1955 *Present :* **Pulle J. and Weerasooriya J.**

DHARMARATNE, Appellant, *and* FERNANDO, Respondent.

S. C. 102—D. C. Kalutara, 29,062M

Prescription Ordinance (Cap. 55)—Sections 6, 7, 8—Goods sold and delivered—Action for purchase price—Promissory note as evidence of unwritten promise—Prescriptive period.

Where a purchaser of goods gave the seller, at the time of delivery of the goods, a promissory note in respect of the balance purchase price due from him, and the seller, in his suit for the balance price, relied on the promissory note as evidence only of an unwritten promise and did not actually base his action on the promissory note—

Held, that, in regard to the issue of prescription, the action was governed by section 8, and not section 7, of the Prescription Ordinance ; the prescriptive period was therefore one year only, and not three years.

APPEAL from a judgment of the District Court, Kalutara.

Vernon Wijetunge, for the defendant appellant.

Cecil de S. Wijeratne, for the plaintiff respondent.

Cur. adv. vult.

March 22, 1955. WEERASOORIYA J.—

The 2nd defendant appeals against the judgment and decree of the District Court of Kalutara ordering him to pay the plaintiff-respondent a sum of Rs. 800 being the balance purchase price of a motor van which was the subject of a sale transaction between the two parties.

The plaintiff-respondent brought this action against the 1st and 2nd defendants alleging in the plaint, which was filed on the 24th April, 1952, that they had jointly purchased the van from him on the 3rd September, 1949, for Rs. 1,800 of which a sum of Rs. 1,000 was paid to the plaintiff on the same day at the time of delivery of the van to the purchasers who promised to pay the balance Rs. 800 within a month from that date and also gave " a writing ". According to the evidence adduced this " writing " is the promissory note P1 by which the 2nd defendant alone promised to pay the plaintiff the sum of Rs. 800 on demand. After trial the learned District Judge dismissed the action against the 1st defendant, holding that the van had been purchased only by the 2nd defendant against whom he gave judgment.

The sole question for decision in this appeal is whether at the date of the filing of the plaint the action was already prescribed under s. 8 of the Prescription Ordinance, which according to the appellant is the section of the Ordinance applicable to this case.

It is common ground that the promissory note P1 relates to the Rs. 800 which is the subject of the present claim. It was conceded, however, by learned counsel for the plaintiff at the hearing of the appeal that the action is not based on it but is based on the alleged liability of the 2nd defendant (and also of the 1st defendant) in terms of the unwritten promise to pay the Rs. 800 (being the balance purchase price) within a month of the date of sale. That the plaintiff came into Court on this basis cannot be doubted, having regard to the terms of paragraph 4 of the plaint as well as issue No. 3. The plaintiff's contention is that notwithstanding that the claim is in respect of goods sold and delivered, in view of this unwritten promise the question of the maintainability of the action is governed by s.7 and not by s. 8 of the Prescription Ordinance. In upholding this contention the learned District Judge observed that an agreement with some degree of formality (whatever that may mean) was in the contemplation of the parties. Possibly he had in mind the *dictum* of de Sampayo J. in *Walker, Sons & Co. Ltd., v. Kandyah* [1] that the term " written contract " in s.6 of the Prescription Ordinance seemingly refers to a contract entered into with a certain degree of formality and he therefore thought that the term " unwritten contract " in s.7 must be given a corresponding meaning.

In addition to the above case, several decisions of this Court were cited to us as having a bearing on the point involved in this appeal. Most of those decisions were discussed in *Assen Cutty v. Brooke Bond, Ltd.* [2] which, it appears to me, furnishes the answer to this point. That case is a decision of a bench of two Judges, and it dealt *inter alia* with a claim for the recovery of damages on a breach of warranty as to the quality of certain goods sold and delivered on an unwritten contract, and the contention raised was whether the transaction was governed by s.7 or s.8 of the Prescription Ordinance. Macdonell C.J. took the view (at page 178) that in a case of sale of goods the present section 8 refers only to the unwritten contract for which an action lies owing to the fact of delivery of the goods and that where the action lies on some other ground as, for example, a breach of warranty in delivering goods not up to sample (as

[1] *(1919) 21 N. L. R. 317 at 319.* [2] *36 N. L. R. 169.*

in that case) the present s.7 of the Ordinance is the governing section. In taking this view he seems to have adopted the reasoning of Ennis J. in *Campbell & Co. v. Wijesekere* [1], and of Bonser C.J., in *Markar v. Hassen* [2], each of which is also a decision of a bench of two Judges. In the last mentioned case the claim was for the balance purchase money for a steam launch which had been sold and delivered by the plaintiff. The precise point which is raised in the present appeal did not have to be decided in that case, the only contention there being that a steam launch was not "goods" within the meaning of the present s.8 That contention was rejected by Bonser C.J. who in holding that "goods" mean movable property, also expressed himself in the following terms—

> "There is no necessary inconsistency between sections 8 and 9 (now sections 7 and 8 respectively) of the Ordinance. An action for or in respect of goods sold and delivered may be, as in the present case, an action upon an unwritten contract.
>
> I read section 8 as providing that the period of prescription applying to the *actio venditi* in general is to be three years, and section 9 as providing that in the particular case of a sale of movables where there has been a delivery to the buyer of the thing sold the period is to be reduced to one year."

In the separate judgment of Garvin J. in *Assen Cutty v. Brooke Bond, Ltd.* (supra) he came to the same conclusion (at page 190) as Macdonell C.J. but on a different ground, namely that the operation of s.8 must be limited to the recovery of *debts* due in respect of the matters specified therein and that only such actions are excluded from section 7. As pointed out by him in an earlier passage (at page 189) the decision of the Full Bench in *de Silva v. Don Louis* [3] brings within the operation of s.6 (to the exclusion of s. 8) all actions for or in respect of goods sold and delivered based on written contracts, and if that case is also relied on to exclude from the operation of s.8 all actions of a like nature when based on unwritten contracts (a proposition for which that decision does not appear to be an authority and which was dissented from by Garvin J. himself) no effect whatever would be given to section 8.

Even if it be assumed as proved in the present case that at the time of the unwritten contract of sale there was annexed thereto a legally binding agreement (also not in writing) between the seller and the purchaser that the balance sum of Rs. 800 was not payable till after the expiry of a month, the contention of learned counsel for the plaintiff that by reason of that agreement the transaction is governed by s.7 to the exclusion of s.8 of the Prescription Ordinance is one which appears to have been rejected by both the Judges who decided *Assen Cutty v. Brook Bond, Ltd.* (supra). Moreover, the finding of the District Judge that the 2nd defendant agreed to pay the balance sum of Rs. 800 unconditionally is against this contention since that finding denotes that if there was any understanding at all that the 2nd defendant could have a month's time to pay the balance it was purely as an act of grace on the part of the

[1] *(1920) 21 N. L. R. 431 at 435.*
[2] *(1896) 2 N. L. R. 218.*
[3] *(1881) 4 S. C. C. 89.*

plaintiff which had no legal consequences. The promissory note P1 which provides for the payment of Rs. 800 on demand confirms this view.

In my opinion, on the authorities cited, this action must be held to have been prescribed within the period of one year under s. 8 of the Prescription Ordinance. That period had already elapsed at the date of the filing of the plaint.

The judgment and decree ordering the 2nd defendant to pay the sum of Rs. 800 are set aside and the plaintiff's action is dismissed with costs here and in the Court below.

PULLE J.—I agree.

Appeal allowed.