[VASSILIADES P. TRIANTAFYLLIDES, STAVRINIDES, JJ.]

1966
Nov. 8
1967
June 8
—
GEORGE WILLIAM PORTSMOUTH
v.
CYPRUS INLAND TELECOMMUNICATIONS AUTHORITY

GEORGE WILLIAM PORTSMOUTH

Appellant-Plaintiff,

v.

CYPRUS INLAND TELECOMMUNICATIONS AUTHORITY,

Respondents-Defendants.

(*Civil Appeal No.* 4570).

Contracts—Contract of service—Cost-of-living allowance—Claim for such allowance under a contract of service—No express provision to that effect in the contract—Whether or not in the circumstances of this case the Court in construing the contract may imply such term—Principles applicable to the question of implied terms in contracts—Payment by the respondents to the appellant of cost-of-living allowance not provided for either expressly or impliedly in the contract of service—Whether such payments can be recovered by the respondents on the ground that they were made due to a mistake under section 72 of the Contract Law, Cap. 149—Cfr. sections 21 (2) and 22 of the said law (supra)*—Mistake—Section 72 of the Contract Law—Meaning—The term "mistake" in section 72 covers a mistake of fact as well as a mistake of law—See, also, herebelow.*

Construction of contracts—Implied terms—Principles upon which the Court, in construing a contract, may imply terms therein—Intention of the parties—Efficacy of the contract—Trial Court's refusal in the present case to imply a term regarding payment of a cost-of-living allowance to the appellant, upheld by the Supreme Court—See, also, above.

Implied terms—Implied terms in contracts either oral or in writing—Principles applicable—See above.

Mistake—Money paid by mistake can be recovered—Section 72 of the Contract Law, Cap. 149—Irrespective of whether it is a mistake of fact or a mistake of law—See, also, above under Contracts and herebelow.

Mistake—Onus of proof—The burden is on the party claiming back the money (or thing) paid or delivered by mistake—Plea of mistake—Need of proper pleading.

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Evidence—Onus of proof in cases of claims based on mistake—Preponderance of evidence—Balance of probabilities.

Mistake—Meaning of "mistake" in section 72 of the Contract Law, Cap. 149—See above

Practice—Pleadings—Plea of mistake—Need for proper pleading.

Estoppel—Plea of—Altering of appellant's position as a result of the conduct of the respondents—In the circumstances of the present case the appellant could successfully have pleaded estoppel To resist refund to the respondents of the amount they paid to him over a number of years by way of cost-of-living allowance to which he (appellant) was not entitled under his contract of service

The appellant sued the respondents-defendants for an amount of £3,574 949 mils alleged to be due to him by the respondents in the way of salary, gratuity and earned leave, under a contract of service in writing dated the 17th April 1956 Under this contract the appellant had served the respondents, as their general Manager, until the 6th October, 1960. The appellant, in framing his claim, included therein a cost-of-living allowance at the rate at which it had been paid to him during his service as general Manager of the respondents as aforesaid The respondents denied that the appellant was entitled to a cost-of-living allowance under his contract of service—there being no term to that effect—and counterclaimed for whatever had been paid to the appellant as a cost-of-living allowance during his service

The trial Court found that the appellant was not entitled to a cost-of-living allowance and that, therefore, his claim, which was otherwise correct, should be reduced to an amount of £3,008 796 mils, the Court found, furthermore, that respondents were entitled to recover whatever had been paid already to the appellant by way of cost-of-living allowance Consequently, it gave judgment for the respondents for a balance of £297 700 mils, and made no order as to costs

The trial Court held that in the contract of service of the 17th April, 1956, between the appellant and the respondents, there could not be implied a term providing for the payment to the appellant of a cost-of-living allowance. The trial Court proceeded, next, to find that the payments of cost-of-living allowance to the appellant by the respondents during the period of his service, had been made as a result of a mistake of fact on the part of the respondents, and that, therefore, what-

ever had been so paid was recoverable under section 72 of the Contract Law, Cap. 149, which section reads as follows :

> "72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it".

In allowing in part the appeal and entering judgment for the appellant for the amount of £3,008.796 mils (*supra*) and, also, dismissing the respondents' counterclaim, the Court :

Held, (I) *on the first issue* viz. *on the construction of the contract of service and the alleged implied term therein as to the cost-of-living allowance :*

(1) We are in agreement with the view of the law taken by the trial Court to the effect that :

(a) In construing an express contract the Court may imply a term or terms into the agreement if it is clear from the nature of the transaction that had the parties adverted to the situation they would have intended to incorporate such term into their agreement.

