ATTORNEY-GENERAL
v.
WILSON AND ANOTHER

COURT OF APPEAL.
ISMAIL, J.,
C.A. 137/94
D.C. NUWARA ELIYA 392/M.
JUNE 13, 1997.

Prescription – Motor Accident – Driver pleaded guilty to the charge of negligent driving – Action filed after 6 years – Prescription Ordinance No. 22 of 1871 section 9 – Applicability to State – Roman Dutch Law – Law of England – Civil Law Ordinance.

The Attorney-General instituted action on 27.07.88 against the defendants-respondents to recover a certain sum with interest being damages caused on 7.10.81 to a vehicle belonging to the State, when it collided with a lorry belonging to the 2nd defendant-respondent Society. The 1st defendant-respondent (Driver) had pleaded guilty to a charge of negligent driving. The position on behalf of the Attorney-General at the trial was that as the 1st defendant-respondent had pleaded guilty to the charge of negligent driving it was not open to the respondents-respondents to take up the defence of prescription. The District Court held that the action was prescribed. On appeal –

Held:

1. Upon examination of the pre-existing rights of the Crown under the Roman Dutch Law it would appear there was no immunity for the Crown from the rules of limitation in respect of its alienable rights but there was immunity only in respect of inalienable rights.

2. Under the Roman Dutch Law the Crown would not be entitled to claim immunity from the rules relating to prescription. Under that system, although prescription did not as a general rule run against the Crown, it did run against the Crown where debts were due to it as though it were a private individual so that if the right the Crown was seeking to enforce was an ordinary right of property or an ordinary obligation, prescription could be pleaded against it. This principle did not apply in regard to a claim by the Crown relating to its inalienable rights, this principle is limited only to rights capable of alienation.

The claim for damages by the State is prescribed after the lapse of three years according to Roman Dutch Law.

APPEAL from the Judgment of the District Court of Nuwara Eliya.

Cases referred to:

1. *Terrunnanse v. Menike* 1 NLR 200 at 202
2. *Corea v. Appuhamy* – 15 NLR 65 at 77
3. *John v. Dodwell* – 20 NLR 206 at 213 (PC)
4. *Fuard v. Weerasuriya* – 56 NLR 12
5. *Tillekeratne v. Bastian* – 21 NLR 15
6. *Silva v. Attorney-General* – 62 NLR 121 at 128
7. *Union Government v. Whittaker Estate* – 1916 AD 194
8. *Latsky case* – 1877 Buch 68
9. 1870 Vanderstraaten Reports 83 at 89

Ms. Eva Wanasundera S.S.C. for the Attorney-General plaintiff appellant.
Mohan Pieris with *Ms. Nuwanthie Dias* for the defendant-respondents.

Cur. adv. vult.

July 07, 1997
ISMAIL, J.

The Attorney-General instituted an action against the defendants-respondents abovenamed on a plaint dated 27 July '88 to recover a sum of Rs. 17,325/- with interest, being damages caused on 7 October, 81 to a vehicle bearing No. 33, Sri 8792 belonging to the State, when it collided with a lorry bearing No. 24 Sri 5036 owned by the 2nd defendant-respondent Society. It was stated that the 1st defendant-respondent drove the said lorry negligently on that occasion while acting within the course of his employment under the 2nd defendant-respondent Society and that he has pleaded guilty on 17.3.83 to a charge of negligent driving in a case filed against him in the Magistrate's Court, Nuwara Eliya.

The Attorney-General pleaded that the provisions of the Prescription Ordinance do not affect the cause of action set out in the plaint. Both defendants denied liability and averred in the answers filed separately on 15.12.89 and 20.07.90 that the cause of action pleaded by the Attorney-General is prescribed.

The submission on behalf of the Attorney-General at the trial was that as the 1st defendant-respondent has pleaded guilty to the charge of negligent driving, it was now not open to the defendants-

respondents to take up the defence of prescription. It was submitted that it was an admission that a cause of action had accrued to the plaintiff, notwithstanding the lapse of time.

The learned District Judge by his judgment dated 19.4.94 rejected this submission and held that as the action has been instituted by the Attorney-General 6½ years after the date of the collision, that the claim for damages was prescribed. The issue on prescription which was tried as a preliminary issue was answered in favour of the defendants-respondents and the action filed by the Attorney-General was dismissed.

The Prescription Ordinance No. 22 of 1871, as amended by Ordinance No. 2 of 1889, which now governs the entire field of jurisdiction provides in section 9 that no action shall maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen.

