section 7 of the Ordinance cannot apply. If any section is applicable it is section 6, and as the term of limitation prescribed by it is the years, the plaintiffs have still their remedy. But the case before us is covered by authority. It was held by a Bench of two Judges (*1 N. L. R. 120*) that a trustee receiving money on behalf of his *cestui que* trust cannot set up a plea of prescription in bar of the claim of such *cestui que* trust. In the course of his judgment Burnside C.J. said, " No proposition is better established than that prescription does not run between trustee and *cestui que trust*. " I agree, subject to the observation made by Clarence J., that " there may be cases in which the relationship between trustee and *cestui que trust* has come to an end, and in which the two parties have come to stand at arm's length, and money which originally accrued under the trust remains in the hands of the whilom trustee in another character than that of trust money. In such a case no doubt the statutory term might begin to run from the time when the parties ceased to stand to each other in the character of trustee and *cestui que trust*. "

The District Judge was, therefore, wrong in dismissing the plaintiffs' action on the ground of prescription, in the absence of anything to show that Cathonis Fonseka had ceased to stand to the plaintiffs in the character of a trustee. I cannot accede to Mr. Bawa's contention that as there was no privity of contract between the plaintiffs and Cathonis Fonseka this action cannot be maintained. If Cathonis Fonseka was a trustee of the plaintiffs, as it was quite clear he was, his estate, now represented by the defendants, is liable to pay the claim of the plaintiffs.

I would set aside the decree of the Court below and send the case back for trial and decision, if necessary, on the other issues of law

save that of prescription, and on the questions of fact raised by the 4th and 5th issues. The appellants will have their costs of this appeal. All other costs will abide the final result.

Set aside and sent back.