

## **[Case analysis] The judgment and Reason about Who Paid the Bill for the Wrong Spicy Chicken**

**-- based on the Contract Law of the People's Republic of China**

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### **Abstract**

**It is not uncommon for restaurants to offer wrong dishes. In this case, the customer thinks that the wrong dish is caused by the waiter's mistake, which should not be paid by them. The merchant insists that the customer charges for the dish for he thinks that the customer has eaten the dish. There is a dispute between the two sides. This paper discusses and analyses these disputes..**

### **Keywords**

**Offer wrong dishes, Contractual relationship , Unjust enrichment.**

### **1. Case**

Consumer A went to restaurant B and ordered a boiled fish. As a result, the waiter served the boiled fish and the spicy chicken belong to the next table at the same time. Mr. A did not object and ate all the boiled fish and spicy chicken. When checking out, the restaurant asked Mr. A to pay 50 yuan for the dishes of spicy chicken. Mr. A refused to pay, so he sued the restaurant to the court.

### **2. Divergent Views on Whether Mr. A Should Pay for It**

1.1. The first point of view is that Mr. A had eaten spicy chicken and finished the real consumption. He should pay for it, that is, even if the consumer only eats a bite, he actually consumes it, and he should pay for it.

1.2. The second view is that the loss of restaurant B was caused by the mistake of the waiter in the restaurant. The restaurant should bear the damage by itself, that is, whose fault and who should bear the loss.

1.3. The third view is that the case should be judged according to whether A is benevolent or malicious: if A knew that spicy chicken was the wrong dish and ate them, he should pay; if he did not know the situation, he can avoid paying.

### **3. Judgement and Reasons of the Case**

In my opinion, the judgment of this case can be based on the third point of view and combined with the chapter of unjust enrichment in the General Principles of Civil Law of China. First of all, we need to clarify what is subjective malice and subjective goodwill in the third view mentioned above. In my opinion, the subjective good and evil of the beneficiary depends on whether the beneficiary has fulfilled the duty of care defined in the universal recognition.

Violation of recognized duty of care is malicious and unfair. In the system of unjust enrichment, "without legal basis" only means that there is no legal basis for obtaining benefits, but it does not require that there is no legal basis for the power or property acquired. For example, it is lawful for the processors to acquire the ownership of the processed products, but there is no

lawful basis for the processors to acquire this benefit, which should be returned in accordance with the unjust enrichment. Even if we adopt the theory of unreasonable ownership of real right, when the sale contract is declared invalid, the real right can be transferred smoothly. At this time, the right to retain the real right is legal (according to the property law), but there is no legal basis for retaining the interest. After clarifying the definition of subjective goodwill and malice, the following is a concrete analysis My judgment and reasons for the controversial issues in this case are as follows:

### **3.1. Firstly, Whether the Civil Legal Relationship Between the Two Parties Belongs to the Contractual Relationship Or Not?**

According to Article 33 of China's Contract Law, the parties may request to sign a confirmation before the contract is established, and the contract is established when the confirmation is signed, so the confirmation is the direct evidence of the establishment of the contract. If there is no direct evidence to prove the establishment of the contract ship, only the evidence to prove that the contract has been fulfilled or If the promise is made by an act and the act has been accepted by the relative person, the service contract is also tenable. In this case ,when the consumer Mr. A went to the restaurant B for dinner; he ordered a boiled fish, the content of the contract appeared on the order menu; the restaurant served the boiled fish according to the requirements, which was the performance of the contract by B. This series of facts show that both parties have formed a contractual relationship.

### **3.2. Secondly, Is It A Change to the Original Contract That the Waiter of Restaurant B Mistakenly Handed Mr. A the Spicy Chicken Without An Order?**

According to the provisions of the Chinese Contract Law on the alteration or termination of a contract, the consent of the other party must be obtained when the contents of the contract are modified, supplemented or terminated. According to the above, the waiter mistakenly served the boiled fish and other people's spicy chicken at the same time. This wrong dish has exceeded the original content of the contract between Mr. A and B restaurant, constituting B's unauthorized change of the contract content. At this time, restaurant B does not indicate that spicy chicken is a gift, so it is not an indication of a gift added to the original contract; and Mr. A did not explicitly express his acceptance and willingness to pay, so it is not a change in the scope of the original contract. That is, the two sides did not form a new agreement (gift contract) and did not reach the agreement to change the scope of the original contract, so from the legal structure, this spicy chicken only constitutes "unjust enrichment" for A.