Withers, J. in *Terrunnanse v. Menike*[1] at 202 referring to this Ordinance said:

> "It has been laid down and constantly acted upon by this Court that the *Governing Ordinance No. 22 of 1871*, and the previous Ordinance No. 8 of 1834, kept alive the repeal by regulation No. 13 of 1822 of "all laws heretofore enacted or customs existing with respect to the acquiring of rights and the barring of civil actions by prescription," and that the consequence of that regulation and those Ordinances was to sweep away all the Roman Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown."

The Privy Council observed in *Corea v. Appuhamy*[2] that "the whole of the law of limitation is now contained in the Ordinance of 1871." The Ordinance itself makes it as complete as possible and provides in section 10 for a term "in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance."

Lord Haldane said in the case of *John v. Dodwell*,[3] that "the Prescription Ordinance of Ceylon governs the whole of a jurisdiction which is general, including law and equity in one system..." A similar

observation was made by Mr. L. M. D. de Silva in *Fuard v. Weerasuriya.*[4] "The Ordinance is clearly applicable to all causes of action and no basis can be found in the Law of Ceylon for excluding its application to all or any causes of action in equity."

In regard to the applicability of the principles of Roman and Roman Dutch Law, Bonser C.J. observed in *Tillekeratne v. Bastian,*[5] that they "are only of historical interest, as it is recognised that our Prescription Ordinance constitutes a complete code; and though no doubt we have to consider any statutory enactments in the light of the principles of common law, it will be seen that the terms of our own Ordinance are so positive that the principles of the common law do not require to be taken into account."

Despite the whole law in regard to prescription being contained in Ordinance No. 22 of 1871, the submission on behalf of the Attorney-General was that the rights of the State are, however, not affected as section 15 provides that "nothing herein contained shall in any way affect the rights of the State" and that therefore the plea of prescription cannot be taken against the Attorney-General.

There is a similar provision in regard to enactments in section 3 of the Interpretation Ordinance which sets out that "No enactment shall in any manner affect the right of the State unless it is therein expressly stated or, unless it appears by necessary implication that the State is bound thereby".

The rights of the State referred to in these provisions must necessarily mean the right to plead prescription in suits against the State or the right to sue on behalf of the State without the plea of prescription being taken against it. These rights must exist independently of the Ordinance and it is therefore necessary to ascertain what the unaffected rights of the State are and to consider the pre-existing position of the Crown in regard to its rights and whether they are affected by limitation.

After the Royal Proclamation of 1799 the Roman-Dutch notion of the fiscus, as representing the State and enjoying privileges, passed into the legal system of Ceylon with the main body of the Roman Dutch Law and the relations between subject and subject as well as between government and the subject fell to be determined by the Roman Dutch Law. The liability and immunities of the Crown in

Ceylon continued in practice to be governed by the English Law rather than the Roman-Dutch, for the prerogatives of the English sovereign became part of our law upon the accession of the island to the British Crown – see Weeramantry on The Law of Contracts – Vol. 1 section 501 page 493.

However it would appear from the judgment reported in 1870 Vanderstraaten's Reports 83 at page 84, that the prerogative right of the English Crown to claim the benefit of the maxim '*nullum tempus occurrit regi*' time does not run against the Crown – was never introduced into this country. That judgment contains the following passage:

> "The case has next to be considered with reference to the question whether that branch of the Royal Prerogative which is founded on the maxim 'nullum tempos occurrit regi' is in force in Ceylon – for, if so, the Roman Dutch Law will not apply. I think it is not. The maxim in question is part of the Prerogative Law of the English Crown, which prerogative is part of the Common Law of the 'Realm of England', of which Ceylon forms no part."
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> "It follows from the Common Law of England having no authority here, and from the Royal Prerogative of the English Crown, deriving its authority from the Common Law of England, that neither has that prerogative any authority in Ceylon."

