time and subject also to her right being defeated at the plaintiff's option. It was, therefore, intended to create some rights in favour of the vendee but different from what it purported to create. This does not come within the rule that an instrument may be shown not to have been intended to create any rights at all but was brought about entirely with the indirect object of creating false evidence against third parties, or within the rule that a party may set up and prove a parol agreement constituting a condition precedent to the attaching of any obligation under it.

The case set up by the plaintiff and found by the Lower Appellate Court is, therefore, contrary to the terms of section 92 of the Evidence Act. The result is that the document must be allowed to have operation according to its terms.

We dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

SRI SRI SRI GAJAPATI KRISHNA CHANDRA DEO GARU, PROPRIETOR OF NANDIGAM ESTATE, BEING A MINOR UNDER COURT OF WARDS BY HIS NEXT FRIEND THE COLLECTOR OF GANJĀM (PLAINTIFF), APPELLANT,

1913. March 11 and 12.

v.

P. SRINIVASA CHARLU (DIED), LEGAL REPRESENTATIVE OF THE LATE DIWAN BAHADUR P. ANANDA CHARLU, C.I.E., AND TWO OTHERS (DEFENDANTS—LEGAL REPRESENTATIVE AND HIS LEGAL REPRESENTATIVES), RESPONDENTS. *

(Indian) Contract Act (IX of 1872), sec. 70, applicability of, regardless of English decisions.

Plaintiff's father made a gift of a village to the defendant, the condition being "we (the plaintiff's father) should get the village sub-divided in your (donee's) name, you should pay to the Government the peshkash fixed thereupon according to the said subdivision."

Held that the defendant was bound to pay his portion of the peshkash only from the time of the subdivision when alone the exact amount due by defendant was ascertained; and that plaintiff, who had paid the whole peshkash

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was entitled to recover from the defendant under Section 70 of the Indian Contract Act whatever the defendant was liable to pay after the sub-division.

Section 70 of the Indian Contract Act should be applied in all cases where the requirements of the section are fulfilled whatever might be the English law on the subject.

A person must be said to have enjoyed the benefit of an act within the meaning of section 70 of the Indian Contract Act, when he in fact enjoyed the benefit by accepting or adopting it, without objecting to it.

Section 70 does not require that the defendant must have an option of declining the benefit if that means that before the benefit is conferred he must be given the choice of accepting or declining it.

Per MILLER, J.—The fact that plaintiff's interest also might have suffered if the act was not done will not make the act any the less one done *for* the defendant.

Narayanaswami Naidu v. *Sree Rajah Vellanki Sreenivasa Jagannadha Rao* (1910) I.L.R., 33 Mad., 189 and *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (1910) I.L.R., 33 Mad., 15, referred to.

Per SADASIVA AYYAR, J. *Obiter*:—If the benefit conferred is inseparably accompanied by onerous obligations that a reasonable man would refuse to accept it section 70 will not apply.

Damodara Mudaliar v. *Secretary of State for India* (1895) I.L.R., 18 Mad., 88 and *Jognarain* v. *Badri Das* (1912) 16 C.L.J., 156, followed.

Yogambal Boyee Ammani Ammal v. *Naina Pillai Markayar* (1910) I.L.R., 33 Mad., 15, dissented from.

Abdul Wahid Khan v. *Shaluka Bibi* (1890) I.L.R., 21 Calc., 496 (P.C.) and *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1875) 2 I.A., 131, distinguished.

Rajah of Vizianagaram v. *Rajah Setrucherla Somasekhararaz* (1903) I.L.R., 26 Mad., 686, referred to.

APPEAL against the decree of E. L. VAUGHAN, the District Judge of Ganjām, in Original Suit No. 13 of 1907.

