1967 *Present :* **T. S. Fernando, A.C.J., and Sirimane, J.**

THE ATTORNEY-GENERAL, Appellant, *and*
J. L. D. PEIRIS, Respondent

*S. C. 278/1965—D. C. Colombo, 55283/M*

*Prescription—Action for recovery of money paid under a mistake of fact or a mistake of law—Maintainability—Requirement of demand before institution of action—Effect of omission to make such demand—Effect of demand on a time-barred debt—Profits tax—Payment of it by executor when it was not legally due—Claim by executor for repayment—Plea of prescription raised by Crown—Permissibility—Profits Tax Act (Cap. 243), s. 14—Profits Tax (Special Provisions) Act, No. 36 of 1964, s. 2—Income Tax Ordinance (Cap. 242), s. 28—Prescription Ordinance (Cap. 68), s. 10—Trusts Ordinance (Cap. 87), s. 91.*

n an action to recover money due, prescription starts to run as from the date when the cause of action arose. The fact that the plaintiff was not aware that he had a cause of action does not affect the question at all. " An obligation (such as the one in this case) remains alive only for a particular period of time and the demand for its fulfilment must be made *within that time.* But it is not the demand itself which gives rise to the cause of action. If the plaintiff came into Court without making a demand he may have been deprived of his costs or mulcted in costs, if the defendant brought the money to Court ; for, the summons in the case would itself constitute the demand. But an obligation, which is no longer alive, cannot be revived by making a demand and eliciting a refusal, long after an action to enforce the obligation is time-barred."

Plaintiff, who was one of the executors of a deceased person's estate, sought to recover from the defendant certain sums of money paid by him on behalf of the estate as Profits Tax in respect of the years 1948 to 1951, at a time when there was no provision in law under which Profits Tax could be levied by the Commissioner of Income Tax. The payments were made between the years 1952 and 1955. The present action was instituted on 3rd May 1962 after a demand for the return of the money was made by the plaintiff in 1959 (when he discovered his mistake) and was refused by the Commissioner of Income Tax on 29th November 1961. It was conceded that a claim in such a ease would be prescribed under section 10 of the Prescription Ordinance three years after the accrual of the cause of action. Further, the trial Judge found that the payment was made by the executor under a mistake of fact and without any " undue influence " on the part of the Tax Department.

*Held,* (i) that the plaintiff's claim was time-barred. As soon as the Commissioner of Income Tax recovered money from the plaintiff without legal authority, he was under an obligation to return it ; and the plaintiff's right to demand a return of the money accrued to him the moment he made the payment. Accordingly, the plaintiff's causes of action arose on the dates he made the payments, the last of which was on 6th April 1955. The argument that the plaintiff was not aware of his mistake, and having discovered it in 1959 made a demand, the refusal of which on 29th November 1961 gave rise to the " cause of action " was quite untenable.

(ii) that, as the action was instituted on 3rd May 1962 and decree was entered in favour of the plaintiff on 29th April 1964, the provisions of section 2 of the Profits Tax (Special Provisions) Act, No. 36 of 1964, were not applicable in the absence of any express reference therein to pending actions.

(iii) that, as it could not be said that the money was paid as the result of "undue influence" or that a fiduciary relationship had come into being between the Tax Department and the plaintiff, section 91 of the Trusts Ordinance was not applicable.

*Quaere*, whether the money was paid by the plaintiff under a mistake of law and, if so, whether he was entitled in law to recover what he paid.

Observations on the question whether it is proper for the Crown to resist a citizen's claim, which is otherwise than fraudulent, by resorting to a plea based on the provisions of the Prescription Ordinance.

APPEAL from a judgment of the District Court of Colombo.

*H. Deheragoda*, Senior Crown Counsel, with *D. S. Wijesinghe*, Crown Counsel, for the defendant-appellant.

*H. W. Jayewardene*., *Q.C.*, with *S. J. Kadirgamar*, *Q.C.*, and *B. Eliyatamby*, for the plaintiff-respondent.

*Cur. adv. vult.*

December 2, 1967. T. S. FERNANDO, A.C.J.—

I have had the advantage of seeing the judgment prepared by my brother Sirimane, and I agree to the making on this appeal of the order proposed by him. I wish only to add the following observations.

