

ALLAHABAD HIGH COURT

State of U. P

Vs.

Kanhaiya Lal Makund Lal

Special Appeal No. 18 of 1955. from the decision of M.L. Chaturvedi, J.
(Mootham, C.J. and Agarwala, J.)

30.11.1954. 01.12.1955

JUDGMENT

Mootham, C.J.

1. This is an appeal from an order of Chaturvedi, J. dated 30-11-1954. The respondent firm is a dealer in bullion, and in gold and silver ornaments, and as part of its business it entered into forward contracts in silver. In respect of such contracts it was assessed to Sales Tax for the years 1948-49 1949-50 and 1950-51 in the sums of Rs. 150/12/-, Rs. 474/- and 741/- a total of Rs. 1,365/12/- and these amounts were duly paid.

In 1952 this Court held in - '*Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur*¹.' that the provisions of the U.P. Sales Tax Act purporting to impose a sales tax on forward contracts were ultra vires - a decision later upheld by the Supreme Court in the - '*Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash*³', - and thereupon the respondent firm applied to the Commissioner of Sales Tax, U.P., for a refund of the aforesaid sum of Rs. 1,365/12/-.

A refund was refused, and the respondent firm filed the petition out of which this appeal arises - praying for the issue of a writ of mandamus requiring the Sales Tax Officer, the Commissioner of Sales Tax and the State Government to refund the sum of Rs. 1,365/12/-. Before the learned Judge the liability of the State Government to repay this amount does not seem to have been seriously opposed, and the writ sought for, was directed to issue.

2. The opposite parties to the petition now appeal, and it is argued by the Advocate General of their behalf that the amount in dispute was paid by the respondent firm under a mistake of law and is therefore irrecoverable. The Advocate General also stated categorically that in this appeal he did not contend that the respondents ought to have proceeded for the recovery of the amount claimed by them otherwise than by way of a petition under Article 226 of the Constitution.

3. The respondent firm contended that the principle upon which the Advocate General

¹ AIR 1952 All 764

² AIR 1954 SC 459

relies has no application in India; it founds its claim on Section 72, Indian Contract

Act which provides that "A person to whom money has been paid" or anything delivered, by mistake or under coercion, must repay or return it." To this the Advocate General replies that the State Government is not a "person" within the meaning of this section and that the mistake to which the section refers must be a mistake of fact.

4. The word "person" is not defined in the Indian Contract Act, and unless there is anything repugnant in the context it will by virtue of Section 3 (39), General Clauses Act, include "any company or association or body of individuals, whether in-corporated or not.

5. I do not see any reason why the word "person" should be given a restricted meaning. The greater part of modern industry and commerce is founded on contract, and unincorporated bodies habitually enter into contracts. I do not think it can be doubted that a District Board or a Municipality is a 'body of individuals' within the definition of person in the General Clauses Act, and logically I see no sufficient reason for excluding from the ambit of the definition the body of individuals, "the Government", responsible for the governance of a State.

6. The definition in the General Clauses Act is not exhaustive, and we are entitled to look to the Indian Contract Act itself to find out what the legislature intended that the word "person" should mean. A contract involves an agreement between a promisor and a promisee, and under Section 2 of the Act every promisor and promisee is a person; it appears clear therefore that every contract is an agreement between parties who are 'person' within the meaning of the Act. If the Government is not a person within the meaning of Section 72 it is not in my opinion a person within the meaning of the other sections of the Act where that term, is used; and the consequence of accepting the view advanced by the Advocate General would be that Government cannot enter into contracts. Article 295 of the Constitution refers specifically to the rights, liabilities and obligations of the Government of India and of the Government of a State arising out of contract, and it is a matter of common knowledge that the Central and State Governments in India are constantly entering into contracts. Contracts of letting of service and freight are matters of every day occurrence, and as far as I am aware it has never been suggested that a Government is not competent to enter into a contract because it is not a person. The object of the Contract Act requires, in my opinion, that the word "person" should have an extended sense, and I have no difficulty in holding that it includes the State Government.

7. The second contention, somewhat tentatively advanced by the Advocate General, was that Section 72 has no application where the mistake under which money has been paid is one of law. That question was considered in - '*Shiba Prasad Singh v. Maharaja Srish Chandra*³', In that case the Privy Council said

"Payment by mistake in Section 72 must refer to a payment which was not legally due and which could not have been enforced; the mistake is in thinking that the money paid was due when in fact it was not due".

The Advocate General has invited us to hold that : 'Shiba Prasad Singh's case, was wrongly decided on the ground that the opinion of the Judicial Committee as to meaning of Section 72 is in conflict with the provisions of Section 21 of the Act. That section provides that

"A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact",

and the argument is that the provisions of this section will be made nugatory if a party to a valid contract, although caused by a mistake of law can subsequently recover payment under the contract by virtue of Section 72. This argument was considered by their Lordships of the Judicial Committee and rejected.

"If a mistake of law", their Lordships said, "has led to the foundation of a contract, Section 21 enacts that that contract is not for that reason voidable. If money is paid under the contract, it cannot be said that money was paid under mistake of law : it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but, on the other hand, that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid."

With great respect I am in agreement with what their Lordships have said.

8. In my opinion therefore Section 72 applies to the present case and the State Government must refund the moneys unlawfully received by it from the respondents on account of Sales Tax.

9. I would therefore dismiss this appeal with costs which I would fix at Rs. 200/-.

Agarwala, J.

10. I agree. In the present case the tax was admittedly paid without protest but under a mistake of law, because the respondent firm did not know at the time of making the payment that the Act under which tax was collected was unconstitutional and invalid. The question is whether the firm is entitled to its refund.