The facts of this case appear from the judgment of the District Judge given below :—

"In 1890, plaintiff's father, a Zamindar, executed a deed "of gift (Exhibit A) to defendant of a village in his zamindari. "Plaintiff's father died eight years later (1898). The village "was separately assessed in 1904. Plaintiff's father and after him "the plaintiff paid peshkash for the whole zamindari till then. "Plaintiff claims a reimbursement of the peshkash paid between "the date of plaintiff's father's death and separate registration, "*i.e.*, 1898 to 1904. Admittedly, that plaintiff paid up till the "date of separate assessment, the whole peshkash due on the "estate; defendant denies that any payment was in his (defend-"ant's) behalf or that he (defendant) is liable to make any "payment to plaintiff.

"Issue II is the main issue. [The second issue in the case "was: 'was defendant bound to make the said payment either on "the terms of the deed of gift or by law?']. Plaintiff claims "under sections 69 and 70 of the Contract Act on the ground "that defendant was bound to pay the peshkash and that the "wording of the document shows that plaintiff's father never "intended to pay it gratuitously. Under the ruling laid down in "*Bhoja Sellappa Reddy* v. *Vridhachala Reddy*(1) defendant was "clearly not bound to pay even though it might have been in his "interests to do so. It is further to be inferred from the docu-"ment and plaintiff's father's subsequent conduct that plaintiff's "father made the payments gratuitously. Exhibit A is not a "document of the nature of a contract but is a deed of gift "made out of gratitude to defendant for services rendered. "It recites that plaintiff's father 'will apply for separate regis-"tration and according to that sub-division, you (defendant) "must be paying Government the peshkash as fixed as per such "division'. This to my mind means as soon as sub-division "was made, defendant should begin his payments. Plaintiff's "father may have contemplated applying for separate regis-"tration at once but as a matter of fact till his death eight "years later he took no action and apparently went on paying "the full peshkash without, so far as the evidence goes, objection "of any kind. Even for three years after his death, plaintiff "himself took no action and so far as the evidence goes, made no "objection. It appears from Exhibit B, that subsequently the "then manager took action, but plaintiff's case is not based upon "that action but on the wording on the gift deed A. The amount "to be paid was not even fixed till late in 1903, and even then it "might possibly have been objected to as an *ex-parte* calculation. "As the suit must fail upon this issue it is unnecessary to discuss "the remaining issues. The suit is dismissed with costs."

The necessary portion of the deed is given in the beginning of MILLER, J's. judgment.

C. F. Napier and *Dr. S. Swaminathan* for the appellant.

C. P. Ramaswami Ayyar for respondents Nos. 2 and 3.

MILLER, J.—The District Judge decided the case on the second issue only and has construed Exhibit A as meaning that the plaintiff's father made a gift of the village free of land-tax to the donee

MILLER, J

(1) (1907) I.L.R., 30 Mad., 35.

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until the donor obtained separate registration of the village by the Collector and apportionment of the peshkash. The condition in the gift is, "We should get the village sub-divided in your name (we being the Zamindar). You should pay to the Government the peshkash fixed thereupon according to the said sub-division." The Zamindar made the gift in 1890, and died in 1898, and during all that time the donee remained in possession of the village and paid no portion of the land-tax. The conduct of the Zamindar which may be looked to, to aid in construing the document, supports the construction which the District Judge has put upon it, and that is, that so long as the village remained an unseparated part of the zamindari, the Zamindar was to pay the land-tax. But he had the option of obtaining from the Collector separate registry, and that may well imply an obligation on the donee to concur in his application to the Collector for that purpose. Then in 1901, the manager of the estate under the Court of Wards, on behalf of the plaintiff, applied for the separate registration. Notices were published, in accordance with the provisions of the Madras Act I of 1876, in the District Gazette, and on the 19th of September 1903, the Collector fixed the proportionate peshkash at Rs. 206-5-3, and on that date notice thereof was sent to the donee calling upon him to state if he was willing to agree to the apportionment. The donee made no answer to several letters calling upon him to reply, and in 1904 the Collector for want of his concurrence refused to order the separate registry. Subsequently, in September 1904, the donee consented to separate registry, and it was made finally in 1905. In construing the document, as the District Judge has done, that the donee was under no obligation to pay the land-tax before the sub-division of the village, the 19th September 1903 is the first date, so far as I can see, on which any obligation can be laid upon the defendant. There is nothing in the evidence to show that the peshkash could have been fixed earlier by the Collector unless he had been applied to earlier by the Court of Wards. There is nothing to suggest that the delay was due, in any way, to any action of the defendant or to any contention of his, that peshkash ought not to be apportioned: consequently on the terms of the gift, the 19th of September 1903 is the earliest date from which the liability to pay peshkash could commence. On that date or a day or two later the donee received a notice from the Collector that the peshkash had

