

CALCUTTA HIGH COURT

Suchand Ghosal

Vs

Balaram Mardana

(Lawrence H Jenkins, C.J. Doss, J.)

23.05.1910

JUDGMENT

Lawrence H. Jenkins, C.J.

1. The plaintiff, is by virtue of transfer from the defendant No. 9, a co-sharer to the extent of 1/12th in a mourasi jama with the defendants 1 to 8, and has brought this suit to recover from them certain sums of money claimed by him from them on account of sums deposited by him under Section 310A of the Civil Procedure Code together with costs. The decree in respect of which these sums, were, deposited, was, passed in a suit brought by one of several co-sharer landlords against defendants 1 to 8 alone for rent. In execution of that decree there was a sale and it purported to be of the entire holding notwithstanding the fact that the present plaintiff, one of the co-sharers, was not a party to the suit.

2. To have the sale set aside the present plaintiff applied to the Court under Section 310A and made the prescribed deposits. This was twice done successfully, and the result has been that the holding is in the possession of the plaintiff and the defendants 1 to 8, and the liability of these defendants in respect of rent has been discharged. The lower Appellate Court, reversing the Munsiff, has passed a decree in the plaintiff's favour and this decree has been confirmed by Mr. Justice Brett from whose judgment this appeal has been preferred. The plaintiff rests his case on Section 70 of the Contract Act, so it has to be seen whether it falls within the provision of that section. The determination of this question must largely depend on the findings of fact at which the lower Appellate Court has arrived. It has been found by that Court that the plaintiff in making the two deposits did not intend to do so gratuitously, and that the defendants 1 to 8 enjoy the benefit thereof. And seeing that the plaintiff in making those deposits acted with the approval of the Court, what he did was done lawfully. The conditions of the section are thus satisfied, and the only question that remains is to consider what the compensation is that the defendants 1 to 8 are bound to make.

3. The lower Appellate Court excluded the claim for recovery of the costs of the deposit and interest thereon, and against this no appeal has been preferred. In the circumstances of this case, I think there should also be excluded so much of the deposit as represents a sum equal to 5 per cent, of the purchase-money. On the materials placed before us, it does not appear whether the amount specified in the proclamation of sale includes anything beyond the rent decreed, and in

any event the excess would be so trifling that I think it would not be profitable to direct any inquiry on that point. The result then is that I would vary the decree of the Subordinate Judge and direct that the plaintiff do recover from each of the several defendants, 1 to 8, his proportionate share of the sum of Rs. 293-10-6; which is the sum deposited as representing the amount specified in» the proclamation of sale as that for the recovery of which the sale was ordered.

4. I desire to emphasize that my decision turns on the particular findings of fact of the lower Appellate Court, by which we are bound. The terms of Section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious. In this connection the caution enjoined in Venkata Vijaya Gopalaraju v. Timmayya Pantulu (1899) I.L.R. 22 Mad. 314 should be borne in mind. I do not suggest that the lower Appellate Court in this case acted in disregard of this caution; on the contrary I think Its findings have worked substantial justice.

Doss, J.

5. This appeal arises out of an action for contribution. Defendants Nos. 1 to 8 and the plaintiff are the joint owners of a certain mokorari jama. The share of defendants Nos. 1 to 8 in the tenure is 11/12th. Defendant No. 9 was the former owner of the remaining 1/12th which has since passed to the plaintiff by purchase.

6. A co-sharer landlord of the tenure obtained two successive decrees for his share of the rent against defendants Nos. 1 to 8 only, without making defendant No. 9 a party thereto. In execution of those decrees the entire tenure was twice attached and sold. On each occasion the plaintiff deposited, under Section 310A of the Civil Procedure Code, 1882, the amount of the decree and costs together with the Statutory compensation and had the sale set aside without any objection being raised thereto, either by the decree-holder or by the judgment-debtors.

7. Plaintiff has now brought this suit to recover from defendants Nos. 1 to 8 in proportion to their respective shares in the tenure, the two sums so paid by the plaintiff.

8. The defendants Nos. 1 to 8 denied that the plaintiff had any share or interest in the tenure, and pleaded that the payments were voluntary.

