APPELLATE CIVIL.

Before Henderson and Latifur Rahman JJ.

1939

April, 5, 6, 24.

BIRAJ KRISHNA MUKHERJI

v.

PURNA CHANDRA TRIVEDI.*

Contribution—*Re-imbursement—Distinction—Contract reserving benefit to a stranger—Stranger's right to sue on such contract—Indian Contract Act (IX of 1872), ss. 69, 70.*

A suit for contribution is totally different from a suit for re-imbursement. A claim for contribution is based on the payment of the common liability of two or more persons by one of them. A claim for re-imbursement under s. 69 of the Indian Contract Act, 1872, on the other hand, is based on the payment of the liability of one or more persons by another who is interested in making the payment but is not legally bound to pay. A claim for re-imbursement also arises under s. 70 of the Indian Contract Act, 1872, and is based on the defendant's obligation to the plaintiff for compensation when the defendant enjoys the benefit of the lawful and non-gratuitous act of the plaintiff.

Satya Bhusan Banerjee v. *Krishna Kali Banerjee* (1) relied on.

A stranger to a contract cannot sue for the benefit given to him by the contract unless the party to such contract who promises to perform such benefit to the stranger has made himself a trustee for, or an agent of, the stranger for rendering the benefit to him.

K. C. Mukherjee v. *Kiran Chandra Roy* (2); *Malda District Board* v. *Chandra Ketu Narayan Singh* (3) and *Jiban Krishna Mullik* v. *Nirupama Gupta* (4) referred to.

Kshirodebihari Datta v. *Mangobinda Panda* (5) dissented from.

If a *darpatnidâr* agrees with the *patnidârs* to pay the rent due from the *patnidârs* to the *zemindâr* and, if in spite of previous periodic payments in accordance with such agreement, the *darpatnidâr* subsequently does not pay the rent due to the *zemindâr* and one of the co-sharer *patnidârs* pays the entire rent to the *zemindâr*, then no suit for contribution lies against the *darpatnidâr* at the instance of the co-sharer *patnidâr* who has paid the entire rent due to the *zemindâr*. Neither s. 69 nor s. 70 of the Indian Contract Act, 1872, can be invoked against the *darpatnidâr* in such a suit by the co-sharer *patnidâr*.

*Appeal from Appellate Decree, No. 1327 of 1937, against the decree of B. K. Guha, District Judge of Birbhum, dated July 15, 1937, affirming the decree of Dinesh Chandra Sen, Subordinate Judge of Birbhum, dated Feb. 17, 1937.

(1) (1914) 18 C. W. N. 1308.
(2) (1938) 42 C. W. N. 1212.
(3) I. L. R. [1937] 2 Cal. 698.
(4) (1926) I. L. R. 53 Cal. 922.
(5) (1934) I. L. R. 61 Cal. 841.

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Section 69 of the Indian Contract Act, 1872, may apply to contractual obligation under appropriate circumstances.

If a *darpatnidâr* pays rent to the *zemindâr*, which under the contract is due from the *patnidâr* to the *zemindâr*, then, under s. 69 of the Indian Contract Act, 1872, the *darpatnidâr* can recover the same from the *patnidâr*.

Rajani Kanta Mandal v. *Haji Lal Mahommad* (1); *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (2) and *Somashastri Vishwanathshastri Kashikar* v. *Swamirao Kashinath Nadgir* (3) referred to.

Kunchithapatham Pillai v. *Palamalai Pillai* (4) dissented from.

APPEAL FROM APPELLATE DECREE preferred by defendant No. 1.

This appeal by the defendant No. 1 arose out of suit for contribution. Plaintiff's suit was decreed in both the Courts below. Hence this Second Appeal by defendant No. 1. The other material facts appear from the judgment.

Ramaprasad Mukhopadhyaya and *Bonbehari Mukherjee* for the appellant. Defendant No. 1, who is the appellant, is admittedly not a *patnidâr*. The *zemindâr* could not sue defendant No. 1 for any portion of *patni* rent. Hence the defendant No. 1 was not liable to pay the *patni* rent. Undoubtedly defendant No. 1 agreed with the *patnidârs* that he would pay the *zemindâr's* due from the *patnidârs*, but *zemindâr* was no party to the contract. Therefore, the *zemindâr* could not sue for any benefit under the contract unless there is a trust in favour of the *zemindâr* or the defendant No. 1 is an agent of *zemindâr*. There is no evidence of trust or agency and the lower Court's decision on this point is clearly erroneous. I rely on the decisions *K. C. Mukherjee* v. *Kiran Chandra Roy* (5); *Malda District Board* v. *Chandra Ketu Narayan Singh* (6) and *Jiban Krishna Mullik* v. *Nirupama Gupta* (7). Again the suit for contribution as against the defendant No. 1 is misconceived. Defendant was not jointly liable for the *patni* rent with other *patnidârs*. Mutuality is the

(1) (1917) 21 C. W. N. 628.
(2) (1878) I. L. R. 4 Cal. 369.
(3) (1917) I. L. R. 42 Bom. 93.
(4) (1916) 39 Ind. Cas. 405.
(5) (1938) 42 C. W. N. 1212.
(6) I. L. R. [1937] 2 Cal. 698.
(7) (1926) I. L. R. 53 Cal. 922.

