CALCUTTA HIGH COURT

Anath Bandhu Deb

Vs.

Dominion of India

Suit No. 2391 of 1948

(P.B. Mukharji, J.)

11.07.1955

JUDGMENT

P.B. Mukharji, J.

1. This is plaintiff's action against the Union of India For the recovery of two sums of money, one for Rs. 12,161/- and the other for damages amounting to Rs. 49,186-8-0. As the suit was instituted in 1948, the original defendant named was the Dominion of India. The plaintiff has given up his claim for damages for Rs. 49,186-8 and that is recorded. The suit, therefore, is now only For the recovery of Rs. 12,161/-. That is the only issue.

2. The plaintiff claims this sum of Rs. 12,161/-on the ground that it paid this sum to the Government as the purchase price of certain bricks from the Government. The plaintiff alleges that the Government failed to deliver the bricks. The plaintiff, therefore, claims refund of the sum of Rs. 12,161/-.

3. The facts of the case are short and simple. The plaintiff pleads that towards the end of June or the beginning of July, 1946 the Governor-General in Council for undivided India invited benders For the purchase of surplus bricks and brickbats in the Agartolla area in the State of Tipperah. The plaintiff tendered for such purchase. His tender was accepted. On 12-7-1949 he deposited the entire purchase price of Rs. 12,161/- at the Tipperah Treasury by Chalan No.15. The plaintiff pleads that the Governor-General in Council failed and neglected to deliver to the plaintiff the said bricks or any portion thereof and, therefore, he is entitled to a refund of this sum of Rs. 12,161/-.

4. On behalf of the Union of India, the defence taken is three-fold. The first defence is that the contract not being in the form under Section 175(3), Government of India Act, 1935, it was not enforceable against the Union. The second defence is that the Union of India is not liable to refund this amount under this Rights, Property and Liabilities Order, 1947. The third defense is that this Court has no jurisdiction to entertain and determine this suit.

5. Neither the plaintiff nor the defendant has called any oral evidence. There is an admitted brief

of documents and correspondence mark ed Exhibit A in these proceedings.
6. I shall take up the first defense on the form of contract under Section 175(3), Government of India Act, 1935 now represented by Article 299 of the Constitution. Now in this case the contract is supposed to be contained in the invitation for tenders, the offer for such tenders and their acceptance. All that is by correspondence through different officers of the defendant and the plaintiff. But none of such correspondence answers the requirements of Section 175(3), Government of India Act. Under Clause 7 of the invitation for tenders it was provided "the purchasers will be required to sign an agreement" (D.D. No.1). No agreement was in fact signed. It, therefore, must be held and I hold accordingly, that there was no contract which answered the statutory requirements of Section 175(3), Government of India Act.

7. The more important question that now remains to be answered is that even if there is no enforceable contract or agreement as against the Union of India because of this defect in form, can there be any claim for refund of money paid in pursuance thereof on the ground of failure of consideration as pleaded in paragraph 5 of the plaint. In order to be able to claim refund, Mr. T.P. Das, learned counsel For the plaintiff put forward three arguments.
His first argument is that the plaintiff is entitled to claim refund under Section 70 Contract Act. His second argument is that the plaintiff is entitled to claim refund under Section 65, Contract Act. His third argument is that he is entitled to claim refund under Section 72, Contract Act. These arguments require careful consideration.

8. As Section 70, Contract Act, was put forward first as a ground for claiming refund, I shall deal with it first. Section 70, Contract Act, says that where a person "lawfully" does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to give compensation to the former in respect of or to restore the thing so done or delivered.
Now as I read this section, it cannot in my view be applied when the act done or thing delivered was not lawful. The clear language of Section 70, Contract Act, is authority enough for that conclusion but if any more authority is needed, it is provided by the decision of an Appellate Bench of this Court in - '*Nagendra Nath Roy v. Jugal Kishore Roy*[1]', and of the Bombay High Court in appeal in - '*Punjabai v. BhagwanDas*[2]', The first requisite is that the person doing an act or delivering a thing under Section 70, Contract Act, has initially to do it 'lawfully'. It cannot in my judgment be said that a person 'lawfully' pays money to the Government when contract with the Government in order to be enforceable is required by Statute to be in a particular form but the person disregards that form. The intention of Section 175(3), Government of India Act, is clear however harsh it may appear in individual instances. That intention is that the administration is a vast organization and in order to make the administration and public exchequer liable, ordinary prudence requires that any and every proposal and acceptance by any one acting on behalf of the vast administration should not be a burden on the public revenue unless the contract is in prescribed form. It is a needed protection. Without observing such protection, if a person delivers money to the Government and tries to make the Government liable either on the basis of a contract or on the basis of money had and received or on the basis of quasi contract, then much of this statutory security of public exchequer, which this statutory provision was intended to protect, would be gone. In that context I do think that payment of Rs. 12,161/- without insisting on the contract in the

