Mahabir Kishore and Others

Vs

State of Madhya Pradesh.

Civil Appeal No. 1826 of 1974

(G. L. Oza, K. N. Saikia JJ)

31.07.1989

JUDGMENT

SAIKIA J. –

This plaintiffs appeal by special leave is from the appellate judgment of the Madhya Pradesh High Court dismissing the appeal upholding the judgment of the trail court dismissing the plaintiffs suit on the ground of limitation.

BHA A registered firm, Rai Saheb Nandkishore Rai Saheb Jugalkishore (appellants), was allotted contracts for manufacture and sale of liquor for the calendar year 1959 and for the subsequent period from January 1, 1960 to March 31, 1961, for Rs. 2,56,200 and 4,71,900 respectively, by the Government of Madhya Pradesh which also charged 71/2 per cent over the auction money as mahua and fuel cess. As writ petitions challenging the Government's right to charge this 71/2 per cent., were pending in the Madhya Pradesh High Court, the Government announced that it would continue to charge it and the question of stopping it was under consideration of the Government whose decision would be binding on the contractors. The firm (appellants) thus paid for the above contracts a total extra sum of Rs. 54,606.

On October 17, 1961, the under Secretary to Government. M.P. Forest Department, Bhopal wrote the following letter No. 10130-x/61 (exhibit D-23) to the Chief Conservator of Forests, Madhya Pradesh, Rewa :

"Subject : Levy of cess on liquor contractors.

Under former M.P. Government (Forest Department) memo No. 4595-73-CR- XI dated July 25, a royalty at 71/2 per cent of the licence fee for liquor shops was imposed on liquor contractors to cover the value of mahua and fuel extracted from the reserved or protected forests by the contractors for their still.

2. The M.P. High has since decided that the levy of the aforesaid cess is illegal and that the cess cannot be recovered from the liquor contractor, in pursuance of this decision, Government desires that all processes whenever issued or processedings instituted against liquor contractors for recovery of the mahua or fuel cess should forthwith be withdrawn and no revenue recovery certificates should be issued in respect, of this cess.

3. Simultaneously, no free supply of mahua or fuel should be peremitted by virtue of the imposition mentioned above.

Immediate compliance is requested.

No... x/61 Dt. Bhopal the... 61 Copy forwarded for immediate compliance to :

1. Conservator of Forests, Bilaspur.

2. All Divisional Forest Officers, Bilaspur Circle.

3. Copy to C.F. Raipur Circle for similar action in this cess levied in any division of his Circle."

On April 24, 1959, the Madhya Pradesh High Court's judgement in Surajadin Laxmanlal v. State of M.P. declaring the collection of 7 1/2 per cent., illegal was reported in [1960] MPLJ 39. Even after this decision, the Government continued to charge 71/2 per cent., extra money. Again on August 31, 1961, the High Court of Madhya Pradesh in N. K. Doongaji v. Collector decided that the charging of 71/2 percent by the Government above the auction money was illegal. This judgment was reported in [1962] MPLJ 130, it is the appellants case that they came to know about this decision only in or about September, 1962. On October 17, 1964, they served a noticed on the Government of Madhya Pradesh under section 80 of the Code of Civil Procedure requesting the refund of Rs. 54,606, failing which, a suit for recovery would be field; and lather they instituted Civil Suit No. 1-B of 1964 in the Court of the Additional District Judge, Jabalpur, on December 24, 1964. The government resisted the suit on, inter alia, the ground of limitation, the trial court, taking the view that articles 62 and 96 of the First Schedule to the Limitation Act, 1908 were applicable and the period of limitation began to run from the dates the payments were made to the Government, held the suit to be barred by limitation and dismissed it In appeal, the High Court talk the view that article 113 read with section 17, and not article 24, of the Schedule to the Limitation Act, 1963, was appeal, and held that the limitation began to run from October 17, 1961, on which date the government decided not to change extra 71/2 per cent., on the auction money, and as such, the suit was barred on December 17, 1965, taking into consideration the period of two months prescribed by section 80 of the Code of Civil Procedure. Consequently. The appeal was dismissed. The appellants'petition for leave to appeal to this court was also rejected observing, "it was unfortunate that the petitioners filed their suit on December 24, 1964, and, as such, the suit was barred by time by seven days."

