
(1942) 02 MAD CK 0026
In the Madras High Court

Sowdra Bai and Others

APPELLANT

Vs

Saraswathi Ammal

RESPONDENT

Date of Decision : 06-02-1942

Acts Referred:

Citation : AIR 1942 Mad 590 : (1942) ILR (Mad) 669 : (1942) 55 LW 233 : (1942) 1 MLJ 441

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—On the 7th January, 1938, one Gangadhara Mudali falsely representing himself to be Govindaraja

Mudali, the owner of a house and land known as No. 5, Muthia Naicken Street. Purasawalkam, Madras, induced the appellants to lend to him Rs.

2,000 on a mortgage of the property. The real owner had no knowledge of the fraud. As Gangadhara Mudali had no interest in the property the

mortgage deed of course conferred no title. Again falsely representing himself to be Govindaraja Mudali, Gangadhara Mudali induced the

respondent on the 11th February, 1938, to advance Rs. 3,500 on a second mortgage of the property. Out of the Rs. 3,500 which the respondent

agreed to advance she was to pay to the appellants Rs. 2,000 in discharge of the first mortgage. V. G. Sambasivamurthi Mudali, the son of

Govindaraja Mudali, was a party to this second transaction, but again his father had no knowledge of what was happening. Believing that

Gangadhara Mudali was Govindaraja Mudali and that the appellants were first mortgagees of the property the respondent paid to them, the Rs.

2,000. When the fraud was discovered the respondent instituted the present suit in the City Civil Court to recover from the appellants the Rs.

2,000 as a payment made in mistake of the facts. The case was tried by the Principal Judge of the City Civil Court, who held that the respondent

had paid the Rs. 2,000 to the appellants under a mistaken belief that the mortgage executed in her favour had been executed by the true owner

and it was that mistake which had induced the payment. Consequently he granted the respondent a decree for the return of the payment of Rs.

2,000. The appeal is from this decision.

2. Section 72 of the Indian Contract Act states:

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

There is here no ambiguity. If money is paid to a person by mistake he is bound to repay it. That the Rs. 2,000) was paid by the respondent to the

appellants in the mistaken belief that they were prior mortgagees is not open to question and if the words used in Section 72 are to be given their

ordinary meaning the decree must stand. For the appellants it is, however, contended that the case falls within the principle laid down in *Aiken v.*

Short (1856) 1 H. & N. 210 : 156 ER. 1180, and that under the English common law a payment made by mistake cannot be recovered unless

there is some privity between the payer and the payee. Consequently it is said that the section should be read subject to the qualifications imposed

by the common law. I will discuss these contentions presently but before doing so I consider it desirable to quote the judgment of Parke, B, in

Kelly v. Solari (1841) 9 M. & W. 54 : 152 E.R. 24, as it appears to me that Section 72 of the Contract Act embodies the principle there stated, a

principle which was approved of by the House of Lords in *R.E. Jones Ltd. v. Waring & Gillow Ltd.* (1926) A.C. 670 In *Kelly v. Solari* (1841) 9

M. & W. 54 : 152 E.R. 24, Parke, B, said:

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 demand 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 Ms power, seems, from the cases cited, to have been founded on the dictum of Mr Justice Bayley, in the

case of. *Milnes v. Duncan* (1827) 6 B. & C. 671 : 108 E.R. 598; 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 plaintiff 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.

In his speech in *R.E. Jones Ltd. v. Waring & Gillow Ltd.* (1926) A.C. 670, Lord Shaw quoted in full the judgment of Parke, B., and it was

accepted as governing the case. There a gross fraud had been perpetrated, as in this case.

3. The facts in *Aiken v. Short* (1856) 1 H. & N. 210 : 156 ER. 1180, have nothing in common with the facts here. In 1846, one Edwin Carter,

made a will by which he gave his property to his eight brothers and sisters in equal shares. In 1847, the testator died. In 1850, one of the brothers,

George Carter, borrowed £200 from one Francis Short, who died in 1853. The suit was by Short's widow who was the sole executrix of his

will. George Carter was also indebted to a bank to which in 1855, he conveyed his interest in the estate of Edwin Carter subject to charges

previously created by him. As security for the loan of £200 obtained from Short, George Carter had mortgaged his interest in his brother's

estate. After the conveyance to the bank the executrix of the will of Short applied to George Carter for payment of the £200. He referred her

to the bank; which thereupon paid her the £200 in accordance with the terms of the conveyance which it had obtained from George Carter.

After all this had happened, a later will of Edwin Carter was produced, and under it George Carter merely received an annuity of £100 which

was to cease upon his making an assignment. The bank then applied to the executrix for repayment of the £200, and as she refused to comply

with the demand a suit was instituted against her. It was held that the bank was not entitled to recover the money. In the course of his judgment

Bramwell, B., said:

In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the

person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.