[1] AIR 1925 Cal 1097
[2] AIR 1929 Bom 89

specified form should not have been made and, therefore, such payment of money was not "lawfully" made within the meaning of Section 70, Contract Act Specially this is so when the invitation for tender by a specific clause drew attention to the fact that the purchaser would be required to sign an agreement. The plaintiff, therefore, before he paid the money should have insisted on that agreement as prescribed by Statute and also by the express terms of the tender. In depositing the money without such requisite agreement and in disregard of the express terms of the tender, he took the risk and imperilled his position.

9. Then the second difficulty in the way of the plaintiff is the decision of the Court of Appeal in - '*Union of India v. Ram Nagina Singh*[3]*',* The observations there contained appear to suggest though not conclusively that Section 70, Contract Act, does not apply to the context of facts that are preSent here. In fact, the Court of Appeal there reversed the decision of the trial Court under Section 70, Contract Act, which held that Section 70 applied. It is unnecessary for me to go into further details of 'Ram Nagina's case, having regard to the view that I have taken of the construction of Section 70, Contract Act with special reference to the word "lawfully". Thirdly, the plaintiff has not pleaded Section 70, Contract Act and the facts necessary to bring him within that section.

10. The next argument of Mr. Das For the plaintiff is that the plaintiff can claim this refund under Section 65, Contract Act. Here again Mr. Das's difficulty is that there is no pleading claiming protection under Section 65, Contract Act and stating the necessary facts to bring his client within the protection of that section. It has been held in a number of cases mostly unreported, the latest being one of Sarkar J. that a party should not be allowed to take protection under Section 65, Contract Act, unless he pleads it.

11. But the more important reason against the applicability of Section 65, Contract Act, can be explained with reference to the language of the section. That section provides that when an agreement is discovered to be void or when a contract becomes void, any person who has received such an advantage under an agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. The first requirement of that section is that either the agreement must be discovered to be void or the contract must become void. The use of the words "agreement" and "contract" designedly emphasizes the distinction that is apparent from the interpretation clause contained in Section 2(g) and Section 2(h), Contract Act, which describes an agreement not enforceable by law to be void and an agreement enforceable by law to be contract.
A person who disregards an express and obvious statutory mandate such as contained in Section 175(3), Government of India Act, 1935 or its present counterpart the constitutional provision of Article 299 of the Constitution whose effect is to render the agreement unenforceable against the Government cannot in my judgment attract the doctrine that the "agreement is discovered to be void" within the meaning of Section 65, Contract Act. I am not unmindful of the judicial gloss put upon this Section by numerous decisions including the pronouncements of the Privy Council in - *'Harnath Kuar v. Indar Bahadur Singh*[4]*',* that an agreement void ab initio can also be an agreement "discovered" to be void under Section 65, Contract Act. Blazing the trail of the law on this branch is

[3] 89 Cal LJ 342
[4] AIR 1922 PC 403

the decision of the Privy Council in - '*Mohori Bibi v. DharmoDas Ghose*[5]*',* All these decisions however are singularly unhelpful in deciding the preSent point before me. The word "discovered to be void" is not a cloak or excuse for ignorance of law at the time of the contract. The word "discovered" must in my view mean that with available materials at the time of the agreement it could not be known that the agreement was void but subsequent materials or events not available at the time of the agreement disclose that it was void and even void to such an extent as renders it void ab initio. But I cannot persuade myself to believe that an agreement at its very inception in outright disregard of express statute or constitutional provision which renders the agreement unenforceable against the Government can be said to be discovered to be void within the meaning of Section 65, Contract Act. If that was the intention then all that Section 65, Contract Act, need have said is "whenever an agreement is void" and not "discovered to be void". The statutory illustrations under Section 65, Contract Act, support that conclusion. While these Statutory illustrations cannot control the Section of the Statute, in this case I find they support the construction that I have put on the word "discovered" in Section 65, Contract Act. The situation preSented for decision in this suit also does not, in my opinion, come within the other expression in Section 65, Contract Act, "when a contract becomes void". It is not a case where the contract has become void but was an agreement unenforceable at its very inception against the party charged upon it.