The effect of section 10 of the Prescription Ordinance could have been avoided in this case by the plaintiff only if he could have brought himself within the benefit of the provisions of section 91 of the Trusts Ordinance. The relevant issue was answered by the learned trial judge against the plaintiff, and nothing we have heard from counsel on his behalf was cogent enough to lead us to a reversal of the finding thereon.

As I am in agreement with my brother that the issue as to prescription has to be answered in favour of the Crown, I do not wish to express any opinion on the question whether the trial judge was right or wrong in answering in the plaintiff's favour the issue as to whether the payment of the profits tax by the plaintiff was made under a mistake of law or under a mistake of fact. Even if the trial judge was correct, the cause of action was barred by section 10 of the Prescription Ordinance.

It is very unusual to find the Crown resisting a citizen's claim, which is otherwise than fraudulent, by resorting to a plea based on the provisions of the Prescription Ordinance. Remembering always that the Crown is declared not bound by that Ordinance, great circumspection must be exercised by the law officers of the Crown before defeating a

citizen's honest claim by raising the plea of prescription. The Department of Inland Revenue has consistently to deal with the general tax-paying public, and its smooth and proper working can be rendered possible only when it gains the confidence of that public by creating the impression that they can expect fair dealing from the Department. In recent years the Department has so often announced its readiness to assist and guide the tax-paying public and invited them to bring their problems to it that I think it would be of some advantage to citizen and Department alike to read the following observations of an experienced Chancery Judge in a fairly recent case. Vaisey J., in *Sebel Products Ltd. v. Commissioners of Customs and Excise* [1], dealing with a case, not where the Statute of Limitations was relied on by the Crown, but where the Commissioners of Customs and Excise had refused to refund money paid to them by a plaintiff voluntarily under a mistake of law, stated :—

> " At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants, being an emanation of the Crown, which is the source and fountain of justice, are, in my opinion, bound to maintain the highest standards of probity and fair dealing comparable with those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control : see *Re Tyler* (1907) 1 K. B. 865. Secondly, because the taxpayer, who is too often tempted to evade his liability and to keep in his own pocket money which he ought to have paid to the revenue, will find too ready an excuse in the plea that the revenue authorities will, if they can, keep in their coffers, if they can get it there, money which the taxpayer was under no obligation to pay to them and they had no right to demand. Although such an excuse would have no validity in either a court of law or in the forum of the taxpayers' own conscience, I think that, in the public interest, grounds for proferring it should, so far as possible, be avoided. "

SIRIMANE, J.—

The plaintiff is the son of the late Mrs. Nancy Charlotte Peiris and also one of the executors of her estate. Mrs. Peiris died on 20.3.51.

After her death, the Commissioner of Income Tax served on the plaintiff four notices of assessment claiming various sums of money as Profits Tax which the deceased was liable to pay during the years 1948, 1949, 1950 and 1951, aggregating to a sum of Rs. 271,533/40. In consequence of these notices, the plaintiff made certain payments, and in this action alleged (*inter alia*) that the Commissioner of Income Tax was not entitled to recover any sum as Profits Tax due from the deceased, from him, and sued the Attorney-General as representing the Crown to recover the amounts he had paid.

[1] *(1949) 1 A. E. R. at p. 731.*

It was admitted at the trial that the plaintiff had made various payments as follows :

| | | Rs. | c. |
|---|---|---|---|
| 1. | On 27. 6.52 .. | 287 | 40 |
| 2. | On 27.11.52 .. | 32,356 | 40 |
| 3. | On 27.11.52 .. | 115,576 | 80 |
| 4. | On 27.11.52 .. | 28,802 | 94 |
| 5. | On 7. 3.55 .. | 18,593 | 92 |
| 6. | On 7. 3.55 .. | 8,804 | 48 |
| 7. | On 6. 4.55 .. | 1,370 | 40 |
| | | 205,792 | 34 |

and he restricted his claim to that sum.

Items 5 and 6 set out above were sums due to the plaintiff by way of reduction of income tax, if he paid all the Profits Tax due.

The learned District Judge gave him judgment in a sum of Rs. 178,393·94 which figure had been reached by disallowing items 5 and 6.

The Attorney-General has appealed against this judgment, and the plaintiff has filed a cross-appeal claiming a further sum of Rs. 27,398·40 (which is the total of items 5 and 6).