Mr. M. V. Goswami, learned counsel for the appellants, submits, interalia that the High Court erred in holding that the limitation started running from October 17, 1961, being the date of the letter, exhibit D-23, which was not communicated to the appellants or any other contractor and, therefore, the appellants had no opportunity to know about it on that very date with reasonable diligence under section 17 and the High court ought to allow at least a week for knowledge of it by the appellants in which case the suit would be within time. Counsel further submits that the High Court, while rightly discussing that section 17 of the Limitation Act, 1963, was applicable, erred in not applying that section to the facts of the instant case, wherefore, the impugned judgment is liable to be set aside.

Mr. Ujjwal A. Rana, learned counsel for the respondent, submits, inter alia that October 17, 1961, having been the date on which the Government finally decided not to recover extra 71/2 per cent., above the auction money, the High Court rightly held that the limitation started from that date and the suit was clearly barred under article 24 or 113 of the Schedule to the Limitation Act, 1963; and that the Government decision was communicated to the appellants, there was no reason why they, with reasonable diligence, could not have known about it on the same date.

The only question to be decided, therefore, is whether the decision of the High Court is correct. To decide that question. It was necessary to know what the suit was for. There is no dispute that 71/2 per cent., above the auction money was charged by the Government of Madhya Pradesh as mahua and fuel cess and the High Court subsequently held that it had no power to do so. In view of those writ petitions challenging that power, the Government asked the contractors to continue to pay the same pending Government's decision on the question; and the appellants accordingly paid. Ultimately, on October 17, 1961, the Government decided not to recover the extra amount any more but did not yet decide the fate of the amounts already realised. There is no denial that the liquor contracts were performed by the appellants. There is no escape from the conclusion that the extra 71/2 per cent., was charged by the Government believing that it had the power, but the High Court in two cases held that the power was not there, the money realised was under a mistake and without authority of law. The appellants also, while paying. Suffered from the same mistake. There is, therefore, no doubt that the suit was for refund of money paid under a mistake of law.

The question is what was the law applicable to the case. Nul ne doit's enrichir aux depends does autres-No one ought to enrich himself at the expense of others. This doctrine at one stage of English common law was remedied by "indebitatus assumpsit" which action lay for money "had and received to the use of the plaintiff". It lay to recover money paid under a mistake, or extorted from the plaintiff by duress of his goods, or paid to the defendant on a consideration which totally failed. On abolition of "indebitatus assumpsit", courts used to imply a promise to pay which however. In course of time, was held to be purely fictitious. Lord Mansfield in Moses v. Macferlan [1760] 2 Burr. 1005 at page 1012 explained the juridical basis of the action for money "had and received" thus :

> "This kind of equitable action to recover back money, which ought not in justice to be kept. Is very beneficial, and therefore, much encouraged. It lies only for money which, 'ex aequo et bono", the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of low; as in payment of a debt barred by the statute of limitation, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these cases, the defendant may retain if with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstance. In one word the gist of this kind of action is that the defendant. Upon the circumstances of the case, is obliged by the ties of natural justice and enquiry to refund the money."

In that case, Moses received from Jacob four promissory notes of 30 sh each, He endowed these to Macferlan who, by a written agreement contracted that the would not hold Moses liable on the endorsement Sub-sequently, however, Macferlan sued Moses on the notes in a Court of Consciences. The court refused to recognise the agreement and Moses was forced to pay. Moses then brought an action against. Macferlan in the King's Bench for money "had and received" to his use. Lord Mansfield allowed him to recover observing as above.

Courts in England have since been trying to formulate a juridical basis of this obligation. Idealistic formulations as "aequum et bonum" and "natural justice" were considered to be inadequate and the

more legalistic basis of unjust enrichment is formulated. The doctrine of "unjust enrichment" is that, in certain situations, it would be "unjust" to allow the defendant to retain a benefit at the plaintiff's expense. The relatively modern principle of restitution is of the nature of quasi-contract. But the English law has not yet recognised any generalised right to restitution in every case of unjust enrichment. As Lord Diplock has said, "there is no general doctrine of unjust enrichment' recognised in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system, i.e., based upon the civil law." In Sinclair v. Brougham [1914] AC 398 (HL), Lord Haldane said that low could not "dejure" impute promises to repay whether for money "had and received" otherwise, which may. If de facto, it would inexorably avoid.

