1963 *Present :* **Sansoni, J., and L. B. de Silva, J.**

THE ATTORNEY-GENERAL, Appellant, *and* S. S. ARUMUGAM, Respondent

S. C. 649/60—D. C. Trincomalee, 6131

Action against Crown—Notice of action given to Attorney-General by plaintiff—Validity of it in a second action instituted in respect of same cause of action—Civil Procedure Code, s. 461.

Contract—Money paid under a mistake of law—Such payments are not recoverable— Condictio indebiti—*Set-off.*

(i) Where the Attorney-General as representing the Crown is sued in respect of an act purporting to be done by him in his official capacity, the notice of action given to him by the plaintiff as required by section 461 of the Civil Procedure Code does not cease to be effective if the action happens to be withdrawn on the ground that it has been instituted in a Court which has no jurisdiction and is subsequently instituted in the proper Court without any further notice of action under section 461.

(ii) Where certain overpayments made by the defendant to the plaintiff under a mistake of law in the interpretation of the terms of a contract providing for payment for work done were sought by the defendant to be set off against sums which subsequently fell due to the plaintiff—

Held, that money paid under a mistake of law cannot be recovered.

APPEAL from a judgment of the District Court, Trincomalee.

Mervyn Fernando, Crown Counsel, for the Defendant-Appellant.

C. Ranganathan, with *S. Rajaratnam*, for the Plaintiff-Respondent.

Cur. adv. vult.

June 7, 1963. L. B. DE SILVA, J.—

The plaintiff-respondent was a contractor under the Irrigation Department in the Allai Extension Scheme under the contract P4. This contract provided for monthly payments for work done. The plaintiff was paid for all work done for the period December, 1952 to May, 1953. He has filed this action claiming a balance sum of Rs. 18,243·69 on account of work done during the period June 1953 to September 1953. The learned District Judge gave him judgment in a sum of Rs. 15,989 and costs. The defendant has appealed from this judgment.

The plaintiff originally filed action on this claim in the District Court of Colombo. He gave notice of action as required by section 461 of the Civil Procedure Code. P1 is the notice by the plaintiff, P1a dated 12th February 1959 is his proctor's letter to the defendant forwarding P1 and a draft (P1b) of the proposed action to be filed in the District Court of Colombo. The Colombo action was subsequently withdrawn as objection was taken to the jurisdiction of the Court to hear that action. The present action was filed by the plaintiff without giving the defendant any further notice of action under section 461.

Learned Crown Counsel urged in this appeal that this action must be dismissed for failure to comply with section 461 of the Civil Procedure Code. After hearing Counsel on this preliminary point, we decided to hear the appeal on its merits. The section does not specifically state that before every action filed on the same cause of action, a separate notice should be given. The purpose of the notice is apparently to give the Attorney-General an opportunity to consider the claim and settle it outside Court if he considers it desirable to do so.

This section requires the notice to state only the cause of action, the name and place of abode of the person intending to file the action and the relief he claims. There are no local cases in which this question has been considered. But this question was considered in an Indian Case of *Vallabram Purshottam v. Secretary of State* [1], under similar provisions of the Indian Civil Procedure Code. Justice Broomfield held in that case at page 23, " it would amount to an extremely technical and unwarranted construction of section 80 to hold that the notice given by the plaintiff in this case has ceased to be effective because of the false start which he made by filing his suit before the expiration of two months and being compelled therefore to withdraw it ". We respectfully agree with his decision and disallow the preliminary objection to the filing of this action.

On the merits, the defence alleged that a large sum of money had been overpaid to the plaintiff on this contract in respect of the period December, 1952 to May, 1953. From the amount due to plaintiff for work done during the subsequent period, the Irrigation Department withheld two sums of Rs. 15,173·49 and Rs. 3,070·20, being amounts surcharged as overpayments totalling Rs. 18,243·69. The statement (D31) prepared and produced by an officer of the Irrigation Department, sets out the details of these surcharges. From this statement, it appears that except for two sums of Rs. 248·76 against June and Rs. 727·50 against July, 1953, totalling Rs. 976·26, all the balance items of surcharge refer to the period ending May, 1953.

It was conceded in this Appeal, that the payments which were subsequently surcharged, were paid under a mistake of law in the interpretation of the terms of the contract providing for payment for work done. Plaintiff took up the position in this case that payments made under a

[1] *A. I. R. 1935 (Bombay) 21.*

mistake of Law, cannot be recovered and the Irrigation Department was not entitled to withhold any such alleged overpayment with respect to the period ending May, 1953, from money payable to him for work done during the subsequent period.