9. The first Court held that plaintiff's title to a 1/12th share in the tenure had been established, but dismissed his suit, on the ground that the defendants were not liable to reimburse the sums paid by him. On appeal, the Subordinate Judge has given the plaintiff a decree for the sums deposited by him in Court with interest thereon at 12 per cent. This Court, on Second Appeal, has affirmed the decree of the Subordinate Judge.

10. The defendants Nos. 1 to 8 have preferred this appeal under Section 15 of the Letters Patent, and it has been argued on their behalf that the payments made by the plaintiff are purely voluntary and hence an action for contribution does not lie. In my opinion, this contention is not valid. In order to test the soundness or otherwise of this contention let us consider in the first

instance whether the plaintiff would have been entitled to sue defendants Nos. 1 to 8 for contribution if he had made those payments into Court after attachment but before sale of the tenure. It appears that though the plaintiff was not a party to the decree, yet what in fact was attached was the entire tenure including the share of the plaintiff.

11. If the plaintiff under those circumstances deposited in Court the amount of the decree, to avert the impending sale, it would be a payment made under compulsion of law, even though, in case the payment had not been made, and the sale had consequently taken place, the sale would not, in law, have passed his share in the tenure.

12. The case of *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdry*¹ decided by the Privy Council before the Indian Contract Act IX of 1872, came into force and the case of *Dulichand v. Ramkishen Singh*² decided by the same tribunal, after that Act had come into force, clearly recognise this principle.

13. In both those cases, the circumstances were such that if the payments had not been made, and the sale had taken place, the rights and interest in the property of the person who made the payment would not have been affected: see also *Johnson v. Royal Mail Steam Packet Co*³. *Edmunds v. Wallingford*⁴ *The Orchis*⁵, *Jugdeo Narain Singh v. Raja Singh*⁶

14. This rule is also recognised in Section 72 of the Indian Contract Act. In the recent case of *Kanhya Lal v. The National Bank of India*⁷ which is a suit to recover money paid by the plaintiff to prevent what he alleged was a wrongful sale of his property in execution of a money-decree against a third person, Section 72 of the Contract Act was fully discussed and the cases of *Fatima Khatoon Chowdrain v. Mahomed Jan*⁸ *Chowdry* and *Dulichand v. Ramkishen Singh (1881) I.L.R. 7 Calc. 648 L.R. 8 I.A. 93(Supra)*, were cited before the Privy Council. Their Lordships remitted the case to the Court below in order that the appeal to that Court might be heard and decided on its merits. Though there is no express decision on the point in their judgment, their Lordships would not have remitted that case to the Court below if in their opinion the 'suit, as framed, was not maintainable.

15. But apart from this, the plaintiff would have been entitled to sue the defendants Nos. 1 to 8 for contribution upon another ground. The plaintiff and the defendants Nos. 1 to 8 are, as I have said, joint owners of the tenure and are jointly and severally liable to their landlords for the entire rent. It is unquestionable that if any co-sharer tenant pays off the entire rent, he is entitled to sue, his other, co-sharers for contribution. It is true that the plaintiff was no party to the decrees for rent and hence they could not be realised from him in execution; but it is clear that if the defendants Nos. 1 to 8 had satisfied the decrees, they would according to the fundamental principle of equity which, as to contracts in general, is formulated in Section 43, para. 2 of the Indian Contract Act, have been entitled to sue the plaintiff for contribution not only in respect of the amount of the arrears of rent, but also in respect of the full amount of the interests and costs. If, on the other hand, the plaintiff had paid to the landlords the full amount of the decrees and costs and the landlords had accepted the same and had entered satisfaction of the decrees, there is no reason why the plaintiff should not have been equally co-titled to sue the defendant Nos. 1 to 8 for contribution. If that is so, does the fact that the plaintiff made the deposits under Section 310A place him in a worse position? It is perfectly true that the plaintiff had no right to make the deposits he did, under Section 310A of the Civil Procedure Code, 1882. He not being a party to

the suits and the decrees, the sales in execution thereof could only pass the rights and interest of the defendants Nos. 1 to 8 and his interest in the property would not have been affected by them. But still, the deposits were in fact made and were made without any protest or objection on the part of the decree-holder or the judgment-debtors and the Court received them and applied them towards the satisfaction of the decrees.