been fixed and that the sub-division has been concluded subject to his consent. It may be, therefore, that from that date the sub-division contemplated by the deed of gift was complete and that the donee was bound to pay the amount fixed, in which case all subsequent payments made by the plaintiff may be recoverable under section 69 of the Indian Contract Act. But it is unnecessary for us to decide the case on that section. It may be safer to rely, as the plaintiff also relies in his plaint, upon section 70. From the date on which the peshkash was fixed, it seems clear that the peshkash paid by the plaintiff to the amount of Rs. 206–5–3 was made for the donee. No doubt, it is possible that, if the plaintiff had not paid it, his own interest might have suffered; though it is probable that the Collector, inasmuch as the Court of Wards was the payer, might have come down upon the given village for any arrears which the Court of Wards might assent to be due in respect of that village; that, however, is a matter which I need not go into; it is undoubtedly possible that the plaintiff's interest might have suffered, but that I think, will not, in the circumstances make the payment the less a payment for the defendant. The amount of the peshkash which had been fixed was payable by the defendant, and it was paid as such and as being due upon that property. Therefore, though it might have been in the interest of the plaintiff to pay it, it does not seem to me, that there is any reason to say that it was not on that ground a payment made for the defendant. It is perfectly clear, of course, that once the sub-division was effected, the amount paid by the plaintiff could not have been intended to be left unrecovered, that the payment was not intended to be made gratuitously.

Then, the only other point that has to be considered in deciding whether the section is applicable in its language seems to be: 'Did the defendant enjoy the benefit thereof?' He undoubtedly did enjoy the benefit thereof; he never objected to accepting the benefit; he remained in possession of the village until the permanent registration was effected; and he never showed that he did not wish the payment to be made. On the contrary, he finally accepted the sub-division and the apportionment. It is true no doubt, that, in his written statement, he suggests that the amount was excessive; but so far as the evidence shows, he does not seem to have said so to the

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Collector or to the plaintiff or to any one before the suit was filed. Consequently, I think that he clearly accepted the benefit: he enjoyed the land and let the plaintiff pay the land-tax which he must have known was being paid for him. It does not seem to me that anything further is required in order to make the amount recoverable under the section. We have been referred to some cases as showing that this section does not materially depart from the English Law with regard to voluntary payments. I do not know that I need discuss them. We must of course proceed on the language of the section as it stands, unless we are bound by some decision to put a particular interpretation on it. What is necessary under the section? It is necessary, no doubt, that the plaintiff should prove first that he is doing something lawful when he is making the payment. That provision has been interpreted in various cases but here there is no question about the lawfulness of the payment. Then, he will have to show that he did not intend to pay gratuitously. That is also clear here. He will have then to show that what he did was done for the defendant, and it clearly may be very difficult for him to show that in some cases, especially in cases where his own interest is manifestly predominent. If he pays in his own interest, he will not ordinarily be held to have made the payment for the defendant, but whether he did so or not is, it seems to me, a question of fact in each case. Then finally the plaintiff will have to show that what he did did actually confer a benefit upon the defendant and that the defendant enjoyed the benefit. It would seem to be a sufficient answer to the plaintiff's claim if the defendant declined the benefit which it was proposed to thrust upon him. He may be taken to be the best judge of what is beneficial to himself in ordinary cases and could not in such cases be said to have enjoyed a benefit which was no benefit. On this ground or on the ground that in such cases the payment is not really made for the defendant may be rested the cases which show that, unless the defendant is willing to accept the benefit, the payment will not be recoverable under the section. No case has, I think, been cited during the argument. There is a case, *Narayanaswami Naidu* v. *Sree Rajah Vellanki Sreenivasa Jagannadha Rao*(1), in