11. On behalf of the State, the learned Advocate General has urged that a tax voluntarily paid is not liable to be refunded. He relies upon English and American authorities and also some earlier Indian cases in support of his contention.

12. A payment may be made either under a mistake of fact or under a mistake of law, and a payment may be made either voluntarily or under coercion or pressure. The English law is well settled that money paid under a mistake of law or voluntarily cannot be recovered in an action for money had and received; but that money paid either under a mistake of fact or under pressure of coercion may be recovered, vide - '*Maskell v. Horner*⁵',

13. The American law seems to follow the English doctrine. In Willoghby on the Constitution of United States, Vol. 1, p. 12, it is stated :

"The general doctrine that no legal rights or obligations can accrue under an unconstitutional law is applied in civil as well as criminal cases. However, in the case of taxes levied and collected under statutes later held to be unconstitutional the taxpayer cannot recover unless he protested the payment at the time made.

This, however, is a special doctrine applicable only in the cases of taxes paid to the State. Thus, in transactions between private individuals, money paid under or in pursuance of a statute later held to be unconstitutional, may be recovered, or release from other undertakings entered into obtained.

14. Professor Willis in his Constitutional Law states that a tax paid under an unconstitutional statute is refundable except when the payment may be considered as voluntary.

15. The Indian doctrine is embodied in Section 72, Indian Contract Act –

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

The section does not make any distinction between a mistake of law or a mistake of fact. It merely uses the general term "mistake".

16. Following the English decisions, in some earlier cases in India it was held that Section 72 does not apply to money paid under a mistake of law, see - '*Rajeshwara Sethupathi v. Secretary of State*⁶', and - '*Wolf and Sons v. Dadiba Khimji and Co*⁷'. This was so held because of the provisions of Section 21, Indian Contract Act which provides that a contract is not voidable because it was caused by a mistake as to any law in force in British India.

17. In some cases the only point considered was whether the tax which was found to be invalid was paid under coercion or voluntarily and it was held that if it was a voluntary payment, it could not be recovered. The question, whether the tax was refundable if it was paid under a mistake of law was not considered at all, vide - "*Municipal Council, Tuticorin v. Messrs. Ralli Bros*⁸.", and - '*Municipal Council, Rajahmundry v. Subba Rao*⁹',

18. On the other hand in - "*Jagdish Prosad v. Produce Exchange Corporation Ltd*¹⁰.", it was held that the word 'mistake' in S 72, Indian Contract Act included not only a mistake of fact but also a mistake of law and it was

⁵(1915) 3 KB 106 ⁷44 Bom 631 at p. 649 ⁹ AIR 1937 Mad 559

⁶ AIR 1929 Mad 179 ⁸ AIR 1934 Mad 420 ¹⁰AIR 1946 Cal 245

further pointed out that this section did not conflict with Section 21, because that section dealt not with a payment made under a mistake of law but of a contract caused by a mistake of law, whereas Section 72 dealt with a payment which was either not under a contract at all or even if under a contract, it was not a cause of the contract. The Privy Council settled the law ultimately when it held in AIR 1949 PC 297, that the word "mistake" in Section 72 includes a mistake of law and that money paid under a mistake of law could be recovered and that that section does not conflict with the provisions of Section 21, Indian Contract Act, Said their Lordships : If a mistake of law has led to the formation of a contract, Section 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that that money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced.

Payment "by mistake" in Section 72 must refer to a payment which was not legally due and which could not have been enforced: the "mistake" is thinking that the money paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand and if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover, if the argument based on inconsistency with Section 21 were valid, a similar argument based on inconsistency with Section 22 would be valid and would lead to the conclusion that Section 72 does not even apply to mistake of facts.

19. Learned Advocate General urged two points as against this ruling of the Privy Council : first that the view expressed in the case was erroneous and second that it did not apply to the case of claim against 'the State's the 'State' is not a 'person' within the meaning of Section 72, Indian Contract Act. Whether or not the ruling of the Privy Council is binding on this Court after the commencement of the Constitution, I am in respectful agreement with the view expressed therein for the reason stated by their Lordships.

20. That the State is a juristic person can admit of no doubt.

21. Article 300 of the Constitution provides that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State. The Union of India and the States in India have the capacity to hold the property and to enter into contracts, vide Articles 294 to 299. Under Section 3(39), General Clauses Act, a 'person' includes 'any Company or association or a body of individuals whether incorporated or not'. A 'State's a body of individuals and therefore may be recognized as a 'person' unless the

law provides otherwise. In my opinion, the provisions of the Constitution, quoted above, far from prescribing to the contrary, go to show that the Union of India and the States in India are bodies having a definite juristic personality capable of suing or being sued in a court of law.

22. But it was urged that though the Union of India and the States may sue or be sued this is not so, for every purpose, and that the State is not a person for the purpose of recovery of a tax paid under a mistake of law.

23. The learned Advocate General conceded that when the payment of tax was not voluntary, but was paid under protest, the State would be sued though not under Section 72. If the State can be sued for refund of tax paid under protest, the suit must fall under Section 72 and if the State is a person within the meaning of Section 72 when the payment of tax is made under protest, it is difficult to hold that the State is not a person when a suit against it is for the refund of tax which is paid under a mistake of law though not under protest.

24. For all these reasons, in my opinion the State was liable to refund the tax which is paid to it under a mistake of law.

25. BY THE COURT :- This appeal is dismissed with costs which we assess at Rs. 200/-

Appeal dismissed.