Corporation Of Calcutta vs Hindusthan Construction Co. Ltd. on 1 March, 1972

Equivalent citations: AIR1972CAL420, AIR 1972 CALCUTTA 420, 1972 TAX. L. R. 2501

JUDGMENT

Salil Kumar Hazra, J.

1. The plaintiff Corporation of Calcutta is claiming in this suit repayment or refund of Rs. 40,871/- from the defendant, as money paid to the defendant by mistake of fact and law.

2. The defendant carries on business as engineer and contractor. In Janu-ary/March, 1952, the plaintiff Corporation of Calcutta invited tenders for completion of Dry Water Flow Channel for 'Dr. Dey's Kulti Outfall Scheme', for construction of channels. The defendant submitted tenders. Three contracts were entered into between the plaintiff and the defendant. The first contract was executed on April 29, 19.52, the second contract was executed on April 29, 1952 and the third contract was executed on November 1, 1952. The contracts were made as per specifications and tenders of the defendant. Tenders were sent along with forwarding letters of the defendant. Each of the forwarding letters of the defendant to the plaintiff provided as follows:--

> "We have not provided for sales tax in our quotation. Any sales tax payable on account of this work will be to your account."

It was expressly and/or impliedly agreed by and between the parties that in case any sales tax was payable in respect of the said contracts by the defendant to the State of West Bengal, the plaintiff will reimburse the defendant for the same. In terms of the said agreement between the parties the works of construction of dry water flow channel was carried on by the defendant and completed in the year 1953. The defendant, from time to time, submitted bills to the plaintiff, for sales tax which the defendant claimed to have paid to the State of West Bengal, in respect of the said contracts. The defendant stated that the total amount so paid by the defendant was Rs. 54,498.42 p. The particulars of the same will appear as hereunder:

> Number of the Bill Date of the bill Particulars of the contract AMOUNT H. C. O./OB/69 K. W. B./S. F. B. 15.3.54 Manufacture of bricks at Kantatola Rs. 22,229.75 paise H. C. O./OB/S 23.3.56 Remodelling Topsia-Kulti Road. Zone IV Rs. 3,570.94 ,, H. C. O./OB/1 23.3.56 D W F Channel 1-3 miles Rs. 15,483.81 ,, H. C. O./OB/2 23.3.56

-do- do- 4th mile Rs. 4,524.71 ,, H. C. O./OB/3 23.3.56

-do- do- 5th mile Rs. 4.531.73 ,, H. C. O./OB/4 23.3.56

-do- do- 6th mile Rs. 4,157.48 ,, Rs. 54,498.42 paise The defendant wrote to the plaintiff on January 10, 1957, demanding from the plaintiff an advance of Rs. 50,000/- against the sum of Rs. 54,498.42 paise, which the defendant stated that they have already paid as sales tax to the State of West Bengal. On September 27, 1957, the plaintiff advanced a total sum of Rs. 40,871/- to the defendant for sales tax, relying and/or acting on the representation of the defendant. In or about April 1958, the plaintiff discovered that the said payment of Rupees 40,871/- was made by mistake of fact and law. On September 25, 1958, the plaintiff wrote to the defendant asking for refund of the amount received by the defendant from the plaintiff on account of sales tax. The plaintiff enclosed with the said letter, a copy of the report and opinion of the law officer o£ the plaintiff, to the effect that the contracts entered into between the parties were construction contracts and bricks manufactured on Corporation land and supplied at a cost fixed under the contracts by the contractors and the Corporation for exclusive use of the work to be done, as such there was no liability to pay sales tax on such contract in view of the decision of the Supreme Court in and also the judgment of the Calcutta High Court in . According to the plaintiff the payment of Rs. 40,871/- was made by mistake and the mistake was discovered in or about April, 1958 after the decision of the Supreme Court reported in 1958 SC page 560 (Gannon Dunkerley's case), holding, that no sales tax is payable on construction contracts as stated above, became known to the plaintiff. As the said amount was not refunded by the defendant, this suit was instituted on 15th November, 1960. On February 10, 1961, the defendant filed its written statement. In the written statement the defendant denied that the payment of sales tax was made by the plaintiff by mistake of fact and law. The defendant stated the contract in respect of manufacture of bricks at Kantatola is not a construction contract within the meaning of the Supreme Court decision as alleged. The defendant denied that the plaintiff is entitled to claim refund. The written statement was amended on September 5, 1963. In the amended written statement the defence, inter alia, was that the defendant in good faith paid the sum of Rs. 54,498.42 p. as sales tax at the request and/or with the knowledge and/or consent of the plaintiff, who induced the defendant to believe that it was obligatory to pay sales tax as aforesaid and the plaintiff would reimburse the defendant for such payment. The plaintiff not only induced the defendant to pay sales tax as aforesaid but also paid the sum of Rs. 40,871/- as and by way of indemnification and/or reimbursement. Further the plaintiff was estopped from denying the validity of the payment of the sales tax and/or its liability to reimburse or indemnify the defendant for the same. The following issues were raised before me:

