

## **NAGPUR HIGH COURT**

Nagorao Govindrao Ayachit

Vs

Governor-General In Council

S.A. No. 205 of 1947

(R. Kaushalendra Rao, J.)

31.07.1950

### **JUDGMENT**

#### **R. Kaushalendra Rao, J.**

1. This appeal arises out of an action for recovery of money paid under mistake which is regarded as a particularly troublesome class of action. The appeal is by the deft. who lost in both the Cts. below.

2. The facts of the case are not in question. The applt. is the wahiwatdar of the Ayachit Temple, a very old temple in the city. One Dhanpalsingh alias Tatyrao Deshmukh used to visit the temple. In December, 1939, he told the applt. that he had to fulfil a vow by feeding one thousand Brahmins as he had been blessed with a son. The applt. was further told that Dhanpalsingh was new to the place and so he would get money from Raipur from his father-in-law to the applt.'s address. After a few days the applt. received three money orders totalling Rs. 1,772. Dhanpalsingh appeared the next day and collected the money from the applt. Baying that they would go to make purchases in the market for feeding the Brahmins. While they were going to the market Dhanpalsingh slipped away into a lane and disappeared with the money.

3. It was the applt.'s report to the police which ultimately led to the prosecution and conviction of Dhanpalsingh. It was discovered that the money orders were forged. Three money orders for Rs. 10, Rs. 69-3 and RS. 28-8 0 sent to different persons at Nagpur were forged for Rs. 600, Rs. 600 and 572-8-0 respectively as sent from Raipur by one Ramachandra Dewaji Tatyrao Deshmukh to be payable to the applt. Dhanpalsingh was awarded a sentence of 2 years R. I. and was ordered to pay a fine of Rs. 2000. Out of the fine, if recovered, the Ct. ordered the payment of Rs. 1772 to the City Post Office as compensation. Though Dhanpalsingh was sent to prison, the amount of fine could not be recovered from him. The suit out of which the present appeal arises was, therefore, instituted by the Governor-General in Council against the applt. for refund of money paid under mistake.

4. The only question is one of law whether the Respondent can in the circumstances of the case recover the amount of the money orders from the applt. According to the view of the learned

appellate Judge the words of Section 72, Contract Act, are unambiguous and leave no room to the applt. to escape from liability to refund the money. In support of his decision the Judge relied on *Kelly v. Solari*<sup>1</sup>, and *R. E. Jones, Ltd. v. Waring and Gillows, Ltd*<sup>2</sup>.

5. In *Kelly v. Solari*, (1841) 152 e. R. 24 : (9 m. and w. 54) (supra) Baron Parke expounded the principle of cases of refund on account of mistake in fact thus :

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a remand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Bayley J. in the case of *Milnes v. Duncan*<sup>3</sup>,) and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the pltf. meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

6. The principle enunciated in *Kelly v. Solari*, (1841) 152 e. r. 24 : (9 m. and w. 54) (supra) was affirmed by the House of Lords in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd*<sup>5</sup>. The facts in the case before the House of Lords were these. One B who was without means was indebted to the Respondents on account of furniture obtained under a hire-purchase agreement. B went to the Appellants . and falsely represented that he would on behalf of International Motors appoint the Appellants , as agents for the sale of a new car called "Roma" if they would give him an order and make a deposit. He further told the Appellants . the Respondents a firm of high standing were the principals who were financing the International Motors. The Appellants . placed with B an order for 500 Roma cars and gave him a cheque for #5000 payable to the Respondents The cheque was made over by B to the Respondents for clearing his own account under the hire-purchase agreement and taking the furniture. On discovering the fraud the Appellants . sued the Respondents for recovery of #5000 was paid under mistake of fact. The House of Lords held that under the rule laid down in *Kelly v. Solari*<sup>5</sup>, the Appellants . were entitled to recover the sum paid under the cheque. The decision was, however, not unanimous. Viscount Cave L. C. who was in the minority with Lord Atkinson was of the view that the Appellants . were precluded on the ground of estoppel from recovering the money. According to the Lord Chancellor there is a great body of authority in favor of the view that where a person to whom money has been paid by mistake has been misled by the payer's conduct and on the faith of that conduct has acted to his own detriment, the payer cannot in law-as surely he cannot in fairness-insist on repayment. 'Lord

Shaw of Dunfermline observed that though various attempts had been made not to attack the rule in *Kelly v. Solari*, (1841) 152 E. R. 24 : (9 M. and W. 54) (*supra*), but to set up a species of estoppel by reason of the carelessness of the person who was misled into the mistake in fact, that decision has remained of paramount authority as part of the law of England. Lord Sumner and Lord Carson held that the circumstances of the case did not give rise to any application of the doctrine of estoppel.

7. I am relieved from the necessity of considering the merits of the two lines of thought to be found in the decision of the House of Lords. Section 72, Contract Act, under which the question in the present appeal has to be decided has recently been considered by their Lordships of the P. C. in *Saiba Prasad v. Srish Chandra*<sup>6</sup>, The learned Dist. J., while deciding this case had not the decision of the P. C. before him. The decision makes it clear that the law in India governing actions for recovery of money paid under mistake is not the same as in England. Under the common law, it is well established that a person cannot recover money paid under a mistake of law, the reason given being that no one can plead ignorance of the law. See *William Whiteley Ltd. v. The King*<sup>7</sup>, and *Baylis v. London (Bishop)*<sup>8</sup>, According to their Lordships of the P. C. Section 72, Indian Contract Act, makes no distinction between mistakes of fact and mistakes of law. The decision of Sen J. in *Jagadish Prasad v. Produce Exchange Corporation, Ltd.*<sup>9</sup>, that a payment made under a mistake of law which is not the origin of a contract can be recovered under section 72 has been approved in *Shiba Prasad v. Srish Chandra*, AIR 1949 PC 297 : 76 I. a. 244 (*supra*). Further Lord Reid who delivered the judgment of the Board observed:

"It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a pltf. by estoppel or otherwise."