12. The Supreme Court in - *'Chatturbhuj VithalDas v. Moreshwar Parashram*[6]*',* has made certain observations which are relevant on this point. Bose, J. of the Supreme Court at page 243 of that report says:

> "It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it that there would be nothing to prevent ratification, specially if that was For the benefit of the Government. There is authority For the view that when a Government Officer acts in excess of authority, the Government is bound if it ratifies the excess; see - '*Collector of Musulipattam v. Cavaly Venkatanarain Appah*[7]*',* We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of Article 299(1)."

Now this observation clearly lays down that the contract or rather the agreement is not void when it does not satisfy the requirements of Section 175(3), Government of India Act, 1935 or Article 299(1) of the preSent Constitution. If they are not void, then Section 65, Contract Act, can no longer be attracted, because it only applies in cases of void agreements or contracts, in the one case when discovered to be void and in the other when it becomes void. Mr. Das's reference to the Privy Council decision in - '*Surajmall Nagoremull v. Triton Insurance Co. Ltd.*[8]*',* is not on the point because there the Statute, which was the Indian Stamp Act, had an entirely differently worded provision, namely, "No contract for Sea Insurance shall be valid unless the same is expressed in a Sea Policy". Section 175(3), Government of India Act, or Article 299 of the Constitution, as pointed out by the Supreme Court in 'Chaturbhuj's case, does not speak of the validity of a contract in general but its enforceability against the Government.

[5] 30 Ind App 114 (PC)
[6] AIR 1954 SC 236
[7] 8 Moo Ind App 529 (PC)
[8] AIR 1925 PC 83

13. For these reasons, I hold that Section 65, Contract Act does not help the plaintiff to claim this sum from the Government in the fact and circumstances of this case.

14. This induced Mr. Das appearing For the plaintiff to invoke the protection of Section 72, Contract Act. His argument is that his client paid that sum of Rs. 12,161/- under a mistake of law. In order to decide this point, it will be helpful to recall the provisions of Section 72, Contract Act, which reads as follows:

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

At one time there was a great conflict of judicial opinion on the point whether Section 72, Contract Act, excluded mistake of law from its purview, one series of decisions holding that it did and the other series of decisions holding that it did not. The point was finally decided by the Privy Council in - '*Shiba Prasad Singh v. Srish Chandra*[9]*',* The point there arose that a lessee paid more royalty to the lessor under a mistaken construction of a particular mining lease. It was held that he was entitled to recover it under Section 72, Contract Act. The effect of the observations of Lord Reid before the Privy Council at page 302 is that mistake of law will also be covered in the circumstances of the case by Section 72, Contract Act. Mr. Das availed of this law laid down by the Privy Council and argued that his client made a mistake of law about the form of the contract and its effect in this case and paid money under that mistake of law. On that ground he claimed to come within the meaning of the decision of the Privy Council and on that ground he founded his claim For the refund of the sum of Rs. 12,161/-. This argument is ingenious and deserves careful examination. I see two fallacies in that argument.

15. First fallacy lies in overstretching Lord Reid's decision. Although Lord Reid put a construction on Section 72, Contract Act, which included mistake of law within its purview, His Lordship was careful to observe at page 302:

> "It may be well to add that their Lordships' judgment does not imply that every sum paid under a mistake is recoverable no matter what the circumstances may be."