ISSUES :

1. Was the sum of Rs. 40,871/- advaced by the plaintiff to the defendant by mistake of fact and/or law on the representation of the defendant that the sales tax was payable in respect of the contracts as stated in the plaint? 1 (a). Was there any agreement that the defendant would pay sales tax to the State of West Bengal on account of the plaintiff in relation to the contract in suit? 2 (a). Was the mistake of fact or law discovered in view of the decisions of the Supreme Court holding that no sales tax was payable on construction contracts? 2 (b). Were the contracts between the parties and in any event the contracts for manufacture of bricks at Kantatola 'Construction contracts' within the meaning of the Supreme Court decision?

3. Has the consideration for payment of Rs. 40,871/- wholly failed or become illegal or void as alleged in paragraph 12 of the plaint?

4. Is the plaintiff estopped from denying the validity of the payment of sales tax made by the defendant and/or its liability to reimburse and/or to indemnify as pleaded in paragraph 11 (c) of the Written Statement?

5. Is the suit bad for non-joinder of parties as the State of West Bengal has not been made a party in this suit?

6. Is the suit barred by the law of limitation?

7. To what relief, if any, is the plaintiff entitled?

The real question in this suit is whether the sum of Rs. 40,871/- is refundable by the plaintiff as claimed in the plaint. The letters and documents between the parties are admitted and are included in Ext. A, the admitted brief of documents. The contracts between the parties entered into are also admitted. It seems to me that there is no proper scope of oral evidence in this case but since oral evidence has been given I am setting out hereunder the nature of oral evidence adduced by the parties to the suit. Two witnesses were examined on behalf of the plaintiff Corporation of Calcutta. The first witness is Bireswar Roy Chowdhury who was working as a sub-overseer in Dr. Dey's Kulti Outfall Scheme and the second witness is Ajit Kumar Rose, who is now assistant law officer of the Corporation of Calcutta. On behalf of the defendant only one witness was examined, Claud D'Souza who was serving in the defendant company in the accounts department and dealt with the sales tax matter of the defendant company. Bireswar Roy Chowdhury, Sub-Overseer in Dr. Dey's Kulti Outfall Scheme proved its three contracts which are admitted by the defendant Company. He said that the defendant Hindusthan Constniction Company was carrying on the works. He also stated that at the Corporation ground some bricks were manufactured by the defendant and the D.W.F. Channel was pitched with bricks. Some works on the roads were carried on. The soiling and edging of roads were carried on. The construction work was from first to 3rd mile of Dr. Dey's Kulti Outfall Scheme and also for 5th mile and 6th mile. The Hindusthan Constniction Company Ltd. supplied the labour. Bricks were manuafctured at Kantatolla brick-field belonging to the Corporation. The defendant had a work site not in the brick-field itself, but on the side of that brick-field they had a temporary construction where they had three work sites and the works of the channel were carried on by them

from this earth. The defendant did excavation of earth for carrying out the works. From this earth they manufactured bricks, and with these bricks they carried on the works of the D.W.F. Channel. The bricks were manufactured out of Corporation earth for use in constructing those channels.

3. The second witness on behalf of the Corporation, Ajit Kumar Bose stated before me that, he actually assisted the Law Officer in drafting the report. The report arose out of sales tax claimed by the defendant payable in respect of the contract entered into between the Hindusthan Constniction Company and the Corporation, The defendant Company claimed sales tax from the Corporation in respect of the contract entered into by them and there were three contracts. The witness came to know after the decision passed by the Supreme Court that the Corporation is not liable to pay sales tax in accordance with the contract. The decision was with regard to the case of Cannon Dunkerley & Co. and in the report of the Chief Law Officer this decision has been referred. As a result of the Supreme Court decision the position was that the Corporation is not liable to pay sales tax, on the contrary, it can recover sales tax paid to the defendant company by the Corporation of Calcutta by mistake. The contract being one contract for construction of road and the channel to be constructed pursuant to the outfall scheme framed by Dr. Dey, the Corporation was not liable to pay sales tax in respect of the three contracts. There was no sale of goods in these contracts. The contract being one or indivisible contract, sales tax was not payable. The bricks were utilised for preparation of the channel and for construction of the road. The bricks were manufactured out of earth obtained from the Corporation land. The payment of sales tax was made on September 27, .1957, before the decision of the Supreme Court in 1958. Prior to the decision of the Supreme Court the Corporation did not know or realise that sales tax was not payable. Payment was made by mistake to the defendant Company. He also stated that payment was made on September, 1957. The suit was filed on November 15, 1960. The High Court reopened after long vacation on November 14, 1960. On that date the Court was closed on account of the death of Mr. Hem Chandra Naskar who was a Minister of the Government of West Bengal. The Court re-opened on November 15, 1960 and on the re-opening day the suit was filed. The Court remained closed for long vacation from September 20, 1960 up to November 13, 1960.