(1) (1910) I.L.R., 33 Mad., 189.

which it is pointed out that, at any rate, the law of section 70 of the Indian Contract Act is certainly not narrower than the English Law, and, though in that case we held that we could imply a request to pay, I do not know that there is anything in section 70 which requires us to deal with the matters as one of an implied contract; but here, I think, that from the condition of the gift accepted by the defendant we might well imply an undertaking that anything that might be paid on his behalf after sub-division (which he was bound to facilitate) would be repaid by him.

I do not think that what I have laid down is opposed to any of the cases, though perhaps I go somewhat farther than *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(1). I do not think it can be held under section 70 of the Indian Contract Act that the defendant must have an option of declining the benefit if that means that before the benefit is conferred he must be given the choice of accepting or declining it. Here as I have said the defendant adopted the benefit. It seems to me that we are clearly in this case within section 70 of the Indian Contract Act and therefore, I hold that, from the date on which the sub-division was settled by the Collector, *i.e.*, from the 19th of September 1903, though the registration could not be made then, the payments were made by the plaintiff for the defendant and that in respect of them the latter is bound to reimburse the former the amount of the payments up to the 18th April 1904 (the last payment), with interest at 6 per cent. per annum from the date of the suit till payment. Proportionate costs are to be paid, and received in, both the Courts.

SADASIVA AYYAR, J.—On the construction of the gift deed, I agree that the defendant would, under its terms, become liable to pay the proportionate kist on the village gifted to him only from the date when the Collector divided off the village as a separate estate and fixed the separate revenue due upon that village. But there was clearly an implied obligation imposed under the gift deed on the defendant to give facilities for such separate registry whenever the donor takes steps to have such separate registry and separate apportionment of poshkash made by the Collector. All payments made before the date (about the 20th September 1903), when the Collector fixed

(1) (1910) I.L.R., 33 Mad., 15 at p. 21.

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the separate revenue payable in respect of the village and sent notice to the defendant, cannot therefore be recoverable by plaintiff from defendant, having regard to the provisions of the gift deed. As regards the payments of peshkash made after September 1903, the circumstances clearly indicate that the payment of the whole peshkash including the *portion* chargeable upon the defendant's village (according to the Collector's estimate) was made by the plaintiff not only on his (plaintiff's) own behalf, but also on behalf of the defendant. Much reliance was placed by the respondent upon the case decided in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(1) by MUNRO and SANKARAN NAIR, JJ. A portion of the head note runs thus: "Where the person paying is interested in making the payment, he cannot be presumed, in the absence of evidence to show that he intended to act for the other party also, to have acted for such other party." I fully accept the statement of the law so laid down. In that case, there seems to have been such absence of evidence—I take 'evidence' to include 'surrounding circumstances'—to show that the plaintiff in that case intended to act for the other party also. *Abdul Wahid Khan* v. *Shaluka Bibi*(2) was, again, decided on the particular facts of that case, *i.e.*, the circumstances in that case similarly indicated that the payment by the plaintiff in that case was not also on behalf of the other party sought by the plaintiff to be made liable to pay contribution. I do not think that these cases intended to lay down generally that, where a person is interested in making a payment, it cannot be held *under any circumstances* that he intended to act for the other party also. On the contrary, the observations in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(1) clearly show that from the circumstances it might be inferred that the plaintiff intended "*also* to act for the defendant." I think the facts and the circumstances of the present case clearly show that all payments made after September 1903 were intended by the plaintiff to be both on behalf of the plaintiff and of the defendant. There are of course, other observations in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Marakayar*(1) to the effect that section 70 of the Indian Contract Act merely