It is to be borne in mind that George Carter owed ₹200 to the estate of Francis Short and in paying the executrix the bank was discharging a

lawful debt. In the present case both the appellants and the respondent were victims of a gross fraud.

4. The Court of Appeal applied *Aiken v. Short* (1856) 1 H. & N. 210 : 156 E.R. 1180, in *Morgan v. Ashcroft* (1938) 1 K.B. 49, but *Greene*.

M.R., was disposed to think that the observations of Bramwell, B., in *Aiken v. Short* (1856) 1 H. & N. 210 : 156 E.R. 1180, could not be taken

to be an exhaustive statement of the law. He considered that they must be confined to cases where the only mistake is as to the nature of the

transaction.

5. In the course of his argument on behalf of the appellants, Mr. C. S. Venkatachariar referred us to *Watson v. Russell* (1864) 5 B. & S. 968 :

122 E.R. 1090. In that case one Keys chartered a vessel belonging to the defendant, the hire being payable every four weeks in advance. It was a

condition of the charter party that in the event of non-payment of the hire, the owner was to be entitled to retake his ship. A sum of ₹120 was

due and Keys applied to the plaintiff to assist him. Thereupon the plaintiff handed Keys a cheque for ₹60, made payable to the defendant or

order, on the understanding that Keys should inform the defendant that the cheque was given on the condition that the vessel should be allowed to

proceed on a certain voyage. Keys paid the cheque to the defendant, but did not tell him of the condition. As the whole of the ₹120 was not

paid, the defendant took possession of his ship. Thereupon the plaintiff sued the defendant to recover the money. It was held that as the defendant

received the cheque without notice of any condition and for valuable consideration, the plaintiff was not entitled to recover, It may be mentioned

that in *R. E. Jones Ltd. v. Waring and Gillow Ltd.* (1926) A.C. 670., where *Kelly v. Solari* (1841) 9 M. & W. 54 : 152 E.R. 24, was applied.

Lord Shaw observed that *Watson v. Russell* (1864) 5 B. & S. 968 : 122 E.R.

1090, applied to a different set of circumstances and had no real bearing upon cases depending upon payments having been made under a mistake in fact. The class of cases ruled by *Watson v. Russell* (1864) 5 B. & S. 968 : 122 E.R. 1090, was in his opinion confined solely to that of payments made under a condition not communicated to the receiver, a condition as to the future conduct which it was hoped, expected or stipulated should follow the payment.

6. It is not necessary to decide whether under Indian law *Aiken v. Short* (1856) 1 H. & N. 210 : 156 E.R. 1180, and *Watson v. Russell* (1864) 5

B. & S. 968 : 122 E.R. 1090, would apply in cases where the facts were similar. It is sufficient to say that the facts in the present case are not

analogous to the facts in either of those two cases. The observations of Parke, B., in *Kelly v. Solari* (1841) 9 M. & W. 54 : 152 E.R. 24, are

directly in point and they fit in with Section 72 of the Contract Act.

7. In support of the contention that if the respondent is entitled " to proceed, she must show some privity between her and the appellants, stress

has been laid on this passage in Addison's Law of Contracts (11th Edition 462):

It is necessary in order to maintain this action, that a certain amount of money belonging to one person should have improperly come into the hands

of another and that there should be some privity between them.

This statement is based on *Watson v. Russell* (1864) 5 B. & S. 968 : 122 E.R. 1090 and *Colonial Sank v. Exchange Bank of Yarmouth, Nova*

Scotia (1885) 11 A.C. 84. There is nothing in Section 72 to suggest that it should only be applied when there is privity between the payer and the

payee; but assuming that this is essential, I consider that the condition is fulfilled here. The appellants thought that they were the first mortgagees of

the property and the respondent thought she was the second mortgagee who was discharging a prior encumbrance. That there is privity between a

first and second mortgagee has already been accepted by this Court. See *Askaram Sowkar v. Venkataswami Naidu* (1920) 40 M.L.J. 218 : ILR

Mad. 544; and *Periaswami Chettiar and Another Vs. S.A. Ramaswami Goundan*, . It is true that the appellants were not mortgagees but they

regarded themselves as such. In my judgment there is here sufficient privity, if privity is an essential factor in this action.

8. For these reasons I consider that the decree passed by the trial Court is in

accordance with law and I would dismiss the appeal with costs.

9. The respondent has filed a memorandum of cross objections as the learned trial Judge directed the parties to pay their own costs. As the plaintiff

succeeded she should have been given her costs. Therefore the memorandum of cross objections should be allowed with costs.