4. The only witness for the defendant Company Claud D'Sonza admitted that the work that the defendant did was in connection with the Constriction of Dry Water Flow Channel. He also admitted that for the said works three contracts were entered into between the plaintiff and the defendant. Whatever sales tax the defendant claimed to have paid as sales tax was in respect of the works done in respect of the three contracts and under no other contract. He also admitted that the Corporation had asked the defendant to construct these channels and drains for the entire work and for that the entire work had been done by the defendant. In connection with that work, some bricks had to be used by the defendant and the bricks had been used for the completion of the construction work.

5. Mr. B. K. Ghose learned counsel for the defendant submitted as follows:--

> It was a term of the contract that the plaintiff would re-imburse the defendant in case any sales tax was payable in respect of the contracts. The defendant demanded advance payment of Rs- 50,000/- by the letter dated January 10, 1957 and the plaintiff advanced on September 27, 1957, a total sum of Rs. 40,871/-. The judgment

of Sinha, J. was delivered on January 18, 1957 and was (May Issue). Therefore, in May 1967 when the payment was made the plaintiff should have discovered the mistake of fact or law. Ignorance of law is no excuse. Money had been paid ignoring the law. In course of argument Mr. B.K. Ghose further submitted that there was a separate contract for manufacture of bricks at Kantatolla. The tender for manufacture of bricks on Corporation land at Kantatolla mentioned in the letter dated January 11, 1951 was accepted and there was a separate contract for the same. The defendant paid sales lax as agent of the plaintiff. The plaintiff is estopped from realising Rs. 40,871/- from the defendant. Section 72 of the Indian Contract Act does not apply. As the defendant parted with the money, therefore its money was realised from the plaintiff. The plaintiff is disentitled to recover what was paid by mistake, because the defendant has been misled by the plaintiff's conduct. On equitable consideration, the plaintiff is not entitled to refund. He relied on the following cases:

(1) (P.S. Machado v. Venkatarama Gopala Ayer).

(2) AIR 1946 Cal 245 (Jagadish Prosad Pannalal v. Produce Exchange Corporation Ltd.). (3) (Anath Bandhu Deb v. Dominion of India).

(4) 76 Ind App 244 = (AIR 1949 PC 297) (Shiba Prasad Singh v. Srish Chandra Nandi). (5) AIR 1951 Nag 372 (Nagorao Go-vindrao Ayachit v. Governor-General in Council). (6) ILR 42 Bombay 16 = (AIR 1917 Bombay 119) (Soloman Jacob v. National Bank of India Ltd., Aden). (7) (The State of Madras v. Cannon Dunkerley & Co.).

(8) (Mithan Lal v. State of Delhi).

(9) (Dukhineswar Sarkar & Bros. Ltd. v. Commercial Tax Officer).

6. Mr. Sankar Kumar Ghose the learned counsel appearing for the plaintiff submitted as follows:--

7. There are three contracts which are the subject-matter of the suit in respect of which the defendant alleged to have paid sales tax to the State of West Bengal. The plaintiff advanced Rs. 40,000 thinking that sales tax was payable on the three contracts. These are all work contracts or construction contracts and sales tax is not payable on such contracts. This point has been finally decided in the judgment of the Supreme Court in . Previous to this judgment there was a judgment of the Calcutta High Court by Sinha J. in to the same effect. But before the judgment of the Supreme Court there were different views of different High Courts and the matter was finally decided by the Supreme Court as stated above. Sales tax was not paid by the defendant as an agent of the plaintiff but as dealer under the Bengal Finance (Sales Tax) Act, 1941. The plaintiff paid sales tax in view of the agreement between the parties upon demand made by the defendant for payment of sales tax thinking that sales tax was payable in respect of works under the contracts, but the plaintiff realised after the decision of the Supreme Court that in the instant case sales tax was not payable. The amount paid as such sales tax by the plaintiff was paid by mistake of fact and law, and Section 72 of

the Indian Contract Act is attracted. There was no question of any waiver, estoppel or limitation. Equitable consideration is no bar to the relief claimed by the plaintiff for refund as Section 72 of the Indian Contract Act applies in this case. Mr. Sanker Chose in support of his submissions very ably relied on and referred to the relevant passages in the several judgments in the following reported cases: 76 Ind App 244 = 54 Cal WN 1 = AIR 1949 PC 297; (Sri Shiba Prasad Singh v. Sris Chandra Nondi), Sales Tax Officer Bana-ras v. Kanhaiyalal, (1959) 10 STC 57 (All); Sales Tax Commr., U. P. v. Sada Sukh Vyopar Mondal, AIR 1916 Nag 61; Govind v. Mt. Chandrabhaga, AIR 1948 Nag 110; Nainsukh Das v. Goverdhandas, AIR 1927 PC 151; John Agabog v. James Colder Robinson, Hem Nolini v. Isolyne Saroj Bashini, Steuart and Co. Ltd. v. Mackertich, (1968) 22 STC 524 (SC); Gill & Co. Pvt. Ltd. v. Commercial Tax Officer, Hyderabad.