The Profits Tax Act, Chapter 243, came into force in 1948. By section 14 of that Act, the charging and recovery of Profits Tax was to be effected in the same manner as in the case of Income Tax and for that purpose certain sections in the Income Tax Ordinance were made applicable to Profits Tax.

Under section 28 of the Income Tax Ordinance (Chapter 242) an executor of a deceased person is chargeable with tax for periods prior to such person's death. But this section 28 was not one of the sections made applicable to Profits Tax by section 14 of the Profits Tax Act as it stood at the time these payments were demanded and paid. It was only on the 20th of October, 1957 (by Act 53 of 1957) that section 28 referred to above was made applicable to the Profits Tax Act, and it was conceded at the argument, therefore, that at the time the Commissioner of Income Tax demanded payments totalling to Rs. 271,533·40, there was no provision in law under which he could levy or receive that sum.

The learned Crown Counsel urged this appeal on three grounds which (though not in the order they were advanced) were :

(1) that the plaintiff's claim was prescribed,

(2) that the plaintiff made these payments under a mistake of law and was not, therefore, entitled to claim them now, and

(3) that section 2 of Act No. 36 of 1964 which validated the recoveries of Profits Tax from an executor between 1948 and 20th March 1957 (to which I shall refer later) precluded the plaintiff from making a claim such as this against the Crown.

In regard to prescription, it was conceded that section 10 of the Prescription Ordinance (Chapter 68) applies to the plaintiff's claim, and that his claim was, therefore, prescribed three years after his cause of action arose.

Section 5 of the Civil Procedure Code (Chapter 101) defines " cause of action " as—

> " The wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury. "

This action was filed on 3.5.62.

When did the plaintiff's cause of action arise ?

In my view, *as soon as* the Commissioner of Income Tax received a payment to which he was not legally entitled, he was under an obligation to return it ; and the plaintiff's right to demand a return of the money he paid (assuming that he paid it under a mistake of fact) accrued to him the moment he made the payment. In other words, as soon as the Commissioner recovered money from the plaintiff without legal authority, there was a wrong for the redress of which the plaintiff could have brought an action immediately, so that the plaintiff's causes of action arose on the dates he made the payments, the last of which was on 6.4.55. Once a cause of action has arisen, prescription starts to run *as from that date.* The fact that the plaintiff was not aware that he had a cause of action does not affect the question at all. The only instances where the running of prescription is delayed or suspended, are those where, at the time the cause of action arose the plaintiff was suffering from some disability such as minority, unsoundness of mind, or absence beyond the seas as enumerated in section 13 of the Prescription Ordinance. One may also add to these, a case where there has been a fraudulent concealment of the cause of action by the opposing party. None of these considerations arise in this case.

The argument that the plaintiff was not aware of his mistake, and having discovered it in 1959 made a demand, the refusal of which on 29.11.61 gave rise to the " cause of action " is, in my opinion, quite untenable. An obligation (such as the one in this case) remains alive only for a particular period of time, and the demand for its fulfilment must be made *within that time*. But it is not the demand itself which gives rise to the cause of action. If the plaintiff came into Court without making a demand he may have been deprived of his costs, or mulcted in costs, if the defendant brought the money to Court ; for, the summons in the case would itself constitute the demand. But an obligation, which is no longer alive, cannot be revived by making a demand and eliciting a refusal, long after an action to enforce the obligation is time-barred.

A simple example will make this position clear. Under section 7 of the Prescription Ordinance an action to recover rent is barred three years after the cause of action has arisen. Suppose a tenant mistakenly pays more rent than he is legally liable to pay, and the landlord also mistakenly receives it. Can a tenant, who discovers his mistake 10 or 20 years after the payments have been made, demand from the landlord a return of the excess rent and sue for it within three years of the date of refusal ? The answer must obviously be in the negative.

Our attention was drawn to section 26 of the English Limitations Act (as amended) of 1939 which enacts that where the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake, or could with reasonable diligence have discovered it. We do not have a similar provision in the Prescription Ordinance. If there was, we would have had to address our minds as to when the plaintiff could *reasonably* have discovered his mistake. He had the right of appeal, which if exercised would undoubtedly have brought the error to light ; or, at least, after Act 53 of 1957 was passed, the mistake could reasonably have been discovered. But we are not called upon to construe a section similar to section 26 of the English Act.

Wessels (Law of Contract in South Africa, Second Edition, Volume II), says at page 754 (section 2789) :

> " Where money has been paid by mistake, the *condictio indebiti* action runs from the moment payment has been made and not from the date of demand, for in this respect it resembles a loan."

