APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893. July 26. September 19.

LAKSHMANA AYYAN (DEFENDANT), APPELLANT,

v.

RANGASAMI AYYAN (PLAINTIFF), RESPONDENT.*

Contribution suit for—Joint tort-feasor—Adjustment of a loss arising from an illegal contract.

A deed of partition between A and B, members of an undivided Hindu family, provided that A, who took over all the debts due to the family, should bear the loss if any incurred in the appeal then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against B and satisfied by him: he now sued the son of A (deceased) to recover the amount paid by him:

Held that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 350 of 1891, modifying the decree of T. M. Audinarayana Chettiar, District Munsif of Mannargudi, in original suit No. 169 of 1890.

The plaintiff and the father of the defendant were undivided brothers, and, in 1884, they brought a suit to recover Rs. 6,000 on the footing of a hypothecation bond. This suit was dismissed, and an appeal was preferred to the High Court. During the pendency of the appeal they entered into a partition, by which it was provided, *inter alia*, that the defendant's father should take over the debts due to the family and should bear alone the cost of the litigation above referred to. The appeal to the High Court was dismissed with costs on the ground that the bond in suit was supported by no consideration. The decree for costs was executed against the present plaintiff, and having satisfied the decree he now sued the infant son of his brother, since deceased, to recover, with interest, the amount so paid by him. The District Munsif passed a decree, as prayed, and this decree was upheld except as to the rate of interest by the Subordinate Judge.

* Second Appeal No. 1414 of 1892.

The defendant preferred this second appeal.

Mr. *R. F. Grant* for appellant.

Krishnasami Ayyar for respondent.

MUTTUSAMI AYYAR, J.—Appellant and respondent are the sons of two brothers. On the 25th October 1887 the latter and the father of the former entered into a partition. An appeal was then pending in the High Court from the decision of the Subordinate Court of Negapatam in original suit No. 63 of 1884, which had been brought by them on a hypothecation bond executed in their favor by one Chokkammal Annee of Kulikarai. The partition deed provided, *inter alia*, that appellant's father should take for his share all the debts due to the joint family including the amount of the hypothecation bond, and that, if the appeal then pending was decided against them, appellant's father should pay all the costs of that litigation both in the Original and Appellate Courts. The appeal was dismissed in January 1889, and both the appellant's father and respondent were directed to pay Chokkammal's costs. One of her judgment-creditors took out execution against the judgment debtors in original suit No. 63 of 1884, and recovered the costs from the respondent. The respondent's case was that he was entitled to recover the money paid by him from the appellant, and both the Courts below decreed the claim. It is urged in second appeal that the decree for contribution recognizes a claim contrary to public policy, and that the present suit is in the nature of a suit for contribution brought by one wrong doer against another. Original suit No. 63 of 1884 was dismissed on the ground that the hypothecation bond was executed without consideration, and that it evidenced a fraudulent transaction. It is no doubt a clear proposition of law that one tort-feasor cannot recover contribution from another, but it is subject to this important qualification, viz., that where the loss arising from the illegal contract is adjusted, so that the adjustment is equivalent to a payment, the adjustment cannot be disturbed. It was so held in *Owens* v. *Denton*(1). In that case, the price due for malt illegally sold by plaintiff was included in an account stated and settled between the parties, and it was held by Lord Abinger that the adjustment was equivalent to payment in cash, and that it came within the rule that money paid in pursuance of

(1) 1 C.M & R., 712.

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an illegal contract shall not be claimed back again. No contribution is allowed between joint tort-feasors because the community of wrong between them is the foundation of the action, but the same community of wrong precludes the defendant from recovering what he has paid in consequence of the illegal act. If the loss arising from the wrongful act is adjusted by an account stated between the parties or by a partition deed, as in this case, it is equivalent to payment since it is no longer necessary for the plaintiff to rely on the community of wrong in support of his claim.

The same community of wrong that would prevent the plaintiff from claiming contribution if there were no adjustment by partition likewise prevents the defendant from disturbing the adjustment which is equivalent to payment. The loss arising from the decision in original suit No. 63 of 1884 was a loss which devolved on the coparcenary family, and the partition deed under which the party who took all the debts due to the family agreed to bear the loss, if any, arising from the failure of the suit brought by the family to recover one of those debts is an adjustment which the defendant is not at liberty to go behind for raising a defence from the community of wrong in which he participated. The fact that the partition was made pending the decision of the appeal makes no difference in principle.

No other question is argued on appeal, and I would dismiss the second appeal with costs.

BEST, J.—The point urged before us is that plaintiff's suit is not maintainable, as the agreement sued on is opposed to public policy and therefore void.

The agreement sued on is part and parcel of the partition deed, under which plaintiff and his uncle, the father of the appellant (defendant) divided the family property.

This division took place pending appeal suit No. 50 of 1887 in this Court.

That was an appeal against the decree of the Subordinate Judge of Negapatam, which dismissed a suit brought by plaintiff and his uncle (the father of defendants) for the recovery of a sum of Rs. 4,000 and interest as due under a hypothecation bond executed by one Murugattal Annee. This Murugattal Annee (as first defendant) admitted the then plaintiff's claim, but one Chokkammal Annee, who was the second defendant, denied the

executant's right to encumber the property, and pleaded that the hypothecation bond was fictitious. The finding of this Court was that the hypothecation sued on was a colorable transaction. The appeal was therefore dismissed with costs.

As already observed, it was, while that appeal was pending, that this plaintiff and the father of defendant effected a partition of their family property; and in the deed of partition after mentioning the pending appeal, and after allotting the debt in question to this appellant's father exclusively, it is stipulated that the latter shall pay the entire costs of that suit in both Courts in case the appeal should fail, and it is further stipulated that "if "Naranappien (appellant's father) does not pay the same, and if "any sums are collected from Ramasawmi Iyen (present respond-"ent) in execution proceedings, those sums shall be collected from "Naranappien by Ramasawmi Iyen amicably or through the Court." It is this contingency that has happened; and the question is whether plaintiff is debarred from recovering the costs paid by him by reason of the same having been incurred in a suit brought on a bond which was found to be a colorable transaction.

This is not a suit for "contribution" like *Manja* v. *Kadugochen*(1), and *Suput Singh* v. *Imrit Tewari*(2), but for the enforcement of one of the terms of the partition deed. Appellant's father would have been exclusively entitled to the whole of the amount then sued for had the appeal succeeded, and he could not have been allowed to disclaim his liability for the costs merely because the appeal failed. The contract is part and parcel of the partition deed from which it is inseparable, and, unless the partition can also be set aside, it is not open to the appellant to deny his liability for the amount now sought to be recovered from him.

This appeal must be dismissed with costs.

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(1) I.L.R., 7 Mad., 89. (2) I.L.R., 5 Calc., 720.