16. It is urged that, as soon as the sale took place, the decree was satisfied and the joint and several obligation in discharge of which the money was paid ceased to exist. I think a clear fallacy lurks in this argument. The decree is not satisfied and the obligation is not discharged until the decree-holder receives the money and satisfaction of the decree is entered, nor does the compulsion of law, initiated by the attachment of the property, terminate until such satisfaction. When the sale takes place, the purchase-money deposited by the purchaser remains in Court and it is not paid out to the decree-holder until after confirmation of the sale. If, before the sale is confirmed, an application is made under Section 310A and purchase-money and compensation are deposited, the money so deposited is applied towards the satisfaction of the decree and, on the sale being set aside, the purchase-money deposited by the purchaser is refunded back to him, and he also receives the additional amount of statutory compensation. It follows therefore that it was the money deposited by the plaintiff which in fact satisfied the decree and discharged the joint obligation, although, under the law, he had no right at that stage to make the deposit. I am, therefore, of opinion that the mere fact that the money was deposited under Section 310A does not alter the rights of the plaintiff; but at the same time he is not entitled to ask for contribution in respect of the statutory compensation of 5 per cent, deposited by him under Section 310A of the Civil Procedure Code of 1882, because that sum did not form part of the joint obligation which the parties were by law bound to discharge. If he had paid the sum before the sale, it would not have been necessary to pay this additional amount.

17. I do not think that the present case comes within the purview of Section 70 of the Contract Act. Under the law the co-sharers tenants were not only jointly, but also severally, liable for the rent of the tenure. When, therefore, plaintiff made the deposit in Court, he did so in discharge of his own liability for rent, and not in satisfaction of a debt due by another. In apportioning liability between co-obliges in a suit for contribution, which is eminently an equitable suit, regard must be had more to the real nature of the debt, than to the decree founded on it.

18. But apart from this, and notwithstanding the apparent generality of the language of Section 70 of the Contract Act, it seems to me reasonable to presume that it was not the intention of the Legislature that this section should be invoked where relief might be obtained under any other section of the Act, for instance, Sections 43, 68, 69, 70, 72, 146 and 222 (in cases of implied agency).

19. Nor do I think it was the intention of the Legislature by this section to abrogate the well-established and almost elementary rule of law that "it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises." *Ram Tuhul Singh v. Biseswar Lall Sahoo*⁹ *Ruabon Steamship Co. v. London Assurance*¹⁰ A too liberal construction of the section would render the enactment contained in Section 69 almost a surplusage, and the qualifying words "who is interested in the payment of the money" entirely nugatory. The particular rule embodied in Section 69 would, on such hypothesis, be included in the more general.

20. The dictum of. this Court in *Smith v. Dinonath Mooherjee*¹¹ that this section includes the payment of money by another, is in conflict with that of the Madras High Court in *Damodara Mudaliar v. Secretary of State for India*¹² and is based upon a much too narrow interpretation of the words of Section 69, as not including a case where a person who is bound to pay a certain sum of money is benefited by its payment by another. The words of the section are comprehensive enough to include such a case.

21. For the foregoing reasons, I am of opinion that the judgment of Mr. Justice Brett should, with the slight variation in dicated above, be affirmed and this appeal dismissed with costs.

Cases Referred.

- 1(1868) 12 Moo. I.A. 65 : 10 W.R.P.C. 29
- 2(1881) I.L.R. 7 Calc. 648 : L.R. 8 I.A. 93
- 3(1867) L.R. 3 C.P. 38
- 4(1885) L.R. 14 Q.B.D. 811
- 5(1890) L.R. 15 P.D. 38
- 6(1888) I.R. 15 Calc. 656
- 7(1910) I.L.R. 37 Calc. 426
- 8(1868) 12 Moo. I.A. 65 : 10 W.R.P.C. 29
- 9(1875) L.R. 2 I.A. 131 : 23 W.R. 305
- 10[1900] A.C. 6, 15
- 11(1885) I.L.R. 12 Calc. 213, 217
- 12(1894) I.L.R. 18 Mad. 88, 92