Upon due consideration of the evidence adduced and the arguments made on behalf of the respective parties, my findings are as follows:--

> The execution of the contracts between the parties are admitted. The contracts between the parties are included in Exts. B, C & D. The defendant claims to have paid the sum of Rs. 53,036.88 as sales tax on contracts for construction of D. W. F. channels as will appear from the letter of the defendant dated July 15, 1959. The payment of sales tax was made by the defendant on November 3, 1952, October 6, 1953, October 28, 1954 and November 3, 1955. There is nothing to show, before me, that a separate contract for manufacture of bricks at Kantatolla was made. The defendant did not prove any such contract. Only three contracts are admitted and proved before me and these three contracts are included in Exts. B. C & D. The contract included in Ext. B is dated April 29, 1952. In this contract it is mentioned that tender dated March 15, 1952 was accepted. Another contract is dated April 29, 1952 which is Ext. D. In this contract it is mentioned that tender dated March 18, 1952 was accepted. The third contract is dated November 1, 1952 which is Ext. C. In this contract it is mentioned that tender dated January 25, 1952 was accepted. Therefore, the tender mentioned in the letter dated January 11, 1951 for manufacture of bricks at Kantatolla was not separately accepted and there was no separate contract for manufacture of bricks at Kantatolla. Use of bricks was part of the works to be done under the contracts. This will appear from the Schedule of rates and tender form which contain the description of the works including the works for excavation, lining and ancillary works. Manufacturing of Bricks at Kantatolla was required for all the three contracts. The works included brick soling, brick edge lining and so forth. Claude D'Souza, witness called by the defendant admitted that in connection with the works, certain bricks had to be used by the defendant. The bricks that were used by the defendant were manufactured at Kantatolla on Corporation land and on sand supplied by the Corporation. All works were done under these three contracts. The contracts were for construction of channel and drains (D'Souza Oq 53 to 70). Therefore, in view of the fact admitted before me, there is no doubt that the contracts were contracts for construction, and manufacture of bricks was made for the use of construction work and the using of bricks was part of construction contracts. There was no occasion for sale of bricks separately but the bricks

manufactured at Kantatolla were used for construction work and became parts of the entire indivisible works done by the defendant.

8. The principles of law laid down in and in are clearly attracted and no sales tax was payable on the three contracts. These are all construction contracts. When the assessment orders were passed by the assessing authorities, and when payment of sales tax was made by the defendant in terms of the assessment orders, the law on the point was not clear; and the view prevailed on interpretation of West Bengal Sales Tax Act, that construction contracts Were assessable under the Sales Tax Act and the materials used for carrying out the contract of construction, in case of structural contract were also assessable for payment of sales tax. However, after the decision of the Supreme Court in affirming the decision of the Calcutta High Court in it is clear that sales tax could not be assessed on construction contracts. Materials used for construction contract cannot be separately assessed for payment of sales tax. Therefore, when payment was made by the Corporation of Calcutta on September 27, 1957 to the defendant the payment was made by mistake of law and fact. The same mistake was made by the defendant when payment was made by the defendant to the Slate of West Bengal. Both parties were labouring under the same mistake inasmuch as on construction contract the sales tax was not payable.

9. The next question which arises is whether in the instant case Section 72 of the Indian Contract Act will be applicable. The leading case on this point is the case of Sri Sri Sibaprosad Singh v. Maharaja Srish Chandra Nandy, decided by the Privy Council in the year 19-19 and reported in 76 Ind App 244 -- ATR 1949 PC 297 = 54 Cal WN 1. With regard to the argument made by Mr. B. K. Chose that payment was made by mistake of law and as such it is not recoverable, this decision of the Privy Council is a complete answer. Previous to the Privy Council decision, there were conflicting views of the learned Judges in India. Harries, C. J., took the view following the English principles of law that money paid under mistake of fact is recoverable; but generally speaking, money paid under mistake of law is not recoverable. In the opinion of Harries, C. J., under the Indian Contract Act though the same deals with the effect of mistake of fact and law upon a contract there is no express provision relating to the effect of payment made under such mistake. The view of Harries, C. J., was that the law relating to the matter is the same in this country as it is in England. Lort-Williams J., in 39 Cal WN 174 (Katherine Stiffles v. Carr Mackertich) also took the same view that when money is paid voluntarily with full knowledge of all facts, it cannot be recovered on the ground that payment was made under a mistake of law. Sen J. in a case reported in AIR 1916 CAL 245, disagreed with the above view of Lort-Williams J, Sen J., took a contrary view in interpretation of Section 72 of the Indian Contract Act and held that English Common Law Rule that payment made under mistake of law is not recoverable can have no application in India, where there is a statute governing this question. The Privy Council in Sibnpro-sad's case, 76 IA 244 = (AIR 1919 PC 297), agreed with the view of Sen J., Therefore, prima facie, under the farts of this case the law laid down in Section 72 of the Indian Contract Act is attracted.