The principle of "unjust enrichment" requires : first, that the defedant has been "enriched" by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly, that the retention of the enrichment is unjust. This justifies restitution Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.

Another analysis of the obligation is of quasi-contract. It was said : "if the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt. And gives this action founded in the equity of the plaintiff's case, as it were, upon a contract (quasi ex contractu) as the Roman law expresses it." As Lord Wright in Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd. [1943] AC 32; [1942] 2 ALL ER 122 (HL), pointed out, "the obligation is as efficacious as if it were upon a contract. Such remedies are quasi contract or recitation and theory of unjust enrichment has not been closed in English law."

Section 72 of the Indian Contract Act deals with the liability of a person to whom money is paid or thing delivered, by mistake or under coercion. It says :

> "A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it."

Illustration (b) to the section is :

> "A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive."

Our law having been codified, we have to apply the law. It is true, as Pollock wrote in 1906 in the prefect to the first edition of Pollock and Mulla's Indian Contact and Specific Relief Acts;

> "The Indian Contract Act is in effect... a code of English law. Like all codes bases on an existing authoritative doctrine, it assumes a certain knowledge of the principles and the habits of thought which are emboided in that doctrine."

It is therefore, helpful to know "those fundamental notions in the common law which are concisely declared, with or without modification by the text".

There is no doubt that the instant suit is for refund of money paid by mistake and refusal to refund may result in unjust enrichment depending on the fact and circumstances of case. It may be said that

this court has referred to unjust enrichment in cases under section 72 of the contract Act, see Shiv Shanker Dal Mills v. State of Haryana, AIR 1980 SC 1037; U.P. State Electricity Board v. City Board, AIR 1985 SC 883 and State of M.P. v. Vyankatlal, AIR 1985 SC 901.

The next question is whether, and if so, which provision of limitation Act will apply to such suit. On this question. We find two lines of decision of this court, one in respect of civil suits and other in respect of petition under article 226 of the constitution of India. Though there is no constitutionally provided of limitation for petition under article 226, the limitation prescribed for such suit has been accepted as the guideline. Though a little more latitude is available in the former.

A tax paid under mistake of law is refundable under section 72 of the Indian Contract Act, 1872. In STO v. Kanhaiya Lal Mukund Lal Saraf [1959] SCR 1350, where the respondent, a registered firm, paid sales tax respect of its forward transaction in pursuance of the assessment order passed by the sales Tax Officer for the year 1949 to 51; in 1952, the Allahabad High Court held in Budh Prakash Jai Prakash v. STO [1952] ALJ 332, that the levy of sales tax on forward transaction was ultra vires. The respondent asked for a refund of the amounts paid by filling a writ petition under article 226 of the Constitution. It was contended for the sales tax authorities that the respondent was not entitled to a refund because (1) the amount is dispute were paid by the respondent under a mistake of law and were therefore, irrecoverable, (2) the payment were in discharge of the liability under the sales Tax Act and were voluntary payments without protest. And (3) inasmuch as the monies which had been received by the government had not been retained but had been spent away by it, the respondent was disentitled to recover the said amount This court held that the terms "mistake" in section 72 of the Indian Contract Act comprised within its scope a mistake of law as well as a mistake of fact and that. Under that section, a party is entitled to recovery money paid by mistake or under correction, and if it is established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party receiving the money is bound to repay or return it though it might have been paid voluntarily, subject. However, to question of estoppel, limitation or like. On the question of limitation, it was held that section 17(1)(c) of the limitation Acts, 1964 would be applicable and that were a suit was to recover "monies paid under a mistake of law, a writ petition within the period of limitation prescribed, i.e., within three years of the knowledge of the mistake. Would also lie." It was also accepted that the period of limitation dose not begin to run until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it.

The money may not be recoverable if, in paying and receiving it, the parties were in pair delicto. In Kiriri Cotton Co. Ltd. v. Ranchhoddas Keshaviji Dewani [1960] AC 192, were the appellant company, in consideration of granting to respondent a sub-lease asked for and received from him a premium of $10,000 and the latter claimed refund therefore, the privy Council held that the duty of observing the law was firmly placed by the ordinance on the shoulder of the landlord for the protection of the tenant, and the appellant company and the respondent were not, therefore, in pair delicto in receiving and paying respectively the illegal premium, which, therefore, in accordance with establishment common law principles, the respondent was entitled to recover from landlord and that the omission of a statutory remedy did not, in case of this kind, exclude the remedy by money had and received. In the instant case also, the parties could not be said to be in pari delicto in paying and receiving the extra 71/2 per cent. Had the appellant not paid this amount, they would not have been given the contract.