(b) The object of raising an implication from the presumed intention of the parties is to give to the transaction such efficacy as both parties must have intended that at all events it should have.

(c) But the general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing; and no term should be implied if the contract is effective without the proposed term and capable of being fulfilled as it stands.

(2) It is useful in this connection to refer to one of the English precedents on the point, *Luxor (Eastbourne) Ltd. and Others* v. *Cooper* [1941] 1 All E.R. 33, at p. 52 per Lord Wright (*Note* : the passage is set out in the judgment of the Court, *post*).

(3) In the light of all the material before us in this case, we have not been convinced by the appellant that the trial Court erred in refusing to imply a term, in the relevant contract of service, to the effect that the respondents should pay to the appellant a cost-of-living allowance. In the circumstances, there being no express term to that effect in his contract—it follows that the appellant was not entitled to such allowance by virtue of his contract and that the trial Court rightly reduced his claim to £3,008.796 mils (*supra*).

Held, (II) *on the counterclaim and the judgment given thereon in favour of the respondents* :

(1) The judgment of the trial Court on the counterclaim was based on the finding that the respondents had been paying a cost-of-living allowance to the appellant from 1956 to 1960, through a mistake of fact, and that, consequently, they were entitled to recover back whatever amount they had paid in this respect under section 72 of the Contract Law, Cap. 149 (*supra*).

(2) (a) Much argument has been advanced in this connection on the issue of whether or not, assuming that a mistake had existed, such mistake was one of fact or one of law.

(b) It does not seem to us that it would make any difference either way because, on a proper construction of section 72 of the Contract Law (*supra*) the term "mistake" therein appears to be wide enough to include both a mistake of law and a mistake of fact (see the Privy Council case *Sir Shiba Prasad* v. *Maharaja Srish Chandra*, A.I.R. 1949 P.C. 297).

(3) The burden of establishing a mistake, entitling the respondents to recover the amount paid to the appellant by way of cost-of-living, was on the respondents, who were, in so far as the counterclaim was concerned, in the position of plaintiffs.

(4) (a) Judgment on the counterclaim was given on the basis of mistake; but nowhere in the counterclaim there does appear a plea of mistake, as such, and as distinct from allegations of misrepresentation.

(b) The case of *Edler* v. *Anerbach* [1949] 2 All E.R. 692, at p. 699 illustrates most clearly the need for proper pleading in a case such as the present one; there the mistake as pleaded originally was a mutual one and an amendment had to be applied for during trial in order to enable reliance to be placed on a unilateral mistake.

(c) Furthermore, no positive specific evidence was adduced by the respondents to prove affirmatively that the cost-of-living allowance had been paid for over four years to the appellant due to a mistake.

(d) We cannot agree that because two initial monthly pay sheets—for May and June 1956—were signed by the appellant,

in his capacity as the General Manager of the respondents, and by the secretary of the respondents, and because they provided for a cost-of-living allowance to the appellant, to which he was not entitled under his contract of service (*supra*), *therefore* it is to be necessarily inferred that such allowance was being paid to the appellant, and accounted for, for more than four years by the respondents due to a mistake.

(e) Moreover, it is not in dispute that the accounts of the respondents were prepared and adopted yearly—showing, *inter alia*, the emoluments paid to the appellant—and were being audited by the auditors of the respondents and submitted to the government (see, also, section 20 of the Inland Telecommunications Service Law, Cap. 302).

(f) There is, indeed, nothing in the material before the Court that respondents' accounts for 1956 to 1960 were prepared, audited and adopted under the influence of any mistake in so far as the emoluments of the appellant were concerned.

(g) In our opinion an at least equally, if not more, probable inference is that the respondents' responsible functionaries did duly know that the appellant was drawing a cost-of-living allowance, and that the respondents accepted such a course notwithstanding the absence of any provision to that effect in the appellant's contract of service, because such a cost-of-living allowance was being received by government officials and it was deemed only fair to treat the appellant—and other officers of the respondents—likewise.

(5) Bearing in mind that the burden of proof on the issue of mistake lies on the respondents and in the light of the alternative inferences referred to hereabove, we are of the opinion that the respondents failed to discharge the onus of establishing by preponderance of evidence, or by the balance of probabilities, that the cost-of-living allowance paid to the appellant during his service from 1956 to 1960 was paid "by mistake" in the sense of section 72 of the Contract Law, Cap. 149 (*supra*).

Held, (*III*) for all the above reasons this appeal succeeds in so far as the counterclaim is concerned. There shall be Judgment for the appellant on his claim for £3,008.796 mils plus legal interest and the counterclaim is dismissed. Two thirds of the costs of appellant here and below to be borne by the respondents.