10. The only other points which remain to be considered are whether there are other circumstances which disentitle the plaintiff to recover the sum which was paid y mistake of law and fact. It is to be noted that in the Privy Council judgment in Sibaprosad's case, AIR 1949 PC 297, their Lordships of the Privy Council added that. "Their Lordships' judgment does not imply that other sum paid under

a mistake is recoverable, no matter what their circumstances may be. There may, in a particular case, be circumstances which disentitle a plaintiff by an estoppel or otherwise". The Privy Council used very careful and guarded expression as to the circumstances which disentitle a plaintiff to get refund. The Privy Council used the words "By estoppel or otherwise." What is the meaning of the words "or otherwise'? The law as laid down in Sibaprosad's case was approved and explained by the Supreme Court of India in Kanhiyalal Mukundlal's case, It was held by the learned Judges of the Supreme Court at p. 143 of the report that "on a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies bad been paid voluntarily, subject however to the question of estoppel, waiver, limitation or the like." In other words, the Supreme Court used the expressions "waiver, limitation or the like", in place of the words "or otherwise" which occurred in the judgment of the Privy Council (76 Ind App 244 at p. 259 = AIR 1949 PC 297)."

11. In the judgment of the Supreme Court, it has also been held at p. 142 that in case where Section 72 of the Indian Contract Act applies if payment was made voluntarily, that would not disentitle the plaintiff from receiving this amount. Equitable consideration is again no bar for such relief. Their Lordships of the Supreme Court held at page 143, that no question of estoppel can ever arise when both the parties are labouring under a mistake of law and one of the parties is no more to blame than the other. An estoppel arises only when the plaintiff by his act or conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment; it is only then that the plaintiff is estopped from setting up a different state of facts.

12. The decision of the Supreme Court in has been explained by the Allahabad High Court in the case in (1959) 10 STC 57 (All). It was held by the Allahabad High Court in Sadasuk's case that a person, who had paid money to another by mistake, be it a fact or law, is entitled to get back the money under Section 72 of the Indian Contract Act, 1872. His title to get back the money may, however, be lost on account of certain circumstances like estoppel, waiver, limitation or the like; but no equitable consideration can take away his title to the refund of the money.

13. Now, the only question If whether under the facts and circumstances of the instant case, the plaintiff is disentitled to get refund by reason of estoppel. waiver, limitation or the like. It has been proved before me, that payment of sales tax was made by mistake which is common to both the parties. The letters dated July 15, 1959 and October 3, 1958 by the defendant to the plaintiff clearly show that both the parties were labouring under the same mistake. There is no question of estoppel in this case because estoppel must be of fact and not of law. The decision in AIR 1916 Nag 61, relied upon by Mr. Saiikar Ghose is an authority for the well established principle that representation in order to work as an estoppel may not generally be a material statement of fact. The same principle was also enunciated in AIR 1948 Nag 110 at p. 116 para 54. "In order to operate as an estoppel the representation must be of fact and not a matter of law." In the instant case, there is no question of estoppel because sales tax was not paid on any representation made by the plaintiff; but the defendant paid sales tax to the State of West Bengal as the defendant was assessed as 'dealer'. The

taxing authorities passed the assessment order and required that the defendant should pay as dealer. There was no representation by the plaintiff to make payment of sales tax. Therefore, there is no question of estoppel in this case (see observation of Lord Phil-limore in AIR 1927 PC 151 at p. 156, John Agabog Vertannes v. James Colder Robinson)--also . When both the parties are acting under a common misapprehension there could be no estoppel until the position was cleared up. The defendant in the instant case paid sales tax before realisation of money as sales tax from the plaintiff. After the decision of Supreme Court it was made clear beyond all doubts, that sales tax was not payable on such contracts. Before the decision of the Supreme Court the law on this point was not clear and the parties were labouring under the view that sales tax was payable. The plaintiff paid to the defendant after its demand for payment of sales tax. This is a case where both parties were labouring under the same mistake and again for this reason there is no case of estoppel. Estoppel arises when the plaintiff by his act or conduct makes a representation to the defendant that certain state of facts exists which is acted upon by the defendant to his detriment, it is only then that the plaintiff is estopped from setting up a different state of facts (see . But in the instant case it is the defendant who demanded from the plaintiff that the defendant had already paid sales tax and the same should be paid by plaintiff. It was not a case that the plaintiff was making representation to the defendant that sales tax should be paid and the defendant acted upon any such representation. There was no such representation by the plaintiff at all. Further there was no question of estoppel because the plaintiff was labouring under a mistake of law and fact that such money was due and payable as sales tax. There is no question of waiver in this case, because, immediately after the mistake became known to the plaintiff demand was made by the plaintiff for refund of sales tax. There is no question of Limitation in this case, because the suit was instituted within three years from the date of payment by the plaintiff to the defendant. The payment was admittedly made on September 27, 1957. The High Court reopened after the long vacation on November 15, 1960. The Court was closed on November 14, 1960 due to the death of Shri Hem Chandra Naskar, who was then a minister of State of West Bengal. As November 14, 1960 was declared a holiday, the suit was filed on November 15, 1960, the date when the Court reopened after the long vacation.