It was pointed out by learned Counsel for the respondent that the passage in Voet referred to by the learned author has no relevance to this question, but the cases referred to (in particular, *Baker v. Courage & Company*) are directly in point, and I think, with respect, that the learned

author correctly sets out the law in the passage quoted above. *Baker v. Courage & Company* [1] was decided before the amendment to the English Act of Limitations. Though the term " cause of action " has a somewhat different meaning in English law, the reasoning in the judgment is entirely applicable to the facts of the present case. It was held there, that where money has been paid under a mistake of fact common to both parties the Statute of Limitations runs against the right to recover the money from the date of payment and not from the date of the discovery of the mistake.

Hamilton J. in the course of his judgment as reported in 101 Law Times, page 854, said (at page 857) :

> " It was contended upon the authority of *Kelly v. Solari* (9 N. M. W. 54) that the fact that the defendants had the means of knowing the truth if they had only read their own books is quite immaterial, and that the only point to be considered is, when did they know the fact ? If this were right, it would take away the protection of the Statute of Limitations which has always been understood to be a statute passed for the protection and benefit of persons upon whom claims are made, so as to prevent them from being called on to account in respect of transactions long gone by. It would convert that statute into a snare wherever, as so constantly happens in business, a mistake of fact has occurred ; and supposing that, instead of being the case of the plaintiff it had been the case of a corporation, which would not die, I see no particular reason why this mistake of fact might not have been proved from the documents at the end of 50 or even 100 years, and then notice given and a demand made and the point urged by Mr. Danckwerts would have arisen equally then as now if it arises at all."

One views with distaste a plea of prescription raised by the Crown against a subject who is unable to raise a similar plea against the Crown. But the Crown has thought it fit to take the plea in this case, and it must succeed.

The next point urged for the Crown was that the learned District Judge was wrong when he held that the plaintiff had nct made these payments under a mistake of law because, to quote the Judge's words, " at the stage he made his payments there was no such law in existence. "

Why did the plaintiff make these payments ? I think the answer to that question is, that he did so because he believed, that according to the provisions of the Profits Tax Act, he was *under a legal liability to pay*. The evidence shows that he had the assistance of accountants and legal advisers. Had he acquainted himself with the provisions of section 14 of the Profits Tax Act as it stood, at the time he was called upon to pay, he would have known that the law did not require him to do so.

He made his payments, therefore, under a mistake of law.

[1] *(1910) 1 K. B. 56.*

As a rule payments made under a mistake of law are not recoverable (see *Attorney-General v. Arumugam* [1], *Bogaars v. Van Buuren* [2]), and as far as I am aware this rule has always been followed in our Courts. In *Attorney-General v. Arumugam* (supra), L. B. de Silva, J., followed the law as set out in Voet, Book XII, title 6, section 7 (Gane's Translation, Volume II, page 839).

> " *Condictio indebiti* lies only for ignorance of fact, not of law. Then again it is not every ignorance of a payer which is enough for the action for the return of what was not due, but only that which is ignorance of fact, and does not appear to be slack or studied. If the payment of what was not due happened through ignorance of law, the truer view is that a claim was denied by the civil law."

But there have been certain modifications of this rule in exceptional circumstances, and much reliance was placed by Counsel for the plaintiff on *Kiriri Cotton Company Limited v. Dewani* [3]. It was held in that case that where the person who mistakenly makes payment, is not " in pari delicto " with the person who receives it, then the former is entitled to recover what he mistakenly paid. In the course of his judgment, Lord Denning said :

> " It is not correct to say that every one is presumed to know the law. The true position is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat.* Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers v. Ingham.* If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not *in pari delicto* and the money can be recovered back."

