LETTERS PATENT APPEAL.

Before Mitter and McNair JJ.

1934

March 20, 21.

ANANDAKISHORE CHAUDHURI

v.

PANCHU KAPALI.*

Contribution—Costs—Co-defendant paying costs decreed jointly against him with others, if can claim contribution—Indian Contract Act (IX of 1872), ss. 69, 70.

Any one of several co-defendants, who satisfies, by payment, a decree for costs, passed jointly against him with the other defendants, in a suit which they were equally interested in defending, and in which their defence was substantially the same, is entitled to maintain a suit for contribution.

Kristo Chunder Chatterjee v. *J. P. Wise* (1) dissented from.

Fakire v. *Tasadduq Husain* (2), *Nand Lal Singh* v. *Beni Madho Singh* (3) and *Sreeputty Roy* v. *Loharam Roy* (4) distinguished.

So far as the right to contribution is concerned, there is no distinction between a case in which the costs are realised by execution and that in which payment is made before execution.

The right to contribution is governed by the provisions of sections 69 and 70 of the Indian Contract Act.

Ram Lal Mondal v. *Khiroda Mohini Dasi* (5), *Prosunno Kumar Bose* v. *Jamaluddin Mahomed* (6) and *Rajani Kanta Ghose* v. *Rama Nath Roy* (7) referred to.

LETTERS PATENT APPEAL by the plaintiffs.

The facts of the case and the points raised in the arguments in the appeal are stated in the judgment.

Gopendranath Das and *Shailendramohan Das* for the appellants. *Jateendramohan Chaudhuri* and *Prakashchandra Pakrashi* for the respondents.

Beereshwar Chatterji for the Deputy Registrar.

* Letters Patent Appeal, No. 10 of 1933, in Appeal from Appellate Decree, No. 860 of 1930.

(1) (1870) 14 W. R. (C. R.) 70.
(2) (1897) I. L. R. 19 All. 462.
(3) (1918) I. L. R. 40 All. 672.
(4) (1867) B. L. R. Sup. Vol. 687.
(5) (1913) 18 C. W. N. 113.
(6) (1912) 18 C. W. N. 327.
(7) (1914) 19 C. W. N. 458.

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MITTER J. This is an appeal under section 15 of the Letters Patent, against a judgment of my learned brother Mr. Justice Bartley.

It appears that the Maharaja of Tippera sued for *khâs* possession of certain lands, impleading, as defendants in the suit, two sets of persons,—the first set, claiming a right as superior landlords or *tâlukdârs* and the second set, the tenants claiming to hold under them. The suit was decreed with costs against the landlords and certain tenants who had joined in contesting. It appears, however, that the costs, although they were leviable from the landlords and the contesting tenants jointly and severally, were, as a matter of fact, realized from two of the landlords only. These landlords, who are the appellants before us, brought a suit for contribution against the other defendants, *viz.*, the other landlords and tenants who had contested with them the original suit. The Munsif dismissed the suit as against the tenants, being of opinion that they were not liable to contribute. He, however, decreed the suit against the landlord defendants. On appeal by the plaintiffs landlords, the learned District Judge reversed the decision of the Munsif so far as he dismissed the claim of the plaintiff for contribution as against the tenant defendants. The effect of the appellate court's decree was that the plaintiff's suit for contribution was decreed against all the defendants. Against this decision an appeal was taken to this Court and heard by Mr. Justice Bartley, who reversed the decision of the District Judge and restored that of the Munsif. Against this judgment, the present appeal has been preferred under the Letters Patent.

It is contended on behalf of the appellants that the reasoning on which the learned Judge of this Court has rested his decision cannot be sustained. The learned Judge of this Court has relied on a decision in the case of *Kristo Chunder Chatterjee* v. *J. P. Wise* (1), as an authority for the proposition

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that a joint decree itself creates no privity or obligation as between co-defendants. He has also relied on two decisions of the Allahabad High Court in support of the proposition that there can be no right to contribution as between different sets of defendants, where opposite or exclusive defences are set up: *Fakire* v. *Tasadduq Husain* (1) and *Nand Lal Singh* v. *Beni Madho Singh* (2). He has further referred to the case of *Sreeputty Roy* v. *Loharam Roy* (3) and has relied on certain observations of Sir Barnes Peacock to the effect that, if the defendants were acting as the servants of the plaintiff or under his directions, as he was the person who claimed the right and derived the benefit, he was the person who should pay all the damages. Applying the principles laid down in the cases referred to above, the learned Judge has arrived at the conclusion that, as the joint decree created no privity between the landlords and the tenants who were the co-defendants, and there having been no contract to reimburse the landlords, the suit for contribution, against the tenants, must fail.