This view dating back to 1870 has been observed by Basnayake, C.J. in *Silva v. Attorney-General*[6] to be the correct statement of the law. The question in issue in that case was whether laches could be attributed to the Crown and the Solicitor General had argued that the Crown was not bound to act within the time prescribed by the rules in the Schedule to the Appeals (Privy Council) Ordinance or in the Appellate Procedure (Privy Council) Order 1921, because one of the prerogative rights of the Sovereign was that laches did not operate against the Crown. Basnayake, C.J. who held that the Crown was guilty of laches pointed out at page 126 as follows:

> "The prerogative rights of the Sovereign of England, being a part of the Common Law of that country, do not automatically become the Law of Ceylon; because Ceylon being a ceded country the law of the country continues until the Sovereign or the legislature changes it. The Law of England obtains in Ceylon only to the extent to which it has from time to time been introduced by express

enactment (vide Civil Law Ordinance Vol. II Legislative Enactments p. 138). In the case of this country it is only the prerogative rights declared in the Letters Patent constituting the office of Governor-General (1947) that have been expressly introduced by an act of the Sovereign. Another of the prerogative rights of the Sovereign is a matter of express legislation by our Legislature (section 3 Interpretation Ordinance). In other respects the law governing the Sovereign's rights is the Roman Dutch Law. In fact far from introducing the common law of prerogative of England the Sovereign expressly by the Proclamation of 1799 declared that the Roman-Dutch Law was to be the law of the land."

Upon an examination of the pre-existing rights of the Crown under the Roman Dutch Law it would appear there was no immunity for the Crown from the rules of limitation in respect of its alienable rights but there was immunity only in respect of inalienable rights.

In *Union Government v. Whittaker's Estate*,[7] C.J. stated as follows at page 199; "It was pointed out by De Villiers, C.J. in *Latsky's case*[8] that according to Voet (44.3.11) prescription ran against the Crown with regard to rights which could be alienated, but not, as to others and he added 'this seems to be the rule of our law'. That pronouncement sufficed without further elaboration to settle the question. The principle thus laid down was thereafter repeatedly affirmed by the Cape Supreme Court ...". The passage relied upon from Voet is as follows:

"In these matters it appears to be a not unreasonable distinction that those things which can be shared with others and transferred to others by the Emperor can also be prescribed; but those things which cannot be shared are abhorrent also of prescription" Voet 44.3.11 (Gane's translation).

Wessels in the Law of Contract in South Africa Vol. 2 page 752 – para 2779 states that "no prescription would run against the state as regards its inalienable rights but with regard to rights which could be alienated prescription would run" and cites the passage from Voet quoted above as authority of this proposition.

Weeramantry in the The Law of Contracts – Vol. 2 section 914 page 868, sets out the position under the Roman Dutch Law as follows:

"Under the Roman Dutch Law as well the Crown would not be entitled to claim immunity from the rules relating to prescription. Under that system, although prescription did not as a general rule run against the Crown, it did run against the Crown where debts were due to it as though it were a private individual so that if the right the Crown was seeking to enforce was an ordinary right of property or an ordinary obligation, prescription could be pleaded against it. This principle did not thus apply in regard to a claim by the Crown relating to its "inalienable rights", this principle being limited only to rights capable of alienation.

We can thus conclude that the position of the Crown in regard to limitations is that in so far as prescription is claimed against the Crown in actions instituted by it, there is no principle of law upon the basis of which immunity from prescription may be claimed by the Crown, where its inalienable rights are not involved".

The position of the State in relation to prescription being as set out above, the State cannot use section 15 of the Prescription Ordinance to extend or enlarge these rights which it expressly left unaffected. As was pointed out in *1870 Vanderstraaten's Reports 83 at page 89*[9], it would be as much in contravention of such a clause to hold that the act of which it forms part extends and enlarges, as to hold that it limits and contracts, the rights of the Crown, for in either case those rights would be affected".

The position in regard to the period of prescription under the Roman Dutch Law is set out by Wessels in The Law of Contract in South Africa at paragraph 2823 as follows; "The usual period for the prescription of actions according to the civil law was thirty years, though in some cases it was longer and in others shorter. The Roman Dutch Law since the 16th century retained the period of thirty years for the prescription of obligations and movables and regulated the other periods by the Perpetual Edict of 1540, section 16... Ultimately, the last extant traces of section 16 of the Perpetual Edict disappeared when the Act 18 of 1943 withdrew it from operation in so far as it had not already been withdrawn." The period of extinctive prescription now prescribed by Act 18 of 1943 is three years in respect of actions for damages.

In the present case the Attorney General has on behalf of the State sought to recover damages six and a half years after the alleged

cause of action had arisen. This claim for damages by the State is prescribed after the lapse of a period of three years according to the Roman Dutch Law as shown above.

I hold therefore that it was open to the defendants-respondents to take up the plea of prescription against the claim of the Attorney-General for damages and that the learned District Judge has correctly held that the alleged cause of action is prescribed.

The judgment is affirmed and the appeal is dismissed.

The defendants-respondents would be entitled to the costs of action both in the District Court and in this appeal.

Appeal dismissed.