(1) (1910) I.L.R., 33 Mad., 15. (2) (1894) I.L.R., 21 Calc., 496 (P.C.).

reproduces the English Law as laid down in *Lampleigh* v. *Brathwaite*(1) with all the restrictions imposed by other English decisions following it, and that a person sought to be made liable must not only have benefited by the payment but also have had an opportunity of accepting the payment. I respectfully dissent from such observations, and I am inclined to agree more with the judgment in *Jognarain* v. *Badri Das* (2), in which the too narrow interpretation put upon section 70 of the Indian Contract Act in the above case (*Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(3), is dissented from. The words of section 70 of the Indian Contract Act do not oblige us to import all the restrictions imposed by the English decisions, upon the equitable right of a person, who honestly does something for another without an intent to do so gratuitously, to recover compensation from that other for the benefit so conferred upon and enjoyed by that other person. *Damodara Mudaliar* v. *Secretary of State for India*(4), did not favour the imposition of such restrictions. It is stated in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(3), that the decision in *Damodara Mudaliar* v. *The Secretary of State for India*(4) is opposed to the decision of the Privy Council in *Abdul Wahid Khan* v. *Shaluka Bibi*(5). I have already shown that the decision in *Abdul Wahid Khan* v. *Shaluka Bibi*(5) rested on the particular facts of that case. As regards the observations of the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*(6), not only was the payment in that case made in 1868 (before the Indian Contract Act became law), but it was found in that case that the payment was a voluntary payment "*against the will of the party benefitting* and made in the course of a speculative transaction in which the interest of the appellant was *directly* opposed to that of the respondents." Of course, a few restrictions ought to be placed on the words of section 70 of the Indian Contract Act, if they are so wide that it could not have been possibly intended by the legislature that the words should be given such a wide scope. For instance, if the benefit is conferred *notwithstanding notice of protest of the man benefited that he did not want the benefit*

(1) (1616) 1 Sm. L.C., 141 at p.163.
(2) (1912) 16 C.L.J., 156.
(3) (1910) I.L.R., 34 Mad., 15.
(4) (1895) I.L.R., 18 Mad., 88.
(5) (1894) I.L.R., 21 Calc., 496 (P.C.).
(6) (1875) 2 I.A., 131.

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proposed to be conferred on him, the act could not be said to have been done on his behalf. That seems to have been laid down in *Damodara Mudaliar* v. *Secretary of State for India*(1), and also in the Privy Council case in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (2). Also, if the benefit conferred is so inseparably accompanied by onerous obligations that a reasonable man might reasonably (and not in a wholly capricious way) refuse to accept, the benefit burdened with those obligations, there also section 70 may not apply. But subject to these and other similar restrictions, (it is impossible to predict and lay down exhaustively all the restrictions which it is advisable to lay down) I think that Courts in India ought to be guided more by justice, equity and good conscience than by the English precedents and should not cut down the beneficent provisions of section 70 of the Indian Contract Act which are intended to apply to all cases of benefit *bonâ fide* conferred by one person upon another and which benefit is enjoyed by the other person. It has been held in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(3), that, so far as a charge is claimed by one co-sharer on the property of another co-sharer when both shares are benefited by a payment made by the first co-sharer, such a charge can be imposed by law notwithstanding certain English decisions which refuse to give such a charge to the co-sharer. In this connection, I wish to quote the following passage from the judgment of Sir SUBRAMANIA AYYAR, J., in that case; "This case convinces me that there is far less likelihood of any unsound rule being laid down in this country in consequence of the supposed deceptive character of the phrase 'Justice, equity and good conscience' than there is of Judges refusing to accept a sound rule from, I say with all deference, what is little short of a prejudice to that time-honoured phrase, introduced of old by wise legislators and universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable, and good and expedient,—principles which Judges here as elsewhere, cannot help resorting to in dealing with the difficult questions, not directly governed by existing precedents, which often arise in the course of