14. I will now deal with the cases relied upon by Mr. B.K. Ghose. The cases cited by Mr. B.K. Ghose do not help him and only two cases need be referred to in this connection. The judgment of R. Kaushclendra Rao J., reported in AIR 1951 Nag 372 at p 374, relied upon by Mr. B.K. Ghose, before me, was disapproved by the Supreme Court in . It was held by the Supreme Court that the question of equitable consideration cannot be imported when Section 72 of the Indian Contract Act applies.

15. The other case relied upon by Mr. B.K. Ghose is . In this case it was held by P. B. Mukharji J. (as he then was) that, "ignorance of law is not mistake of law. It cannot be the intention of Section 72, that wherever and whenever and however a mistake of law occurs, a claim may be made under Section 72. Deliberate disregard of law is not mistake of law. It is not open to the plaintiff to say that he did not know the effect of Section 175(3), Government of India Act, 1935, When money was paid voluntarily with full knowledge of all the facts it cannot be recovered on the ground that payment was made under a mistake of law.' In the case before P. B. Mukharji J. (as he then was) the Learned Judge did not grant relief either under Section 70 or under Section 72 of the Indian Contract Act. This case was decided in the year 1955. In my view the subsequent decision of the Supreme Court in the year 1958 enunciated the law on this point differently. It was held by the Supreme Court that the

term "mistake" used in Section 72 of the Contract Act has been used without any qualification or limitation whatever and comprised within its scope a mistake of law as well as a mistake of fact. There is no warrant for ascribing a limited meaning to the word 'mistake' as used therein. There is no conflict between the provisions of Section 72 on the one hand and Sections 21 and 22 of the Contract Act on the other. The principle is that if one party under mistake whether of fact or law pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitled the party paying money to recover back from the party receiving the same."

16. Both P. B. Mukharji, J. (as he then was) and the learned Judges of the Supreme Court, relied on and referred to the judgment of the Privy Council in Sina Prosad's case, 76 Ind App 244 = (AIR 1949 PC 297), but interpreted the principles of law in Section 72 of the Indian Contract Act differently. Unfortunately, the decision in was not referred to in the judgment of the Supreme Court in However, I am bound to follow the law laid down by the Supreme Court.

17. From the documents disclosed by the defendant, it appears that the defendant was a 'dealer' under the Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941) and as such dealer the defendant paid sales tax for the gross turnover during the accounting year. The defendant did not pay sales tax as agent of the plaintiff. There cannot be any liability of the plaintiff Corporation of Calcutta to pay sales tax to the State of West Bengal because the plaintiff Corporation is not a dealer within the meaning of Bengal Finance (Sales Tax) Act. All that the Corporation did was to enter into agreements with the defendant that if any sales tax was payable for the work then the Corporation will pay the same to the defendant. The decision in (1959) 10 STC 57 (All.) at p. 65, is a clear authority for the proposition that the dealer is not the agent of the customer. The defendant did not collect tax from the plaintiff as agent of the State. A point has been taken by Mr. B.K. Ghose that the State of West Bengal should have been made a party. It is clear that the plaintiff is asking for refund of sales tax from the defendant on the ground that the money was paid by the defendant by mistake. There is no question of any repayment from the State of West Bengal because the plaintiff had not paid to the State of West Bengal. As such the State of West Bengal is not a necessary party in this suit for refund under Section 72 of the Indian Contract Act. The defendant claims that it had paid sales tax relating to the construction contracts and the taxing authorities had realised the same. If that is so, the defendant can Lake steps to quash the assessment order or such other steps for refund against the Shite, stating that such tax was paid by mistake. The decision of the Supreme Court reported in (1968) 22 STC 524 (Gill & Company Private Limited v. Commercial Tax Officer, Hyderabad III) is an authority for the proposition that such refund would ordinarily be made by the State- In the premises, I hold that the plaintiff is entitled to refund of payment of Rs. 40,871/-from the defendant.

18. I will answer the Issues raised in this case as hereunder:

Issue No. 1 :-- Yes.