### **3.3. Third, Whether the Wrong Spicy Chicken Belongs to the Exceptions to Unjust Enrichment System- Compulsory Gains?**

According to the second clause of the Provisions on Evidence in Civil Procedure of the Supreme People's Court of China and the ninety-fourth clause of the General Principles of Civil Law of China, if the restaurant B requests Mr. A to pay for the spicy chicken, it needs to prove that Mr. A knows that the spicy chicken is the wrong dish and still eats it, that is to prove that Mr. A is subjective malicious, it is very difficult for B. But I think that according to common sense, in this case, restaurant B did not post or the waiter did not inform about the activities of offering spicy chicken as gifts for ordering, Mr. A was not in the busy party, and spicy chicken and boiled fish had obvious appearance differences. After serving, Mr. A did not express his objection and the food were all eaten (actual profit). It would be unreasonable for A to argue that he didn't know or that he thought the spicy chicken was a gift. Therefore, I think that according to the objective environment and Mr. A's subjective behavior, it can be judged that he knows the wrong dish but still eats it. It is not the Exceptions to Unjust Enrichment System - Compulsory gains. Personally, I believe that A should bear the obligation to pay. Beneficiaries are malicious, which

means that beneficiaries know that their interests are not based on the law when they are beneficiaries. Our country's judicial interpretation stipulates that the returned improper interests should include the original and the fruits of the original. After deducting the cost of labor administration, other benefits obtained from improper enrichment shall be collected. In this case, the beneficiary should return all the benefits he has obtained, even if the benefits no longer exist, he should also be responsible for the return. If the beneficiary receives less benefit than the loss of the injured person, the beneficiary must compensate for the difference between the loss and the profit, in addition to returning all the benefit he receives. This is actually the combination of the beneficiary's obligation of return and liability for compensation.

### **3.4. Consideration Factors of Actual Judgment**

In the process of discussing the scope of the return of unjust enrichment property, there is still a problem, that is, the deduction of the beneficiary's damage. From the perspective of our legislation, the provision of unjust enrichment is relatively simple. I think the interpretation of Article 131, paragraph 2, of the General Principles of China's Civil Law violates the legislative principles of private law. Civil law is a "citizen law" reflecting the autonomy of private law. The parties in the civil field can create their own rights and obligations according to their own needs, and the political state should not participate too much. In Article 131 of the General Principles of Civil Law, "Should" embodies a strong color of public law. The interests of equal parties shall ultimately belong to the parties, and the State shall not confiscate them. Secondly, the judicial interpretation of this article violates the requirements of social and economic development. It is an uncertain concept to make use of other benefits obtained from improper enrichment, but the judicial interpretation is unreasonable, requiring all expropriations. Benefits that derive more benefits from the original interests, such as the use of the original interests, rights-based interests and compensation for the original interests are all included in the benefits. For "other interests", we can not stipulate "should return" or "need not return". In terms of price reimbursement, we should distinguish the role of the beneficiaries of unfair gains in the process of increasing interest rates, which should be protected by law.

In the actual judgment, we should also note that the loss of restaurant B is caused by the waiter's mistake, which makes Mr. A obtain certain property benefits from dishes consumed without reason, resulting in the loss of restaurant. To sum up, although customers have not fulfilled their duty of care, the fundamental reason is that the restaurant served the wrong dishes, considering the fault of both sides, and the dishes have been eaten (can not be returned), both sides can negotiate on the basis of the above theory. I think that in actual judgment, usually by the way of reducing or discounting compensation for the cost of dishes through negotiation between A and B.

## **4. Relevant Legal Provisions Above**

### **4.1. Article 2. of the Provisions on Evidence in Civil Procedure of the Supreme People's Court of China**

The parties concerned are obliged to provide evidence to prove the facts on which their own claims are based or to refute the facts on which the other party's claims are based. If there is no evidence or the evidence is insufficient to prove the factual claims of the parties, the party bearing the burden of proof shall bear the adverse consequences.

### **4.2. Article 94. of the General Principles of Civil Law of China**

Where there is no legal basis for obtaining improper profits and causing losses to others, the improper profits obtained shall be returned to the person who has suffered losses.

### 4.3. Article 131.of the General Principles of Civil Law of China:

If the victim is also at fault for the occurrence of the damage, the civil liability of the infringer can be mitigated.

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