1914.

[FULL BENCH.]

Present : Lascelles C.J., Pereira and Ennis JJ.

DAWBARN *v.* RYALL.

368—D. C. Kandy, 21,101.

Land sold by notarial deed—Deficiency of land—Action for damages for shortage of land—Prescription—Six years—Ordinance No. 22 of 1871, ss 7, 8, and 10.

The claim to compensation for any deficiency of land purported to be sold by deed is not prescribed within six years, as the agreement is one founded on a written contract.

IN this case the plaintiff sued defendant for damages, alleging that there was a deficiency in extent of the land sold to him by a notarial conveyance. The District Judge held that the claim was prescribed, as it fell under section 10 of the Prescription Ordinance. The plaintiff appealed.

Hayley, for the plaintiff, appellant.—The claim comes under section 7 of Ordinance No. 22 of 1871, as the claim arises out of deed of sale. Section 10 is applicable to damages arising from tort, and not from contract. See *Williams v. Baker.* [1]

This claim is based on the written contract of sale. Sale implies putting the purchaser in possession. Under the Conveyancing Act of 1881, when a man sells a land in fee simple, many conditions are implied. It could not be argued that those implied conditions are not in writing merely because they have not been expressly stated in the conveyance. This action itself could not be brought unless it were based on a written contract ; unless the action is based on a written contract the whole case for damages fails.

The facts in *Fernando v. Jayawardene*[2] are not on all fours with this case. There the purchaser was placed in possession and was evicted some years after the sale.

[1] *(1888) 8 S. C. C. 165.*

[2] *2 N. L. R. 309.*

Prescription was in issue in the first trial, but it was not pressed. The respondent has waived the question of prescription. Counsel cited *4 M. & W. 399.*

Bawa, K.C. (with him *Allan Drieberg*), for the defendant, respondent.—The " written promise " in section 7 is *ejusdem generis* with the other contracts stated in the section. The words are " written promise, contract, bargain, or agreement or other written security. "

The word " security " is interpreted in *Wijesekere v. Perera.* [1]

[Chief Justice : Can you not say that the deed is a security for the handing over 300 odd acres ?] No.

This case cannot be distinguished from the case of *Fernando v. Jayawardene.* [2] The *ratio decidendi* in that case is applicable to this case.

Counsel cited *Thommasie v. Kavathipillai Murugasoe,* [3] 360—D. C. Galle, April 6, 1881, *Horsfall v. Martin,* [4] *Berwick's Voet 172.*

[Pereira J. referred to *4 S. C. C. 89.*]

Hayley, in reply.

Cur. adv. vult.

May 8, 1914. LASCELLES C.J.—

On the former appeal this case was remitted for trial on the footing that the plaintiff was entitled, in virtue of the conveyance to him, to possession of the property purported to be conveyed (subject to certain exceptions), and to compensation for any deficiency which might be established. The learned District Judge, treating the claim on this footing, has held that the claim is prescribed, and from this decision the plaintiff now appeals.

The question for decision is whether the claim is founded, as the plaintiff contends, on a " written contract, " so that section 7 of Ordinance No. 22 of 1871 is applicable ; or whether, as the defendant contends, it is founded on "an unwritten contract," and is thus prescribed under section 8 of the Ordinance. The learned District Judge has decided that the claim is prescribed under section 10. But on appeal it was not contended that section 10 was applicable. The argument was that section 8 was the material section ; and in support of this contention we were referred to the ruling in *Fernando v. Jayawardene.* [2] But the decision in this case appeared to us to be so questionable that we reserved the point for consideration by a Full Court.

It is true that the facts in *Fernando v. Jayawardene* [2] are distinguishable from those now under consideration, inasmuch as the purchaser in that case appears to have been placed in possession of the property which he had bought, and it was some years after

[1] *(1911) 14 N. L. R. 87.*
[2] *2 N. L. R. 309.*
[3] *(1883) 5 S. C. C. 174.*
[4] *(1900) 4 N. L. R. 70.*

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the purchase that he was evicted. But the judgment of the learned Chief Justice amounts to a ruling on the principle of law involved in the present case. The case was one where there was a written contract of sale from which a contract to warrant the title was implied by law. It was held that, although the contract of sale was in writing, the implied contract to warrant the property, not being reduced to writing, must be considered as an unwritten contract, and so within section 8.

With the greatest deference to the learned Judges who decided *Fernando v. Jayawardene* [1], I am unable to accept this view. What is the foundation of the plaintiff's claim for compensation ? There can be but one answer to this question, namely, " the written contract of sale between the plaintiff and the defendant." The circumstance that the obligation on the part of the seller to give quiet possession of the thing sold depends upon a condition which the law considers as inherent in a written contract of sale does not make that obligation any the less dependent on the written contract of sale. Without the written contract of sale this obligation would not exist, and such an obligation, in a case where immovable property, is concerned, would not be proved without production of a formal written contract of sale.

To look at the question from another point of view, the existence of every contract depends upon a consensus between the minds of the contracting parties. How was this consensus effected with regard to the plaintiff's obligation to put the defendant into possession of a specific quantity of property ? Clearly by means of the written contract of sale. Mr. Bawa, if I understood him aright, contended that the obligation arises from the relative status of the plaintiff and defendant as vendor and purchaser. But this is not going to the root of the matter. The obligation is contractual and there was one contract only between the parties, namely, the written contract of sale.

We have been referred to several decisions, none of which seems to me to throw much light on the question. In *Thommasie v. Kavathipilai Murugasoe* [2] it was held that a claim for purchase money which was expressed in the conveyance to have been previously paid was a simple money debt which would be prescribed in three years. This does not seem to me to be inconsistent with the plaintiff's contention, for the conveyance in that case, so far from importing any promise to pay the purchase money, proceeded on the footing that it was already paid.

In Horsfall v. Martin [3] the question was whether money due for goods sold and delivered on an unwritten agreement was governed by section 8 or by section 9 of the Ordinance. It was held that section 9 was applicable, so that the action should have been brought

[1] *2 N. L. R. 309.*

[2] *(1883) 5 S. C. C. 174.*

[3] *(1900) 4 N. L. R. 70.*

within one year. But the reasoning of this decision is not easily reconciled with the decision of the Full Court in *Kalahe Parene Vitanege Louis de Silva v. Akmimene Pallia Gurugey Don Louis.*[1]

For the reasons above stated I am of opinion that the present claim is founded upon a written contract of sale, and that it is not prescribed.

The case must, therefore, go back to the District Court for the trial of the substantive question involved.

The appellant is entitled to the costs of the appeal, and also to the costs of his appearance in the District Court on September 8, 1913.

PEREIRA J.—

I entirely agree. In the view taken by this Court in its judgment on the last appeal in this case, the liability of the defendant to put the plaintiff in possession of the entirety of the property sold results from the contract of sale between the parties, and the action is therefore an action on a " written contract " that might be brought within six years in terms of section 7 of Ordinance No. 22 of 1871. So far as regards the question whether a particular undertaking is attributable to a particular contract, I fail to see the distinction that was sought to be drawn by the respondent's counsel between an express undertaking and one that is only implied by law from the terms of a contract.

ENNIS J.—

I entirely agree. The terms of the contract in this case were evidenced by the written document, and anything implied by the written document is as much a part of that document as if separate words had been used.

Sent back

[1] *4 S. C. C. 89.*