Appeal allowed in part. Judgment for appellant entered accordingly. Counterclaim dismissed. Order for costs as aforesaid.

Per curiam : Had the respondents properly pleaded and established mistake, sufficiently to entitle them otherwise to claim back the cost-of-living allowance paid to the appellant during his service, the appellant could succeed on a plea of estoppel due to the fact that because of the course of conduct adopted by the respondents in the matter, over a considerable number of years, he had most definitely been allowed to rely on the assumption that he was receiving properly such allowance, and no doubt he arranged his affairs accordingly; it is, *inter alia*, in evidence that the appellant's income tax was being deducted and paid, over the years, at source by the respondents, on the basis of his total emoluments including the cost-of-living allowance. And on this point we cannot agree with the trial Court that there was no evidence that the appellant was induced to alter his position as a result of the payments of such allowance.

Cases referred to :

Luxor (Eastbourne) Ltd. and Others v. *Cooper* [1941] 1 All E.R. 33, at p. 52 per Lord Wright;

Sir Shiba Prasad v. *Maharaja Srish Chandra*, A.I.R. 1949 P.C. 297;

Edler v. *Anerbach* [1949] 2 All E.R. 692, at p. 699.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Loizou P.D.C. & Ioannides D.J.) dated the 31st December, 1965, (Action No. 162/61) whereby plaintiff's claim for £3,574.949 mils by way of salary, gratuity and earned leave was dismissed and judgment in the sum of £297.700 mils was given in favour of the defendants on their counter-claim.

X. Clerides, for the appellant.

A. Hadjiloannou, for the respondents.

Cur. adv. vult.

VASSILIADES, P. : The judgment of the Court will be delivered by Mr. Justice Triantafyllides.

TRIANTAFYLLIDES, J. : This is an appeal by the Plaintiff-Appellant against the judgment given by the Full District Court of Nicosia in action No. 162/61 on the 31st December, 1965.

The Appellant sued the Respondents-Defendants for an amount of £3,574.949 mils allegedly due to him by the Respondents in the form of salary, gratuity and earned leave, under a contract of service dated the 17th April, 1956.

Under such contract the Appellant had served the Respondents, as their General Manager, until the 6th October, 1960.

The Appellant, in framing his claim, included therein a cost-of-living allowance at the rate at which it had been paid to him during his service as General Manager of the Respondents. But the Respondents denied that the Appellant was entitled to a cost-of-living allowance, under his contract of service—there being therein no term to that effect—and counterclaimed for whatever had been paid to the Appellant as a cost-of-living allowance during his service.

The trial Court found that the Appellant was not entitled to a cost-of-living allowance and that, therefore, his claim, which was otherwise correct, should be reduced to an amount of £3,008.796 mils; the Court found, furthermore, that Respondents were entitled to recover whatever had been paid already to the Appellant by way of cost-of-living allowance. Consequently, it gave judgment for the Respondents for a balance of £297.700 mils, and made no order as to costs.

The trial Court in a carefully reasoned Judgment found that in the contract of service of the 17th April, 1956, between the Appellant and the Respondents, there could not be implied a term providing for the payment to the Appellant of a cost-of-living allowance.

The trial Court proceeded, next, to find that the payments of cost-of-living allowance to the Appellant by the Respondents, during the period of his service, had been made as a result of a mistake of fact on the part of the Respondents, and that, therefore, whatever had been so paid was recoverable.

On the first issue—of the construction of the contract of service between Appellant and the Respondents—the trial Court had this to say :

> "In construing an express contract the Court may imply a term or terms into the agreement if it is clear from the nature of the transaction that had the parties adverted to the situation they would have intended to incorporate such term into their agreement. The object of raising an

implication from the presumed intention of the parties is to give to the transaction such efficacy as both parties must have intended that at all events it should have. But the general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing; and no term should be implied if the contract is effective without the proposed term and capable of being fulfilled as it stands".

"In all the circumstances of this case it seems to us that there would be no justification for introducing an implied term; nor do we think that there is room for the suggested implied term. If it really were the common intention of the parties that cost-of-living allowance should be payable there would be no difficulty in so providing by an express term. In the result we find that the plaintiff was not entitled to cost-of-living allowance under the terms of his contract".

We are in agreement with the above view of the law. It is useful in this connection to refer to one of the English precedents on the point, *Luxor (Eastbourne) Ltd. and Others* v. *Cooper*, ([1941], 1 All E.R., p. 33), in which Lord Wright had this to say (at p. 52) :

"The expression 'implied term' is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of Law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as, for instance, under the Sale of Goods Act and the Marine Insurance Act. The law also, in some circumstances, implies that a contract is to be dissolved if there is a vital change of conditions. However, a case like the present is different, because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances. There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognized, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some

term of which it can be predicated that 'it goes without saying', some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts. However, language is imperfect, and there may be, as it were, obvious interstices in what is expressed which have to be filled up".

