APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SIVA PANDA (DEFENDANT), APPELLANT,

v.

JUJUSTI PANDA (PETITIONER AND PLAINTIFF), RESPONDENT.*

1901. December 10, 13.

Contribution as between judgment-debtors—Decree against two defendants jointly —Satisfaction by one alone—Primâ facie *case made by production of judgment and certificate of satisfaction—Joint tort-feasors.*

Where the amount of a decree has been recovered from one of two judgment-debtors against whom it was jointly passed and he sues the other judgment-debtor for contribution, a *primâ facie* case is made by the production of the judgment and the certificate of satisfaction. That judgment is conclusive as between the judgment-debtors in the sense that it will not be open to either of them to contend that the former suit should have been dismissed, or that one of the parties should not have been held liable to the decree-holder therein, or that the amount decreed was excessive or based on principles erroneous on the face of the judgment. But it will be open to the party from whom contribution is sought, without impugning the propriety of the judgment, to plead and establish that as between the joint debtors the plaintiff is solely liable for the debt or that the defendant is not equally liable with the plaintiff, or that the suit is not maintainable by reason of the fact that the plaintiff and the defendant are joint tort-feasors in a sense in which, on public grounds, the right to claim contribution is negatived.

And though it may have been rightly held in the former suit that both judgment-debtors were jointly liable for the mesne profits of land for three years, it will still be open to the defendant in the suit for contribution to show that the plaintiff alone enjoyed those profits: and in that case the plaintiff will not be entitled to contribution.

Whether the principle laid down in *Merryweather* v. *Nixon* (8 T.R., 186) should be followed in India.—*Quære.*

CLAIM for contribution. Plaintiff and defendant were sued in Original Suit No. 156 of 1899 on the file of the District Munsif's Court at Aska, and a decree was passed against them jointly directing them to deliver over certain land to the plaintiff in that suit and to pay him Rs. 43-15-10 on account of profits and Rs. 31-3-6 as costs. The sum of Rs. 82-6-4 was recovered from the present plaintiff in execution of that decree, and plaintiff now brought this suit for contribution, contending that defendant was

* Appeal under article 15 of the Letters Patent against the judgment and order of Mr. Justice Davies, dated the 18th July 1901, in Civil Revision Petition No. 36 of 1901 preferred from the decree of K. Ramalinga Sastri, District Munsif of Aska, in Small Cause Suit No. 386 of 1900.

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liable to repay him one-half of the aforesaid amount, namely, Rs. 41-3-2. The defendant, in his written statement, pleaded that he had remained *ex parte* in Original Suit No. 156 of 1899; that plaintiff had set up a false statement in that suit; that the question at issue was referred to panchayatdars before whom defendant made a statement that he had no concern in the suit; that at plaintiff's request the Court had in Original Suit No. 156 of 1899 decreed agreeably to an oath which was taken by one of the plaintiffs therein; and that the mesne profits decreed in that suit related to faslis 1306, 1307 and 1308, which were received and enjoyed by plaintiff alone. The only issues framed were whether the suit lay on the small cause side of the Court (the Munsif holding that it did) and whether defendant was bound to contribute. This issue the Munsif decided in favour of defendant. He said: "Defendant is not bound to contribute. He was the first defendant in Original Suit No. 156 of 1899; he left that case *ex parte*. That case was decided by the first plaintiff's special oath. The pleas raised in the original suit show that the present defendant had no interest in that case. The foundation of the action thus fails." He dismissed the suit, but without costs.

Plaintiff preferred this Civil Revision Petition, which came before Davies, J., who set aside the District Munsif's decree and passed a decree in plaintiff's favour on the ground that the District Munsif was wrong in going behind the decree which made the defendant jointly liable with plaintiff. He held that plaintiff was entitled to the contribution claimed.

Against this judgment defendant preferred this appeal under article 15 of the Letters Patent.

V. Krishnaswami Ayyar for appellant.

T. R. Venkatarama Sastri for respondent.

JUDGMENT.—In Original Suit No. 156 of 1899 a decree was passed jointly against the plaintiff and the defendant in the present suit directing them to deliver to the plaintiff in the former suit certain lands and to pay Rs. 43-15-10 on account of the profits of such land and Rs. 31-3-6 for costs of the suit. The defendant in the present suit did not appear and defend the former suit. In execution of the said decree the whole amount decreed with costs was recovered from the present plaintiff alone and he now sues the defendant for contribution and claims payment of Rs. 41-3-2 being one-half of the amount realized from

him. The defendant resists the claim on the following grounds :— (1) That the decree in Original Suit No. 156 of 1899 was passed against him *ex parte*; (2) that he had no concern in that suit and that he appeared and stated so before certain Commissioners appointed in that suit under the Indian Oaths Act to administer a special form of oath to be taken by the plaintiff therein, by which oath the present plaintiff the second defendant therein agreed to be bound; (3) that the present plaintiff put forward a false contention in that suit; (4) that the decree was passed against both the defendants therein in accordance with the oath taken by the plaintiff therein; and (5) that the mesne profits decreed related to faslis 1306, 1307, 1308, and were received and enjoyed by plaintiff alone.