8. The limitation under which a claim for refund of money has to be dealt with under the common law was emphasized by the Ct. of Appeal in *Baylis v. London*<sup>10</sup> (*Bishop*) Under that law the legal and equitable considerations applicable to an action of this kind seem to have become so crystallized notwithstanding, the very liberal pronouncements of Lord Mansfield in *Lady Windsor's Case*; *Sedler v Evans*<sup>11</sup>, and *Moses v. Macferlan*<sup>12</sup> that it is now not possible for a Judge to invent any new doctrine not already recognized in the reported decisions. (See the judgment of Far well L. J. and Lord Sumner, then Hamilton L. J.). But no such limitation need hamper a Judge dealing with a case under section 72, Contract Act.

9. The pronouncement of Lord Reid not only gives countenance to the view expressed by the Lord Chancellor in *R. E. Jones Ltd. v. Waring and Gillow, Ltd.*<sup>13</sup>, but also permits the Ct. to hold that the circumstances in a particular case disentitle the pltf. to recover what was paid under mistake. It is not possible to devise a single formula which will cover all the cases in which the pltf. must be held to be disentitled to recover what was paid under mistake. Reference may, however, be made to *Solomon Jacob v. The National Bank of India Ltd., Aden*<sup>14</sup>, *Raghunath v. Imperial Bank of India, Ltd.*<sup>15</sup>, *China and Southern Bank Ltd. v. Te Thoe Seng*<sup>16</sup>, and *Punjab Industrial Agency, Ltd. v. Mercantile Bank of India, Ltd.*<sup>17</sup>, as examples of cases in which the pltf. failed to recover what was paid under mistake.

10. If the reason for the rule that a person paying money under mistake is entitled to recover it is

that it is against conscience for the receiver to retain it, then when the receiver has no longer the money with him or cannot be considered as still having it as in a case when he has spent it on his own purposes-which is not the case here-different considerations must necessarily arise.

11. It was not disputed before me that the applt. and the Respondent were both victims of fraud perpetrated on them by Dhanpalsingh. The applt. was used as but a conduit pipe by Dhanpalsingh for fraudulently obtaining the money from the Respondent. The applt. paid the money to Dhanpalsingh labouring under the very mistake which induced the Respondent to deliver the money orders to the applt. The learned counsel for the Respondent contended that the applt. had been careless in permitting Dhanpalsingh to make use of the address of the applt. and he should, therefore, bear the loss. I do not agree. I do not think, as far as carelessness is concerned, that the applt. can be charged with carelessness of any greater degree than that of the employees of the Respondent who made the forgery of the money orders possible and delivered more than one money order for a higher sum without there having been any corresponding remittance from Raipur. In any case the fact that the applt. permitted Dhanpalsingh to use the applt's address in no way influenced the Respondent in making the payment to the applt. On the contrary, because the Respondent paid the money to the applt. as though it had been sent from Raipur, the applt. was induced to pay the money to Dhanpalsingh. When the money was received, the applt. believed that the money was meant for Dhanpalsingh as told by him earlier. The conduct of the applt. is above board. The applt. was misled by the resp's conduct and on the faith of that conduct altered his own position before the discovery of the mistake. In my view, these circumstances are sufficient to disentitle the Respondent from recovering the money. The loss must, therefore, lie where it fell.

12. The appeal is allowed with costs in all the Cts. The decree of the lower appellate Ct. is set aside and the suit is dismissed.

Appeal allowed.

#### Cases Referred.

<sup>1</sup>(1841) 152 E. R. 24: (9 M and W 54)

<sup>2</sup>1926 a. C. 670: (95 l. j. k. b. 913)

<sup>3</sup>(1827) 6 B. and C. 671 : 108 e. R. 598

<sup>4</sup>1926 A. C. 670 : (95 L. J. K. B. 913)

<sup>5</sup>(1841) 152 e. r. 24 : (9 m. and w. 54)

<sup>6</sup>AIR 1949 PC 297 : (76 I. a. 244)

<sup>7</sup>(1909) 101 L. T. 741 at p. 745

<sup>8</sup>(1913) 1 ch. d. 127 at p. 137 : (82 L. J. Ch. 61)

<sup>9</sup> AIR 1946 Cal 245 : (80 G. L. J. 170)

<sup>10</sup>(1813) 1 Ch. d. 127 at p. 187 : (82 L. J. Ch, 61)

<sup>11</sup>(1766) 98 E. R. 34 : (4 Burr 1984)

<sup>12</sup>(1760) 97 E. r. 676 : (2 Burr 1005)

<sup>13</sup>(1926) a. C. 670 : (95 L. J. k. B. 913)

<sup>14</sup>42 Bom. 16 : (a I. r. (4) 1917 Bom. 119)

<sup>15</sup>50 Bom. 49 : (AIR 1926 Bom 66)

<sup>16</sup>3 Rang 477 : (AIR 1926 Ran 14)

<sup>17</sup>11 Lah. 667 : (AIR 1930 Lah 852)