In D. Cawasji and Co. v. State of Mysore [1976] 2 SCR 511, the appellant paid certain amount to the government as excise duty and education cess for the year 1951-52 and 1965-66 in one case and from 1951-52 to 1961-62 in the other, the high Court struck down the provision of the relevant Act

as unconstitutional. In writ petition before the High Court claiming refund, the appellant contended that the payment in question were made by them under mistake of law; that the mistake was discovered when the High Court struck down the provision as unconditional and the petition were, therefore, in time but the High Court dismissed them on the ground of inordinate delay. Dismissing the appeal. This court held that where a suit would lie to recover monies paid under a mistake of law, a writ petition for refund of tax within the period of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered. It was held in D. Cawasji's case [1975] 2 SCR 511 that although section 72 of the Contract Act has been held to cover cases of payment of money under a mistake of law, as the State stands in a peculiar position in respect of taxes paid to it, there are perhaps practical reason for the law according to a different treatment both in the matter of the heads under which they could be recovered and the period of limitation of recovery. P. N. Bhagwati J., as he then was, in Madras Port Trust v. Hymanshu International [1979] 4 SCC 176, deprecated any resort to the pela of limitation by a public authority to defeat the just claim of citizen observation that, though permissible under law, such technical pela should only be taken when a claim is not well-founded.

section 17(1)(c) of the limitation Act, 1963, provides that, in the case of a suit for relief on the ground of mistake, the period of limitation dose not begin to run until the plaintiff had discovered the mistake or could, with reasonable diligence, have discovered it. In a case where payment has been made under mistake of law as contract with a mistake of fact, generally, the mistake becomes know to the party only when a court makes a declaration as to the invalidity of the law, though a party could make a pronouncement, it is seldom that a person can, even with reasonable diligence, discovery a mistake of law before a judgment adjudging the validity of the law.

E. S. Venkataramiah J., as his lordship then was, in Shri Vallabh Glass Works Ltd. v. Union of India [1986] 155 ITR 560 (SC) where the appellant claimed refund of excess duty paid Central Excise Salt Act, 1944, laid down that the excess amount paid by the appellant would have become refundable by virtue of section 72 of the Indian Contract Act if the appellant had filed a suit within the period of limitation; and that section 17(1)(c) and article 113 of the limitation Act, 1963, would be applicable.

In CST v. Auraiya Chamber of Commerce [1987] 167 ITR 458; [1986] 3 SCC 50, the supreme Court, in its decision dated May 3, 1954, in STO v. Budh Prakash Jai Prakash [1954] 5 STC 193 having held that tax on forward contract to be illegal and ultra vires the U.P. Sales Tax Act and that the decision was applicable to the assessee's case the assessee filed several revision for quashing the assessment order for the year 1948-50 and for subsequent years which were all dismissed on the ground of limitation. On appeal to this court, Sabyasachi Mukharji J., while dismissing the appeal the contract Act; there is no question of any estoppel when the mistake of law is common to both the assessee and taxing authority. His lordship demand for tax under the Act but declined to order refund of the taxes paid observed that section 5 of the limitation Act, 1908, and article 96 of its first schedule which prescribed a period of 3 years were applicable to suits for refund illegally collected tax.

In Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong [1988] 173 ITR 42; [1988] 1 SCC 401. The Assam Taxation (on Goods Carried by Road or Inland Waterways) Act, 1954, was declared ultra vires the constitution by the supreme court in Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232. A subsequent Act was also declared ultra vires by the High Court on August 1, 1963, against which the state of Assam and other respondent preferred appeals to the supreme court Meanwhile, the supreme court, in a writ petition Khyerbari Tea Co. Ltd v. state of Assam [1965] 5