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test of contribution. I rely on the case of *Satya Bhusan Banerjee* v. *Krishna Kali Banerjee* (1). Section 69 or s. 70 of the Contract Act has no application to the case and the defendant appellant cannot be made liable. Section 69 of the Act does not apply to contractual relations.

Gopendra Nath Das for respondent No. 1. Section 69 of the Contract Act applies to the circumstances of this case. I rely on the case *Somashastri Vishwanathshastri Kashikar* v. *Swamirao Kashinath Nadgir* (2). The lower appellate Court finds agency. I submit that this finding ought to stand. The defendant No. 1 has to pay in the long run and considerations of justice are on the side of the plaintiff respondent. I rely on the case of *Kshirodebihari Datta* v. *Mangobinda Panda* (3).

Lala Hemanta Kumar for respondents Nos. 11 to 16. I adopt the argument of Mr. Das.

Mukhopadhyaya, in reply.

Cur. adv. vult.

HENDERSON J. This is an appeal by defendant No. 1. The suit was one for contribution. There were two *patnis* which were held in the following manner :—

Plaintiff—one-third.

Defendants Nos. 2 to 10—one-third.

Defendants Nos. 11 to 16—one-third.

Defendant No. 1 had a *darpatni* under defendants Nos. 2 to 10. Defendants Nos. 2 to 10 had a *darpatni* under defendants Nos. 11 to 16 and defendant No. 1 had a *sepatni* under them. There were the usual

(1) (1914) 18 C. W. N. 1308. (2) (1917) I. L. R. 42 Bom. 93.
(3) (1934) I. L. R. 61 Cal. 841.

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terms in the leases to the effect that the *darpatnidâr* and the *sepatnidâr* would pay one-third of the *patni* rent to the *zemindâr*. Exhibit 7 is one of the leases. In order to save the *patnis* from being brought to sale, the plaintiff paid the whole of the amount due and then instituted the present suit for contribution. The plaintiff obtained a decree against all the defendants, but it was rather stultified by a direction that he could realise the decretal amount from defendant No. 1 alone. Defendant No. 1 appealed without success and he has now appealed to this Court. There is no appeal or cross-objection by the plaintiff against the inconsistency in the decree which I have just pointed out.

Defendant No. 1 is not one of the *patnidârs* jointly liable with the plaintiff for the payment of the *patni* rent. He cannot, therefore, be made liable to contribute, unless the *zemindâr* is entitled to sue him on the contracts to which he (the *zemindâr*) was a stranger.

This question has been frequently considered in this Court. It appears now to be well settled that ordinarily such a stranger cannot sue. The only opinion to the contrary which I have been able to discover is that of Lort-Williams J. in the case of *Kshirodebihari Datta* v. *Mangobinda Panda* (1). That opinion has been considered amongst others in the cases of *K. C. Mukherjee* v. *Kiran Chandra Roy* (2) and *Malda District Board* v. *Chandra Ketu Narayan Singh* (3) to which I myself was a party. While this opinion of the learned Judge has been frequently dissented from, it has never, so far as I know, been followed.

Both the learned Judges in the Courts below took the view that the *zemindâr* as a stranger could not sue on the contract. They got over the difficulty,

(1) (1934) I. L. R. 61 Cal. 841. (2) (1938) 42 C. W. N. 1212.
(3) I. L. R. [1937] 2 Cal. 698.

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however, the Subordinate Judge finding that the *darpatnidâr* was a trustee for the *zemindâr*, and the District Judge finding that he was an agent.

There are no materials to support either of these conclusions. The contract is one of a type which is frequently found and is precisely similar to those which were considered in one of the cases referred to above and in *Jiban Krishna Mullik* v. *Nirupama Gupta* (1). Those authorities are directly against the findings of the learned Judges in the Courts below and we must overrule the contention that the appellant was liable to contribute, because the *zemindâr* would be entitled to sue him on the contracts.

Reliance, however, was also placed upon ss. 69 and 70 of the Indian Contract Act. On behalf of the appellant, Mr. Mookerjee contended that the former does not apply, firstly, because it has no application to contractual obligations, and secondly, because the suit is not one for reimbursement but one for contribution.