In the light of all the material before us in this case, we have not been convinced by the Appellant that the trial Court erred in refusing to imply a term, in the relevant contract of service, to the effect that the Respondents should pay to the Appellant a cost-of-living allowance. In the circumstances–there being no express term to that effect in his contract–it follows that the Appellant was not entitled to a cost-of-living allowance by virtue of such contract and that the trial Court rightly reduced Appellant's claim accordingly.

We come now to the judgment given in favour of the Respondents on the counterclaim: It was based on a finding by the trial Court that the Respondents had been paying a cost-of-living allowance to the Appellant, from 1956 to 1960, through a mistake of fact.

Much argument has been advanced in this connection on the issue of whether or not, assuming that a mistake had existed, such mistake was one of fact or one of law

It does not seem to us that it would make any difference either way because, on a proper construction of section 72 of our Contract Law, Cap. 149, the term "mistake" therein appears to be wide enough to include both a mistake of law and a mistake of fact.

The said section 72 reads as follows :

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

Our section 72 is in every respect identical with section 72 of the Indian Contract Act, 1878. As stated in Pollock and Mulla on the Indian Contract and Specific Relief Acts (8th ed., pp. 433-435) the Privy Council has interpreted the said section 72 of the Indian Act, in the case of *Sir Shiba Prasad* v. *Maharaja Srish Chandra* (A.I.R. 1949 P.C. 297), as including under the notion of "mistake" both a mistake of law and a mistake of fact. The relevant part of the Privy Council's decision—as quoted by Pollock and Mulla, above—reads as follows :

> "If a mistake of law has led to the formation of a contract, s. 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that the money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment 'by mistake' in s. 72 must refer to a payment which was not legally due and which could not have been enforced; the 'mistake' is thinking that the money paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover if the argument based on inconsistency with s. 21 were valid, a similar argument based on inconsistency with s. 22 would be valid and would lead to the conclusion that s. 72 does not even apply to mistake of fact. The argument submitted to their Lordships was that s. 72 applies only if there is no subsisting contract between the person making the payment and the payee and that the Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it. But there appears to their Lordships to be no good reason for so limiting the scope of Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due".

It is to be noted that sections 21 and 22 of the Indian Contract Act, which are being referred to in the above-quoted passage, are identical with sections 21 (2) and 22 of our Cap. 149.

There remains now to answer the question whether the finding that there existed a mistake entitling the Respondents to recover by virtue of section 72 of Cap. 149 has properly been made by the trial Court in the circumstances of the present case.

The burden of establishing a mistake, entitling the Respondents to recover the amount paid by way of cost-of-living allowance by the Respondents to the Appellant from 1956 to 1960, was on the Respondents, who were, in so far as the counterclaim was concerned, in the position of plaintiffs.

The Respondents by their counterclaim attributed to the Appellant fraud, breach of contract of service, breach of trust and neglect of duty; but in the Judgment of the trial Court no finding has been made in favour of Respondents on any of the grounds on which the counterclaim was based.

Judgment on the counterclaim was given on the basis of mistake; but nowhere in the counterclaim does there appear a plea of mistake, as such, and as distinct from allegations of misrepresentation.

The case of *Edler* v. *Anerbach* ([1949] 2 All E.R. p. 692 at p. 699) illustrates most clearly the need for proper pleading in a case such as the present one; there the mistake as pleaded originally was a mutual one and an amendment had to be applied for during trial in order to enable reliance to be placed on a unilateral mistake.

Furthermore, no positive specific evidence was adduced by the Respondents to prove affirmatively that a cost-of-living allowance had been paid for over four years to the Appellant due to a mistake.

How the trial Court reached its conclusion on the aspect of mistake appears from the relevant part of the Judgment which reads as follows :

> "It appears from the evidence before us that up to the end of June, 1956, *i.e.* up to 2 months after the commencement of the period of service of the plaintiff under the contract of service, the procedure followed by the defendant authority in the payment of salaries was for the pay sheets prepared to be signed and certified as correct by the secretary and the General Manager. The pay sheets for these 2 months are Exhibits 6 and 12 in this case, and

they both have been signed and certified as correct by the secretary and the General Manager, *i.e.* the plaintiff. After June 1956, the procedure was changed and the pay sheets were only signed by the clerk making them out. It further appears from Exh. 18 that the secretary and the plaintiff, as General Manager, also signed the instructions to the Bank to effect payment of salaries".