His Lordship thereafter says that there may be circumstances which disentitle a plaintiff not only on the ground of estoppel but also "otherwise"

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16. The second fallacy is in the assumption that this is a case of mistake of law. In my judgment it is not a case of mistake of law. Ignorance of law is not mistake of law. Deliberate disregard of law is not mistake of law. In the facts of this case it can either be ignorance of law or deliberate disregard of law. "There is no possible third view of the facts in this case. Therefore the plaintiff cannot be said to come within the protection of the doctrine of mistake of law. The difficulty of Applying Mr. Das's argument to the facts of this case is that in that case every one will be entitled to contend that he made a mistake of law. After all, every litigation is in the final analysis based on a mistake of law or of fact made by one party or the other. It cannot be the intention of Section 72,

[9] AIR 1949 PC 297

Contract Act, that wherever and whenever and however a mistake of law occurs, a claim may be made under Section 72, Contract Act. That was expressly said not to be so by Lord Reid in the passage I have just quoted. Ignorance of law is not an excuse. It is not open to the plaintiff, in my view, to say that he did not know the effect of Section 175(3), Government of India Act, 1935. As Lord-Williams J. points out in - *'Katherine Stiffles v. Carr Mackertich Martin*[10]*',* at p.185 that ignorance of a particular right is on the same footing as ignorance of law and when money was paid voluntarily with full knowledge of all the facts, it cannot be recovered on the ground that the payment) was made under a mistake of law. In fact, it is not really a mistake of law at all. Recalling the facts of the case where Lord Reid pronounced the judgment of the Privy Council, there it was possible to take two contending views on the construction of a clause in the lease. Mistake of law means a possible mistake of law and not an impossible mistake of law. Here there was no room for mistake or doubt as to how contract should be entered into in order to bind Government under Section 175(3), Government of India Act. In other words, this is not a case of mistake of law, however akin it might be to it. It is a disregard of the clear law. That is not a mistake. It is ignorance at best and disregard at the worst. In any event, it is not in my view a mistake.

17. The judicial mind is unconsciously moved by the major inarticulate premise, in this branch of the law that no one should be allowed to unjustly enrich himself at the expense of another. The idea of a new obligation, apart from the strict letter of contract, has been slowly and cautiously evolving in this branch of jurisprudence. The law so developed by judicial conscience appears to discover obligations to defeat unjust enrichment or unmerited acquisition by restitution. The natural tendency For the Courts wherever they find a case of unjust enrichment or unmerited acquisition, is justly to order its restitution. But a good deal of caution is necessary in applying these new categories of law like the unjust enrichment or unmerited acquisition to Governments and Public Administration of revenue. For one thing, a Public Exchequer is a people's trust and the rigour and the revulsion against unjust enrichment for individual ends become a little inappropriate and out of focus in the context of Government and Public Administration. While no doubt a Government, just like an ordinary individual, should not be allowed to unjustly and illegally enrich itself at the cost of its subjects, it is essential to remember that such enrichment in the case of Government, unlike an individual, inures For the people including perhaps the aggrieved subject. Secondly the law itself has prescribed as mandate certain indispensable formalities in the case of an enforceable contract against the Government. A Government has to be responsible and careful at both ends of the contract. A person entering into a contract with the Government has first to see that it has the legal competence to enter into the contract and, secondly, it is to be seen that it is so entered in the form prescribed by the Statute of the Constitution that it is enforceable against the Public revenue. The hesitation in applying the rule against unjust enrichment has been understood by the House of Lords in - *'Sinclair v. Brougham*[11]*',* which holds that a Corporation which receives and holds money in an 'ultra vires' transaction cannot be held to return the money it holds wrongfully because no contract could be implied where no express contract could have been made. The doctrine of ultra vires transaction by a Corporation is not, however, the only case representing difficulty in applying the doctrine of unjust enrichment and its restitution.

[10]39 Cal WN 174

[11]1914 AC 398

The case of a Government and Public Administration represents another. Understood in that light, the conclusions that I have reached do not seem to me to be contrary to the basic principles

against unjust enrichment or unmerited acquisition.

18. For the reasons that I have just stated, I am of the opinion that on the preSent facts and circumstances the plaintiff's claim For the sum of Rs. 12,161/- cannot come either under Section 65 or Section 70 or Section 72, Contract Act.

19. The second defense of the Union of India in this case is under the Rights, Property and Liabilities Order, 1947. It is contended on behalf of the Union that even if it were to be regarded as a contract in this case, the liability is on the Dominion of Pakistan under clause 8(1)(a) of the Rights, Property and Liabilities Order, 1947. It is said that the contract here is For the "exclusive purposes" of the Dominion of Pakistan within the meaning of that clause.