Save for the two items of surcharge for work done during June and July, 1953, referred to earlier, the whole of the plaintiff's claim for which he obtained judgment, to wit Rs. 15,989, is covered by such earlier surcharges. Learned Crown Counsel argued that such over-payments are recoverable and that the Irrigation Department was entitled to set off the same from sums payable to the plaintiff for work done subsequently. He admitted that Voet and certain other Roman Dutch Law jurists have taken the view that such payments are not recoverable whilst Grotius and several other eminent jurists have taken the contrary view.

He also conceded that in South Africa such payments are not recoverable but said that South Africa had adopted the Roman Law on this question and that we should not follow the South African Law on this matter. He was unable to cite any Ceylon authority on this question.

Voet—Book XII, Title 6, section 7—(Gane's translation, Vol. 2—p. 839) states, " *Condictio indebiti* lies only for ignorance of fact, not of law. Then again it is not every ignorance of a payor which is enough for the action for the return of what was not due, but only that which is ignorance of fact, and does not appear to be slack or studied. If the payment of what was not due happened through ignorance of law, the truer view is that a reclaim was denied by the Civil law ". Reference has been given to authors who favour this view.

After considering the question from the point of view of the Roman Law and the contrary view of Vinnius and others, Voet has expressed his view on this question of law.

In South Africa, the conflicting views of the Roman-Dutch commentators were considered by Kotze C.J. in *Rooth v. The State* [1]. This report is not available but reference to this decision has been made by Nathan in his " Common Law of South Africa ". He states, " This conflict of opinion was carefully considered by Kotze C.J. in *Rooth v. The State* in an extremely learned judgment, the conclusion arrived at being that, in accordance with the custom of South Africa, following a reasonable construction of Roman-Dutch Law, there is such a distinction as Voet maintains ". This view of the Law has thereafter been universally accepted in South Africa—See *Heydenrych v. The Standard Bank of S. A. Ltd.* [2]

This view of the law has been accepted in Ceylon in *Bogaars v. Van Buuren* [1] by Clarence, A.C.J. and Dias, J. We accordingly hold that money paid under a mistake of law cannot be recovered. It was argued on

[1] *(1882) 2 S. A. R. 259.* [2] *(1924) S. A. L. R. (C. P. D.) p. 335.*

behalf of the Attorney-General that it was only a recovery by legal action that was banned but that it was open to a person who has paid money under such circumstances, to recover the money by any other means or claim a set-off for such money.

In considering set-off or *compensatio* Wille in " The Principles of South African Law " 4th edition—p. 354 states that one of the conditions for set-off is that both debts are fully due—that is, both debts must be legally payable. A natural obligation may be set off against a legal one. But a prescribed debt could not be set off against a debt that came into existence after the lapse of the period of prescription. We are unable to take the view that the claim of the appellant is a natural obligation as contemplated in the Roman Dutch Law.

Out of the two sums totalling Rs. 18,243·69 which were surcharged, a sum of Rs. 2,002·26 surcharged for not selecting the cheapest mode of conveyance, was subsequently paid to the plaintiff. This would reduce the sum surcharged to Rs. 16,241·43. This sum included the two items of surcharge referable to the period after 1st June, 1953. Of these, the item of Rs. 248·76 was surcharged on the ground that the transport of hand drills had been charged for on a Cart load basis instead of by weight. The other item of Rs. 727·50 was surcharged on the ground that it was charged on a Cart load basis instead of Lorry load basis.

The learned District Judge has given good reasons for allowing these items. These items refer to the transport of hand drills and machine spares which were sent from time to time and were urgently required at the work site. The plaintiff could not wait till a lorry load was available to transport these goods from the Railway Station to the work site. The learned District Judge has pointed out that the plaintiff would only be entitled to the absurdly low sum of Rs. 4·86. for transposting goods weighing 4 cwt. over a distance of 27 miles if he was paid for the transport of these goods on a weight basis instead of payment on a cart load basis. We see no reason to interfere with his finding on this matter.

With regard to the shortage of Diesolene worth Rs. 815·67, we agree with the finding of the learned District Judge that it was not due to any default or negligence of the plaintiff and this sum cannot be set off against him.

We accordingly dismiss the appeal with costs.

SANSONI, J.—I agree.

Appeal dismissed.

[1] *(1882) Wendt's Reports 209.*