Issue No. 1 (a):--No. There was no agreement that the defendant would pay sales tax on account of the plaintiff in relation to the contracts in suit. The defendant paid sales tax as dealer and not as agent of the plaintiff.

Issue No. 2 (a):-- Yes. The mistake was discovered after the decision of the Supreme Court holding that no sales tax was payable on construction contract.

Issue No. 2 (b) :-- Yes. The contracts between the parties were construction contracts within the meaning of the decision of the Supreme Court.

Issue No. 3 :--- Yes.

Issue No. 4 :-- No. There is no question of estoppel against the plaintiff. There is no question of any liability of the plaintiff to reimburse or indemnify the defendant as the contracts were construction contracts and sales tax was not payable.

Issue No. 5 :-- No. The State of West Bengal is not a necessary party in this suit.

Issue No. 6 :-- No. The suit is not barred by the law of limitation.

Issue No. 7 :-- The plaintiff is entitled to refund of the money paid or advanced, namely, Rs. 40.871/-.

19. At the end of the argument in this case, Mr. Sankar Chose, the learned counsel appearing for the plaintiff submitted that I should grant to the plaintiff ad interim interest from the date of the institution of the suit till the date of the decree. Whether in the circumstances of a particular case ad interim interest should be granted or not is a matter of discretion and this discretion has to be exercised judicially on the facts and circumstances of each case. This is clear from Section 34 of the Code of Civil Procedure. I do not think I may be justified in granting ad interim interest in respect of the sum of Rs. 40,871/- paid by the Corporation to the defendant by mistake of fact and law. In the instant case both the parties were labouring under a mistake in thinking that sales tax was payable. The defendant was assessed as a dealer and the defendant's case is that it paid sales tax after such assessment. The assessing authority also did so in view of the law of sales tax as known and understood by them at the point of time when assessment order was passed. The Supreme Court finally decided in 1958 in Gannon Dunkerley and Co.'s case, that in case of construction contract no sales tax was payable. Before the decision of the Supreme Court the defendant demanded that in view of the contract between the parries the plaintiff must pay sales tax to the defendant which the defendant has paid to the assessing authority and the plaintiff paid the same. After such payment the plaintiff claimed for refund.

20. The suit was contested by the defendant on several points. One of the points urged by the defendant is that because there was manufacture of bricks by the defendant for the construction work, sales tax was payable. This issue is now decided in tin's suit against the defendant After the institution of the suit long time has elapsed. Even when the suit appeared in my list and was called

on for nearing the plaintiff's solicitor was not ready to go on with the suit and asked for time. The brief of documents was prepared after I had granted time to the plaintiffs solicitor to prepare the same and this was done, when I insisted that the old matters must be heard and no further adjournment would be given. After the suit was instituted the defendant was contesting the suit on the ground, inter alia, that the amount paid by the plaintiff was not refundable.

21. It is true that the plaintiff has succeeded on the point that Section 72 of the Indian Contract Act applies in this case and the plaintiff is entitled to get refund of the sum of Rs. 40,871/- paid by mistake; but that does not mean that the plaintiff should get ad interim interest during the pendency of the suit. Under Section 72, a person to whom money has been paid by mistake must repay it. The section does not say that repayment should be made with interest. There is no question of any interest before filing the suit in this case. The plaintiff cannot get ad interim interest as a matter of course. I cannot disregard the fact that the defendant had parted with its money before receiving payment from the plaintiff labouring under the same mistake. The question of realisation of money paid by the defendant from the State of West Bengal would arise at a Inter stage, if and when, the defendant would take proper proceedings for recovery of the amount against the Sales Tax Authorities. It may be that the defendant may not get any interest from the State. The defendant could not get the benefit of the money which was paid by plaintiff; because, the defendant has also parted with similar amount by making payment to the taxing authorities. Therefore, I do not think that T will be justified in allowing the plaintiff any ad interim interest during the pendency of this suit.

22. The defendant could not get the benefit of the money because the defendant had to pay sales tax. It may be, that the defendant parted with the money before realisation of the same from the plaintiff, but since the defendant had paid more than Rs. 40,871/-, but did not in effect have the use and benefit of the money to wit, Rs. 40,871/- realised from the plaintiff, I do not think I will be justified in allowing any ad interim interest to the plaintiff during the pendency of the suit in respect of the said sum of Rs. 40,871/-.

23. Mr. Sanltar Chose cited before me, a number of authorities to establish his client's case that I should grant ad interim interest from the date of institution of the suit to the date of the decree. Authorities cited by him are:

AIR 1932 Born 319 (Parashram v. Secretary of State).

49 Bom LR 296 (Abdul Hussain Mohasinali Bohri v. Fazalbhai Taheralli Bohri).

AIR 1919 Cal 144 (Sarajubala Debi Chowdhurani v. Saradanath Bhattacharjee).