In our opinion, it would be very difficult to say that in no conceivable circumstances could the section apply to contractual obligations. Such an interpretation would undoubtedly limit the usefulness of the section and lead to most illogical result. For example, it would follow that, while a *patnidâr* who paid the land revenue would be entitled to claim reimbursement from a *zemindâr*, no such right would accrue to a *darpatnidâr* who paid the *patni* rent. Such a distinction would be quite unreasonable and it has been held that in such circumstances the *darpatnidâr* is entitled to claim reimbursement. *Vide* the case of *Rajani Kanta Mandal* v. *Haji Lal Mahommad* (2).

In support of the applicability of the section, Mr. Das relied strongly upon the decision in the case

(1) (1926) I. L. R. 53 Cal. 922. (2) (1917) 21 C. W. N. 628.

of *Somashastri Vishwanathshastri Kashikar* v. *Swamirao Kashinath Nadgir* (1). Mr. Mookerjee asked us to say, that that is a halting decision to which very little weight can be attached. The facts as accurately reported in the head-note are as follows :—

K, who owned considerable property, gave a portion of it to his daughter's husband (plaintiff) in 1878, the deed of gift expressly providing that K undertook to pay the *judi* in respect of the portion. In 1902, K made a gift of the residue of his property to B, the gift-deed containing special reference to the previous gift of 1878 and enjoining the donee to act according to the gift. The *judi* was regularly paid by K first and B afterwards. In 1905, B in his turn made a gift of the property to the defendant, the deed of gift in this case contained a reference to the gift of 1878, but it contained no words requiring the donee defendant to abide by the terms of that gift. The defendant having failed to pay the *judi* to Government, the plaintiff was required to pay it. He sued to recover the amount from the defendant.

Now it is perfectly true that the learned Judges found it very difficult to say that the defendant was liable to pay. But, having once reached that conclusion, they easily found that s. 69 of the Indian Contract Act applied to the case. The decision is undoubtedly an authority for the proposition that the section applies to contractual obligations. A similar view was taken by this Court in the case of *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (2). I myself take the same view and I would respectfully dissent from the view taken by the Madras High Court in the case of *Kunchithapatham Pillai* v. *Palamalai Pillai* (3).

Turning to the facts of the present case I am clear that the *darpatni* and *sepatni* leases are not within the terms of the section. Before it can be said that the appellant is bound by law to pay a portion of the *patni* rent, it must be shown that he could be compelled to do so. We have already held that the *zemindâr* is not entitled to recover it from him. What defendant No. 1 is bound by law to pay is the *darpatni* and *sepatni* rent. The stipulation with regard to the payment of a portion of the *patni* rent

(1) (1917) I. L. R. 42 Bom. 93. (2) (1878) I. L. R. 4 Cal. 369.
(3) (1916) 39 Ind. Cas. 405.

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at the *zemindâr's kâchâri* merely provides a particular method for the payment of a portion of what is due from him to his own immediate superiors. In view of these provisions the receipt from the *zemindâr* will amount to a valid discharge *pro tanto* of the *darpatni* and *sepatni* rents. In these circumstances, it cannot be said, with any show of reason, that the appellant was bound by law to pay any portion of the *patni* rent.

The second question is whether s. 69 applies to contribution suits. Here again the decisions are not uniform, but in my judgment the better opinion is that it does not. Contribution and reimbursement are really totally different things. The words "interested in the payment of money" seem to imply that the person so interested is not the person liable. It would clearly be an under-statement and, in my opinion, misleading to say that a person is interested in the payment of his own debts. The illustration clearly applies not to contribution but to reimbursement and the use of the word "reimbursement" in the section itself points to the same conclusion.

There remains the applicability of s. 70. I am unable to say that this can have any application. The plaintiff was personally liable for the whole of the *patni* rent. When he paid it, he was doing so primarily on his own behalf. On the other hand, the appellant was not liable at all. As the plaintiff was himself personally liable, no question of acting on behalf of the appellant or of acting gratuitously can possibly arise. Any benefit which the appellant might derive from the payment would be purely subsidiary to the benefit which the plaintiff was conferring upon himself. The appellant would also still be liable to his own immediate landlords.

Finally Mr. Das strongly urged (and it appears from the end of the judgment that the learned Judge himself felt) that the appellant ought to be made to

pay, because his failure to do so has led to all this trouble. That of course is no answer to a defence that under the law he cannot be made to pay. It is merely a consideration affecting the question of costs.

We accordingly allow the appeal. The decrees of the Courts below so far as defendant No. 1 is concerned, are set aside and the suit against him is dismissed.

In the circumstances of the case we make no order as to costs.