It is argued on behalf of the appellants that the principles laid down in those cases cannot apply to the facts of the present case. Here the tenants did not set up any opposite or exclusive defence in relation to the defence set up by the landlords under whom they claim the tenancy. It seems to us that the defence which was set up by the tenant defendants was substantially the same as the defence set up by the landlord defendants. The tenants were equally interested in defending the title of their landlords in the suit brought by the Maharaja of Tippera.

It is, further, to be noticed that the decision in the Bengal Law Reports case, which is referred to, was a decision which was given prior to the enactment of the Indian Contract Act of 1872. It seems to us that

(1) (1897) I. L.R. 19 All. 462. (2) (1918) I. L. R. 40 All. 672.
(3) (1867) B. L. R. Sup. Vol. 687.

the matter with relation to contribution must now depend on the two statutory provisions contained in the Indian Contract Act, *viz.*, sections 69 and 70 of the Act. Section 69 runs as follows:

> A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

It is true that the decree obtained by the Maharaja was a decree for costs, which was payable jointly and severally by the landlord defendants and by the tenant defendants as well, but that does not render the provisions of section 69 inapplicable.

It is contended on behalf of the respondents that, taking strictly the language of section 69, the payment, made by the landlord defendants, was not a "payment of money" as contemplated by the section, which the tenant defendants were bound by law to pay, and this argument rested on this reasoning, *viz.*, as there was a joint and several liability, in other words, as the money might have been realized by the decree-holder Maharaja by execution exclusively against the landlord defendants, the tenant defendants were not bound to pay within the meaning of the section. We are unable to accede to this contention. It is true, at one time, the authorities were not clear on the point as is noticed by Sir Frederick Pollock and Sir Dinshaw Mulla, in their commentary on The Indian Contract Act. The learned authors observe (6th Edition, page 389) as follows:

> Whether this section applies to a suit for contribution where *both* the plaintiff and the defendant were liable for the money paid by the plaintiff is not clear on the authorities,

and the earlier trend of decision in some of the cases was that the section did not apply to such a case. But the view taken in the recent cases is that this section applies to suits for contribution, where both the plaintiff and the defendant were liable for the money paid by the plaintiff. The learned authors observed that this view was taken in the cases of

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Ram Lal Mondal v. *Khiroda Mohini Dasi* (1), *Prosunno Kumar Bose* v. *Jamaluddin Mahomed* (2) and *Rajani Kanta Ghose* v. *Rama Nath Roy* (3).

Even if the matter does not come under section 69, there can be no doubt that it comes within the wider language of section 70. There seems to be no justice or equity in the view taken by the learned Judge of this Court, that, although the landlord defendants and the tenant defendants were equally interested in defending the suit brought by the Maharaja of Tippera, they should not equally bear the costs which were decreed against them by a decree of court, which they were jointly and severally liable to pay.

Mr. Chaudhuri, who appears for the respondents, states that this might have been the case if the Maharaja had proceeded to levy execution by attachment or sale of the properties of the landlord defendants who had sued for contribution. But we do not see any distinction between a case where execution was proceeded with by attachment and sale of the properties of those who had sued for contribution and a case where execution had been arrested because the plaintiffs paid off the money. There can be no doubt that the tenants got the benefit of the payment which was made by the plaintiffs in the case.

We are, therefore, of opinion that the decision of the learned Judge of this Court must be set aside and that of the District Judge restored except so far as respondent No. 2 Rajanikanta Kapali is concerned as he is said to have died during the pendency of the appeal in this Court, in September, 1933, *i.e.*, more than three months from now. This appeal as against him has abated and the decree passed in Second Appeal No. 860 of 1930 by Mr. Justice Bartley will stand in favour of the said respondent or his heirs and legal representatives. Subject to this order,

(1) (1913) 18 C. W. N. 113. (2) (1912) 18 C. W. N. 327.
(3) (1914) 19 C. W. N. 458.

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regarding the deceased respondent No. 2 Rajanikanta Kapali, the judgment of the learned Judge of this Court must be set aside and that of the District Judge restored.

The appellants are entitled to the costs of this hearing as well as of the hearing before Mr. Justice Bartley.

McNAIR J. I agree.

Appeal allowed, suit decreed.

A. A.