SCR 975, declared on December 13, 1963, the Act to be intra vires. Consequently, the above appeals were allowed. Notice were therefore, issued requiring the appellant under section 7(2) of the Act to submit returns. Returns were duly filed and assessment orders passed thereon. On July 10, 1973, the Gauhati high Court in its judgment in Loong Soong Tea Estate case's (civil Rule No. 1005 of 1969-decided on July 10, 1974) declared the assessment to be without jurisdiction. In November 1973, the appellant filed a writ petition in the high Court contending that. In view of the decision on Loong Soong Tea Estate's case, he came to know about the mistake in paying the tax as per assessment over and also that he become entitled to refund of the amount paid. The High Court set aside the order and the notice of demand for tax Act but declined to order refund of taxes paid by the appellant on the ground of delay and laches as, in the view of the High Court, it was possible for the appellant to know about the illegality of the tax sought to be imposed as early as in 1963, when the Act in question was declared ultra vires. Allowing the assessee's appeal, Mukharji J., speaking for this court, held (at p. 45) :

> "In this case, indisputably, it appears that tax was collected withou the authority of law. Indeed, the appellant had to pay the tax in view to the notice which were without. It appear that the assessment was made under section 9(3) of the Act, therefore, it was without jurisdiction. In the premises, it is manifest that the respondent had no authority of law and as such the money was liable to be refunded."

The question there whether, in the application under the article 226 of the constitution, the court should have been that it was after the judgment in the case of Loong Soong Tea Estate that the cause was, therefore, held to have been in error in refusing to order refund on the ground that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1963 when the Act in question was declared ultra vires. The court observed (at p. 46 of 173 ITR) :

> "Normally speaking, in a society governed by rule of law, taxes should be paid by the citizen as soon as they are due in accordance with law. Equally as a corollary of the said statement of law, it follows that taxes collected without the authority of law as in the case from a citizen should be refund, because no state has authority of law."

On the question of limitation, referring to Suganmal v. State of M.P. [1965] 56 ITR 84; AIR 1965 SC 1740, and Tilokchand Motichand v. H. B. Munshi [1969] 2 SR 824, his lordship observed that the period of limitation prescribed for recovery of money paid by mistake started from the date when the mistake was known. In that case, knowledge was attributable from the date of judgment in Loong Soong Tea Estate's case on July 10, 1973, and there the appellant came to know of that matter in October, 1973, and there was no denial of the averment made. On that ground, the High Court was held to be in error was, accordingly, held that the writ petition filed by the appellant were within the period of lamination prescribed under article 113 of schedule read with section 23 of the Limitation Act, 1963.

It is thus settled that, in a suit refund of money paid by mistake of law, section 72 of the Contract Act is applicable and the period of limitation is three years as prescribed by the article 113 of the schedule to the limitation Act, 1963, and the provision of section 17(1)(c) of that Act. Will be applicable so that the period will begin to run from the date of knowledge of the particular law under the money was paid being declared void; and this could be the date of the judgment of a competent court declaring that law void.

In the instance case though the Madhya Pradesh High Court in Suraj din Laxmanlal v. State of M.P.

declared the collection of 71/2 per cent., illegal and that decision was reported in [1960] MPLJ 39, the Goverment was still charging it staying that the matter consideration of the Government. The final decision of the Goverment as stated in the letter dated October 17, 1961, was purely an internal communication of the Government, Copy whereof was never communicated to the appellants or other liquor contractor. There could, therefore, be no question of the limitation starting from that date, even with reasonable diligence, as envisaged in section 17(1)(c) of the Limitation Act, the appellant would have taken at least a week to know about it Mr. Rana has fairly stated that there was nothing on record to show that the appellant knew about this letter on October 17, 1963, itself to within a reasonable time thereafter, we are inclined to allow at least a week to the appellants under the above provision. Again Mr. Rana has not been in a position to show that the statement of the appellants that they knew about the mistake only after the judgment in Doongaji's case [1962] MPLJ 130, in or about September, 1962, where after they issued the notice under section 80 of the code of Civil Procedure was untrue. This statement has not been shown to be false. In either of the above cases, namely, of the knowledge one week after the letter dated October 17, 1961, or in or about September, 1962, the suit would be written the period of limitation under article 113 of the schedule of the limitation Act, 1963.

In the result, we set aside the judgment of the High Court, allow the appeal and remand the suit. The records will be sent down forthwith trial court to decide the suit on merits in accordance with law. Expenditure. the appellants shall be entitled to the cost of this appeal.

Appeal allowed.

</html