LATIFUR RAHMAN J. I agree. There is very little for me to add to what my learned brother has said. I should, however, like to point out that the plaintiff is a *patnidâr* having one-third share in two *patnis*. Defendants Nos. 2 to 10 have also one-third share in them, while defendants Nos. 11 to 16, hold the remaining one-third share. By purchase the plaintiff has now become possessed of two-thirds share in the two *patnis*. Defendants Nos. 2 to 10 had sublet their one-third share to the defendant No. 1. Similarly, the predecessors of defendants Nos. 11 to 16 had sublet their one-third share to the predecessors of the defendants Nos. 2 to 10 in *darpatni* right. The defendants Nos. 2 to 10 again sublet this *darpatni* right in *sepatni* right. The condition in these leases being that the defendant No. 1 would pay the *patni* rent and *chaukidâri jamâ* direct to the *zemindâr*.

The *zemindâr*, the Raja of Nashipore, commenced *ashtam* proceedings as the rent was in default. The plaintiff who was liable to pay two-thirds share of the rent, in order to save the *patnis* from sale, not only paid his two-thirds share but also the remaining one-third which the defendants Nos. 2 to 16 were liable to pay, and thus saved his *patni* right. Thereafter, the plaintiff instituted this suit for contribution against all the defendants and has claimed the amount from defendant No. 1, as by *barât* made in

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the *darpatni* lease and *sepatni* lease the defendant No. 1 undertook to pay the dues of the defendants Nos. 2 to 16 to the *zemindâr*.

The learned Subordinate Judge has held that the liability of the defendants arise both under ss. 69 and 70 of the Indian Contract Act. The lower appellate Court has upheld that decision.

In my judgment, the view taken by the Courts below is not correct. A mere agreement between the defendant No. 1 and the defendants No. 2 to 10, for the payment of the *patni* rent on behalf of the plaintiff to the *zemindâr* cannot be made the foundation of a legal obligation on the part of the defendant No. 1 to pay to the *zemindâr*. The latter cannot enforce such an agreement, nor can sue upon it. There is no consideration passing from the defendant No. 1 to the *zemindâr* to make such an agreement binding. The plaintiff is bound by law to pay the *patni* rent to the *zemindâr* but the defendant No. 1 is under no such legal obligation.

As a general rule, the agreement between these defendants can only be enforced by them, unless of course, the agreement, although in form it is with the defendants, is intended to secure a benefit to the plaintiff, so that the latter is entitled to say that he has a beneficial interest as *cetui qui trust*, then the plaintiff will be entitled on equitable grounds to enforce the contract. The mere payment of rent to the *zemindâr* does not secure a benefit to the plaintiff.

Both the Courts below have applied the equitable rule, but, having regard to the particular facts of this case, it has no application. In this connection I may refer to a decision of this Court in *Jiban Krishna Mullik* v. *Nirupama Gupta* (1), where A, a *patnidâr*, created a *darpatni* in favour of B for Rs. 244 per annum, B created a *sepatni* by an instrument in favour of C for Rs. 344 per annum, out of which

(1) (1926) I. L. R. 53 Cal. 922.

Rs. 244 was to be paid to A for the *darpatni* rent and Rs. 100 was to be paid to B, the *darpatnidâr*. C paid to A for some time and then fell into arrears. A sued C for rent. Page J. observed as follows :—

Applying the equitable rule to the facts of this case, it is clear from a consideration of the terms of the instrument by which the *sepatni* was created that the instrument was not executed for the benefit of the plaintiff in any sense and that so far as the plaintiff was concerned the only effect of the instrument was that the *sepatnidâr* agreed with the *darpatnidâr* to pay to the plaintiff as a nominee of the *darpatnidâr* a portion of the rent due under the *sepatni*. The equitable rule should only be applied in rare cases, and under exceptional circumstances and can have no application in a case such as the one under appeal.

Then again the plaintiff has instituted the present suit for contribution. Mutuality is said to be the test of contribution. *In Satya Bhusan Banerjee* v. *Krishna Kali Banerjee* (1), the proposition of law has been formulated by Mookerjee J. in the following terms :—

As pointed out in the Oxford Dictionary (Vol. II, p. 923) contribution signifies payment by such of the parties interested in his share in any common liability. Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares.....Mutuality is the test of contribution. If A and B are jointly liable for a sum of money, and A alone satisfies the whole debt, he is entitled to call upon B to contribute to the extent of his proportionate share, and conversely, if B alone pays the whole debt, he is entitled to call upon A to contribute.

Applying these tests in the present suit before us, the appellant cannot be called upon to contribute.

For the above reasons, in my opinion, the appeal should be allowed and the suit against the defendant No. 1 should be dismissed with costs.

Appeal allowed.

N. C. C.

(1) (1914) 18 C. W. N. 1308.