(1) (1895) I.L.R., 18 Mad., 88. (2) (1875) 2 I.A., 131.
(3) (1903) I.L.R., 26 Mad., 686.

the administration of justice. It is quite true that for the enunciation of such principles, we mainly and generally look to English decisions and text-books of repute. But I fail to see why we are precluded from, when necessary, considering and following rules laid down in the " sister island of Ireland, where the same system of common law and equity is administered by a judiciary neither less able nor less learned than that in England, if such rules appear to us to be the best suited to the conditions and requirements of this country. In order to show that the view *adopted* in *Seshagiri* v. *Pichu*(1), and since then more than once followed in this Court, is not a *pseudo* equitable doctrine peculiar to Ireland, but true equity accepted and enforced as such without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien, in jurisdictions remote from Ireland, but administering the same common law and equity, I may also draw attention to what is alluded to in the passage cited by BHASHYAM AYYANGAR, J., from Freeman on Co-tenancy, and quote a fuller statement by another writer of the law on this point in those parts of the United States where it has arisen. " If a charge on property could be created because it is in consonance with justice, equity and good conscience, I do not see why an obligation, though it will be personal, cannot also be created if consonant with justice especially when section 70 of the Indian Contract Act, interpreting its terms in their ordinary meaning, also favours the plaintiff's right to obtain contribution from the defendant. *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(2), was decided "without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien." Let us take a not infrequent case of two neighbouring agriculturists. One of them is absent in a distant town on private business. His land requires well-water irrigation for one day emergently in order to produce a fair twelve annas crop, though even without the irrigation, it may yield a four annas crop and will not totally fail. His neighbouring land-owner, while spending five rupees for irrigating his own neighbouring land, does the neighbour service of spending five rupees for irrigating his neighbour's land also on that day, believing that, as a reasonable man, his neighbour, when he

(1) (1888) I.L.R., 11 Mad., 452. (2) (1903) I.L.R., 26 Mad., 686.

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returns from the distant place where he is unavoidably detained would repay him the five rupees as he is bound to do in justice, equity and good conscience. Is it to be said that section 70 does not apply to such a case because, though defendant enjoyed the benefit of the twelve annas crops (say benefited to the extent of Rs. 50), he had had no option to accept or reject the benefit? I think not. The Roman Law is admittedly wider than the English Law in this matter, and section 70 was suggested rather "by the note to *Lampleigh* v. *Brathwaite*(1), and perhaps, indirectly by the Roman Law" than by the strict rules laid down in English cases. (As Mr. Stokes has remarked) no doubt, the introduction of considerations as to what a "reasonable man" or "a man of ordinary prudence" would do for another or would accept as properly done for himself when done by a third person, introduces an uncertain element, and gives some discretion to Courts of Justice, but the Contract Act, in several sections, introduces such expressions as "ordinary prudence," "reasonable diligence," "similar skill as is generally possessed" consideration, (see sections 151, 189, and 212 of the Indian Contract Act) and Courts could not shirk the duty of dealing out justice because difficulties in determining what ordinary prudence or reasonable diligence, etc., would dictate under particular circumstances would have to be encountered in deciding some cases. I may add that Mr. Shepherd in his Indian Contract Act says (page 425) that not only does section 70 of the Contract Act, "make a departure from the principle" (of the English decisions) "that a man cannot be charged for services rendered to him by another, unasked and without authority" but that section 189 also makes a similar departure in favour of an agent who acts in an emergency without authority. In the result I agree in the decree passed by my learned brother.

(1) (1616) 1 Sm.L.C., 141.