"There is no doubt that the defendants had the means of ascertaining what their obligations to the plaintiff were but it is in our view equally clear that the payment of cost-of-living allowance was made by the defendants in ingorance of the extent of their obligations to the plaintiff, they, never having ascertained the real facts. It seems to us that the initial mistake was made when Exhibits 6 and 12 were prepared and thereafter they continued paying on the same basis in the mistaken belief that cost-of-living allowance was payable to the plaintiff. This in our view amounts to a mistake of fact".

"We do not think that it can be said that the defendants intended the plaintiff to keep the money so paid as cost-of-living allowance at all events and whether he was entitled to it or not, and in the absence of any evidence to show that the plaintiff was induced to alter his position as a result of these payments we are of the view that the defendants are entitled to recovery".

We cannot agree that because two initial monthly pay sheets –for May and June 1956–were signed by the Appellant, in his capacity as the General Manager of the Respondents, and by the Secretary of the Respondents, and *because* they provided for the payment of a cost-of-living allowance to the Appellant, to which he was not entitled under his contract of service, *therefore* it is to be necessarily inferred that such allowance was being paid to the Appellant, and accounted for, for more than four years by the Respondents, through their appropriate officials, due to a mistake. From July 1956 to September 1960 a cost-of-living allowance was being paid to the Appellant by the Respondents in the ordinary course and without any act, to this purpose, having been made by the Appellant himself as General Manager. Moreover, it is not in dispute that the accounts of the Respondents were prepared and adopted yearly–showing, of course, *inter alia*, the emoluments paid to the Appellant–and were being audited by the auditors of Respondents and submitted to Government. (See, also, section 20

of the Inland Telecommunications Service Law, Cap. 302). There is, indeed, nothing in the material before the Court to show that it was in fact the pay sheets for the months of May and June, 1956 which *actually* did cause a cost-of-living allowance to continue being paid by mistake to the Appellant right down to September 1960, in spite of all the accounting and auditing in between; or that the Respondents' accounts for 1956 and later years were prepared, audited and adopted under the influence of any mistake in so far as the emoluments of the Appellant were concerned.

In our opinion an at least equally, if not more, probable inference—as the one drawn by the trial Court in relation to mistake of fact and set out in the afore-quoted extract from its Judgment—is that the Respondents' responsible functionaries did duly know that the Appellant was drawing a cost-of-living allowance, and that the Respondents accepted such a course notwithstanding the absence of any provision to that effect in the Appellant's contract of service, because a cost-of-living allowance was being received by Government officials and it was deemed only fair to treat the Appellant—and other officers of the Respondents—likewise. In this connection it is quite significant to note that the trial Court itself was of the view that no doubt the Respondents had the means of ascertaining what their obligations to the Appellant were; but with respect we cannot agree with the learned trial Judges when they appear to accept that the Respondents never ascertained the real facts.

In the light of the alternative inferences which are, to say the least, equally open, on the basis of the facts which have been established before the trial Court, we have reached the conclusion—bearing in mind that on the issue of mistake the burden lay on the Respondents—that the Respondents have failed to discharge the onus of establishing by preponderance of evidence, or by the balance of probabilities, that the cost-of-living allowance paid to the Appellant during his service from 1956 to 1960 was paid "by mistake", in the sense of section 72 of Cap. 149; therefore, they could not succeed on their counterclaim.

Lastly—and we need not expand on this—we are inclined to the view that had the Respondents properly pleaded and established mistake, sufficiently to entitle them otherwise to claim back the cost-of-living allowance paid to the Appellant during his service, the Appellant could succeed on a plea of estoppel due to the fact that because of the course of conduct

adopted by the Respondents in the matter, over a considerable number of years, he had most definitely been allowed to rely on the assumption that he was receiving properly such allowance, and no doubt he arranged his affairs accordingly; it is, *inter alia*, in evidence that the Appellant's income tax was being deducted and paid, over the years, at source, by the Respondents, on the basis of his total emoluments including the cost-of-living allowance; and on this point we cannot, therefore, agree with the trial Court that there was no evidence that the Appellant was induced to alter his position as a result of the payments of cost-of-living allowance.

For all the above reasons this appeal succeeds in so far as the counterclaim is concerned. There shall be Judgment for Appellant on his claim for £3,008.796 mils plus legal interest and the counterclaim is dismissed. The two thirds of the costs of the Appellant here and below to be borne by the Respondents.

Appeal allowed in part. Judgment fo Appellant entered accordingly. Counterclaim dismissed. Order for costs as aforesaid.