20. Now the actual tender was called front Comilla in Pakistan. The plaintiff also at that time was in Comilla (Pakistan) when the tender was issued. But the bricks were at Agartolla which is within the Indian Union. The plaintiff's document No.1 shows that the money was paid in the Tipperah Treasury which is now within the Indian Union. But from that same document it appears that the authority was what was called "G.E. Comilla" in Pakistan. The plaintiff's own document No.10, clause 4, shows that this deposit of Rs. 12,161/- was made at Comilla Treasury, which is in Pakistan. Correspondence is mostly from Comilla, Kandipar in Pakistan. From that point of view, it appears to me that although the bricks were at Agartolla, the controlling authority being one of Comilla in East Pakistan, it is not unreasonable to consider this contract to be exclusively For the purpose of the Dominion of Pakistan. The situs of the movables, the bricks is not for this purpose the determining factor as the Controlling authority which controlled their disposal. But I do think that Clause 8 of the Rights, Property and Liabilities Order, 1947 at all applies to this case because the contract cannot be held to be a "contract made on behalf of the Governor-General in Council" within the meaning of that Clause because it does not conform with the statutory requirement of such contract as contained in Section 175(3), Government of India Act. In my view, the more appropriate clause is Clause 10 of the Rights, Property and Liabilities Order which speaks of "an actionable wrong other than breach of contract". "Actionable wrong" here is used in a much wider Sense than tort as pointed lout by the Supreme Court in - '*The State of Tripura v. Province of East Bengal*[12]*',* at p.27 (L). The cause of action in this case can be said to arise not wholly either within India or within Pakistan and in such a case, Clause 10(1)(c) should apply, which provides that in that event it will be a joint liability of the Dominions of India and Pakistan. In that case the proper forum to decide or allocate liability was the Arbitral Tribunal under clause 13(1) of the Rights, Property and Liabilities Order. In a case where I am satisfied that the form of the contract does not meet the statutory requirements so as to be enforceable against Government, I do not feel persuaded to allow the plaintiff to recover only against the Union of India. I need only add here that the Dominion of Pakistan has not been sued even in Pakistan for this amount.

21. The next defense of the Union is that this Court has no jurisdiction to entertain and

[12] AIR 1951 SC 23

determine the suit. It is contended on behalf of the Union that no part of the cause of action arose within the jurisdiction. The plaintiff seeks to find jurisdiction of this Court on the basis of his pleadings in paragraphs 9, 10 and 11 of the plaint. In para.9 of the plaint, the plaintiff states that demands were made in the office of the D.C, Billing Centre, Fort William, Calcutta which was within the jurisdiction of this Court. Curiously enough, it is not pleaded that refusal was within

the jurisdiction of this Court. Paragraph 10 of the plaint rests contest by pleading that D.C, Billing Centre, Fort William, Calcutta which was dealing with this claim was within jurisdiction. But if the refusal by it is not pleaded, then I do not see how that founds the cause of action. Paragraph 11 of the plaint shows that notice under Section 80, Civil Procedure Code was issued from within the jurisdiction of this Court. But the place of issue of the notice under Section 80 is not important or relevant. To apply the notion of jurisdiction in respect of contracts formed by correspondence where both the places from where letters are Sent and where they are received are relevant to the notice under section 80, Civil Procedure Code , is to compare the incomparable. If Section 80, Civil Procedure Code is part of the cause of action, although it itself is required to state the cause of action and it requires only that the plaint shall state that such notice has been delivered or left, then the place of he receipt of that notice and not the place of its issue determines part of the cause of action for there is the express emphasis in the language of that section on the place of receipt of the notice.

On this analysis of paragraphs 9, 10 and 11 of the plaint, it will be found that in strict pleading no part of the cause of action is pleaded to have arisen within the jurisdiction. It is true that the plaint was instituted with leave under clause 12 of the Letters Patent in this case. But nevertheless even thereafter it is always open to the Court to find and I do find it in this case, that such leave was wrongly given. I, therefore, hold that this Court has no jurisdiction on the grounds claimed in the plaint. I need only add here that no jurisdiction is claimed for this Court because the Union of India either carries on business or resides within the jurisdiction of this Court. Even if such ground was claimed having regard to the numerous decisions, such ground would not have been upheld.

22. For these reasons, the suit fails and is dismissed but I make no order as to costs.

Suit dismissed.