AIR 1943 Nag 240 (Yadaorao Ganpatrao Kadu v. Ramrao Balasaheb Dhote).

(Ashoka Bus Transport Corporation Bhilwara v. Appellate Tribunal of State Transport Authority).

AIR 1946 Bom 1 at p. 7 (Anandram Mangturam v. Bholaram Tanumai).

(Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd.).

24. Under different facts and circumstances which arose in the several cases cited by Mr. Sankar Chose, the Court in, the exercise of its discretion allowed ad interim interest which will appear from the above cases. In my view, the cases cited are no authority for the proposition that under the facts and circumstances of the instant case which I am now trying I am compelled to order payment of ad interim interest, although in my view under the facts of this case the plaintiff should not get ad interim interest. After all the question of payment of ad interim interest is a question of discretion and has to be determined in the light of the facts and circumstances of each particular case. However, since Mr. Shankar Kumar Ghose has cited, so many authorities, I will discuss some of them as hereunder. In AIR 1932 Bom 319 at p. 325 it was argued by the plaintiffs advocate that although interest has not been specifically claimed in the plaint under Section 34 of the Code of Civil Procedure read with Order 7, Rule 7 of the Code of Civil Procedure it is within the discretion of the Court to award it. The Special Government Pleader said that the matter was not free from difficulty but the learned Judges awarded interest at 6 per cent per annum from the date of the institution of the suit till realisation in exercise of their discretion. Therefore, this case reaffirms that the Court has discretion to grant ad interim interest and under the facts and circumstances of the case the Court did grant it.

25. The next case relied upon by Mr. Ghose is 49 Bom LR 296. This was a suit on a promissory note. No pendente lite interest was allowed by the trial Court because the promissory note did not make any specific mention about interest. There were two promissory notes. The first promissory note did not contain any provision regarding interest and though the second promissory note did contain such a term the plaintiff had not sent the statements of accounts to the defendants as required by Section 3 of the Central Provinces and Berar Money Lenders Act. The Court did not allow any interest pendente lite or interest after the date of the decree but has not given any reason for refusing to award it.

26. The learned Judges of the High Court held that the Court below was in error in holding that the plaintiff is not entitled to any interest at all on the promissory note dated June 27, 1935 merely becaxise that promissory note did not make any specific mention about interest. It has ignored the provision of Section 80 of the Negotiable Instalments Act which required that in a case like this interest shall be calculated at the rate of 6 per cent per annum. The promissory note in this case was in fact a fresh contract or a novation of the old contract. The suit being one for the enforcement of such a contract the latter part of the definition of "moneylender" contained in Section 2(b) of the Act was not attracted, and the plaintiff was, therefore, entitled to interest from the date of the execution of the promissory note till the date of the suit.

27. No reason has been given for disallowing interest pendente lite or interest subsequent to the date of the decree. No doubt, the granting of such interest is in the discretion of the Court but that discretion had to be exercised judicially. Ordinarily, the Court does not disallow interest to a plaintiff in such cases unless he by his conduct renders himself disentitled to the grant of such interest. The Only suggestion made by the learned counsel for the defendants is that the plaintiff delayed the filing of the suit and also that instead of suing straightway in the Court at Khumgaon

within whose jurisdiction the defendants reside, he wrongly instituted the suit at Nagpur. In my view, interest pendente life was allowed in this case under entirely different circumstances and this case is again an authority for the proposition that granting of interest pendente lite is in the discretion of the Court. I do not think that the facts of the instant case has any relevance to the facts of the case cited by Mr. Ghose.

28. The next case cited is (Thakur Umed Singh v. Amolakchand). This is an appeal arising out of a suit for recovery of price of goods sold and delivered. The Court belnw disallowed interest but did not give any reason for such disallowance. The learned Judges followed (Ghessa Lal v. Mootia) and held that a creditor would be entitled to pendente lite and future interest unless there were reasons why he should be deprived of it. Where the courts below disallow such interest they must indicate the reasons for the conclusion to which they have come, so that the appellate Court may be assured that the discretion which undoubtedly vests in the Courts below in this regard has been ever-cised judicially and on correct principles.

29. T do not think that this case also helps Mr. Sankar Chose that I must grant ad interim interest.

30. AIR 1910 Born I at p. 7 reaffirms that under Section 34, it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for payment of money. in my view, does not help the plaintiff in this respect. I do not agree with the submissions of Mr. Ghose that whenever there was a decree for payment of money, ad interim interest has to be granted. It will depend upon the facts of each case and, in my view, this is not a ease where I shall grant ad interim interest. However, I shall grant interest on decree. I do not think I shall discuss the large number of authorities on the same point which was pressed by Mr. Ghose as it is not necessary. In the premises, there will be a decree for Rs. 40,871/-, interest on decree at the rale of 6% per annum and costs.

31. There will be no order as to payment of reserved costs. The operation of the decree be stayed for four weeks.