At one stage of the argument I was inclined to think that these dicta were applicable to the case before us. But a closer examination of the facts here and those in *Kiriri Cotton Company Limited v. Dewani* has led me to a different conclusion. In that case a tenant paid a premium to a landlord in order to obtain a sub-lease. Under the Uganda Rent Restriction Ordinance (the case was from that country) a landlord who *received* such a premium was guilty of an offence and liable to a fine. The tenant who made the payment, however, was not made liable in any way. In these circumstances, it was held that the duty of observing the law

[1] *(1963) 66 N. L. R. 403.* [2] *(1882) 2 S. A. R. 259.*
[3] *(1960) 1 A. E. R. 177.*

being placed by the statute on the landlord for the protection of the tenant the parties were not *in pari delicto* and the tenant was entitled at common law to recover the premium. In the case before us, it is true that it was the Tax Department which made the initial mistake. But one can go no further than that. The law does not prohibit the department from receiving money mistakenly paid to it by a tax payer when both the receiver and the payer are mistaken. There is no law which the department has to observe for the protection of the tax payer. In this instance, the tax payer could have found out without much difficulty, that the department was mistaken and so refused to pay. Neither party were really " in delicto ", and the payment was made by the plaintiff purely under a mistake of law. He is, therefore, not entitled in law to recover what he has paid. I have expressed this view, as a good deal of argument was addressed to us on this matter, though it is unnecessary to decide this point in view of the conclusion I have reached on the question of prescription.

The last point urged by Counsel for the Crown might also be dealt with. He submitted that the plaintiff's action must *now* be dismissed, in view of the provisions of section 2 of Act No. 36 of 1964. That section reads as follows :—

> " 2. Where any profits tax under the Profits Tax Act with which a deceased person, if he were alive, would have been chargeable at any time after the date of commencement of that Act and before the 20th day of December, 1957, had been assessed upon, paid by or recovered from the executor of such deceased person, such assessment, payment or recovery shall be deemed to have been, and to be, valid as it would have been if the provisions of section 28 of the Income Tax Ordinance had *mutatis mutandis* applied in relation to such assessment, payment or recovery ; and accordingly such executor or any heir of the deceased person shall not be entitled to the refund of any sum so paid by, or recovered from, such executor as profits tax or to institute any action in any court of law, for the recovery of any sum so paid. "

The effect of the first part of this section is to validate retrospectively all profits tax levied from executors during the period in which the provisions of section 28 of the Income Tax Ordinance were not applicable to the Profits Tax Act. The second part of the section provides that *accordingly* an executor who had paid taxes, which were now validated, could not sue to recover those payments. It is quite clear, I think that the disability to sue commences only after the Ordinance came into force, i.e., from 12th November, 1964. This action was filed on 3.5.62, and decree entered in favour of the plaintiff on 29.4.64. The appeal was filed on 11.5.64. It is settled law now that legislation will not affect pending actions unless the enactment is expressly made applicable to such actions. This argument advanced on behalf of the Crown is, therefore, rejected.

Counsel for the plaintiff then sought to support the findings in his favour by contending that the learned District Judge was wrong when he rejected the plaintiff's plea that the Commissioner of Income Tax held this money in trust for the plaintiff. It was argued that if prescription was to run at all it would only begin to run from the date of the repudiation of the trust which (it was submitted) was 29.11.61. This argument was based on the provisions of section 91 of the Trusts Ordinance (Chapter 87), which lays down that when an advantage is gained by the exercise of undue influence, the person gaining the advantage must hold it for the benefit of the person who has been prejudiced. It was contended that a statement in the assessment notice, to the effect that if the tax demanded is not paid, a further sum not exceeding 20 per cent. of the tax would be added, amounted to duress, or the use of undue influence.

I am quite unable to accept this argument. The assessment notices sent to the plaintiff are those sent out by the department to every tax payer. The words complained of are no more than a formal intimation to the tax payer that he may be liable to pay more in the event of delay or default. His right to protest, or appeal against the assessment, is in no way affected—in fact, the notices themselves inform him of the right of appeal. The plaintiff was the executor of a very large estate and in matters pertaining to the payment of taxes (these sums were paid out of a bank account relating to the estate) had at least the assistance of a firm of Chartered Accountants. In fact, most of his correspondence with the Tax Department was through these Accountants. It cannot be said that the money was paid as the result of " undue influence " or that a fiduciary relationship had come into being between the Tax Department and the plaintiff. I think the learned District Judge was right in answering the issue relating to a trust against the plaintiff.

The appeal must succeed, and the cross-appeal must, therefore, fail. But the appeal succeeds on the plea of prescription and on the plea that payment was made under a mistake of law—a mistake which the Tax Department itself had made. In the circumstances, I am not disposed to make an order for costs in favour of the defendant.

The appeal is allowed and the plaintiff's action dismissed. The cross-appeal is also dismissed, but there will be no costs either here or below.

*Appeal allowed.*