Upon these pleadings and with reference to the pleadings and judgment in the former suit, the District Munsif held that the defendant was not bound to contribute and dismissed the suit. His decision seems to be based on the first, second and fourth pleas raised by the defendant as above set forth. The above decision of the District Munsif was set aside in revision by Davies, J., and a decree was passed in favour of the plaintiff as prayed for, on the ground that the District Munsif was wrong in going behind the decree which made the defendant jointly liable with the plaintiff, and that being so, the plaintiff was entitled to claim contribution from the defendant for the moiety.

In our opinion the plaintiff has made out a *primâ facie* case by the production of the judgment in the former suit and of the certificate of satisfaction thereof by him alone. It is immaterial that, so far as the present defendant is concerned, it was passed against him *ex parte*, and it was not competent to the District Munsif to go behind the decree in that case and hold that the foundation of the present action fails because the former suit was decided by the special oath of the plaintiff therein and the pleadings in that suit show that the present defendant, who did not appear and defend that suit, had no interest in that case. Whether the judgment in that case was in fact and law right or wrong, it has become final and it is not now open to the defendant to contend that that suit ought to have been dismissed as against him and no decree ought to have been passed holding him jointly liable with the plaintiff. In a suit for contribution by one joint judgment-debtor against another, the decree passed

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against them jointly in the former suit is conclusive, not only as between them on the one hand and the decree-holder on the other (who is no party to the contribution suit), but also as between the judgment-debtors *inter se*. It is not conclusive on the question of the liability to contribute or the extent of such liability, but it is conclusive in the sense that it is not open to either party to contend that the former suit ought to have been entirely dismissed or that at any rate he ought not to have been held liable to the decree-holder therein or that the amount decreed was excessive or fixed on principles erroneous on the very face of the judgment. Without impugning the propriety of the judgment, it will, of course, be open to the party from whom contribution is sought, to plead and establish that as between the joint-debtors the plaintiff is solely liable to the debt or that he is not equally liable with the plaintiff or that both being joint tort-feasors in a sense in which, on public grounds, the right of contribution is negatived, the suit is not maintainable.

The fifth plea raised in this case might, if established, have been a valid defence to this suit. Though, in the former suit, both may have been rightly held jointly liable to the then plaintiff, yet, if as between the plaintiff and defendant herein, the former alone received or enjoyed the profits for faslis 1306, 1307, 1308, which were decreed in the former suit, the defendant cannot be called upon to contribute.

No plea having been raised against the maintainability of the suit on the ground that the plaintiff and defendant were joint tort-feasors it is unnecessary to consider how far the rule in the English case of *Merryweather* v. *Nixon*(1), which Lord Herschell in *Palmer* v. *W. and P. Steam Shipping Co.*(2), felt bound to say did not appear to him "to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries" should be followed in India or to consider the extent to which it has been limited in England by the subsequent cases of *Adamson* v. *Jarvies*(3), *Palmer* v. *W. and P. Steam Shipping Co.*(4) and *Burrows* v. *Rhodes and Jameson*(5).

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(1) 8 T.R., 186.
(2) L.R., 1894, A.C., 318 at p. 324.
(3) 4 Bing., 66.
(4) 1894, A.C., 318.
(5) 99 (1) Q.B., 816.

As regards the fifth plea, which, if established might, as already observed, be a valid defence to the suit, it is not alleged that any evidence was tendered or rejected.

The appeal therefore fails and is dismissed with costs.

PRIVY COUNCIL.

SUBRAMANIAN CHETTIAR (PLAINTIFF),

v.

ARUNACHALAM CHETTIAR (DEFENDANT),

P.C.*
1902.
June 12, 13.
July 9.

[On appeal from the High Court of Judicature at Madras.]

Registration—Document collateral to a permanent lease of immoveable property—Registration Act—Act III of 1877, *s.* 17—*Transfer of Property Act—Act IV of* 1882, *s.* 107—*Evidence Act—Act I of* 1872, *s.* 92—*Right of suit by assignee of agreement—Assignment of property to trustee—Construction of trust deed—Claims "now due owing or payable."*

An agreement to pay Rs. 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zamindari, which agreement was come to before, but reduced to writing after, the execution of the lease, was *held* to be not affected by section 92 of the Evidence Act, nor to require registration either under the Registration Act, section 17, or the Transfer of Property Act, section 107, where it was not inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property, and it was not rent or recoverable as rent, but a mere personal obligation collateral to the lease.

Held also, that the lessor's rights under the agreement did not pass under a settlement subsequently executed by him for the benefit of his son, by which he assigned to a trustee his zamindari with its incidents, and also "all the outstanding debts, arrears of rent, mesne profits, claims, demands, and sums of money of whatsoever description, now due owing or payable to the settlor on any account whatsoever, and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of these presents . . . except and always reserving to the settlor all outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor, and all rights to prosecute any suit or other proceedings now existing, etc." The use in an Indian document of the words "now due owing or payable" in defining the claims transferred coupled with the words that follow restricting the transfer of rights of suit in respect of such claims to those existing at the date of the deed, showed that rights of the nature of those in the agreement, accruing as they did after the

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* *Present.*—Lord Davey, Sir Ford North, Sir Andrew Scoble, and Sir Arthur Wilson.