

Ayyar v. Gopala Ayyar(1), that a plaintiff can sue to recover the right property notwithstanding misdescription in his document of title. Reliance was placed in these two cases on the proviso to section 92. None of these cases have been considered by the Subordinate Judge. It is true that section 94 has no application as pointed out by him, but the combined effect of section 92, clause (a), and of section 81 of the Specific Relief Act leaves no room for doubt that the defendant can resist the suit on the ground that what was sold to him was different from what the document described.

Mr. Narasimha Ayyangar contends that on the facts he will be able to show that there was no mistake. We must reverse the decree of the Subordinate Judge and remand the appeal for disposal on the merits. Costs to abide the result.

N.R.

RANGASAMI
v.
SOUBI.
—
SESHAGIRI
AYYAR AND
NAPIER, JJ.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Srinivasa Ayyangar.*

SREE RAJAH V. V. S. JAGAPATIRAJU BAHADUR GARU
(DIED) AND ANOTHER (PLAINTIFFS), APPELLANTS,

1915.
July
26 and 27.

v.

29 M. L. J 639

SREE RAJAH T. P. R. S. L. R. SADRUSANNAMA ARAD
DUGARAZU D. K. D. R. BAHADUR GARU AND FIVE
OTHERS (DEFENDANTS), RESPONDENTS.*

(Indian) Contract Act (IX of 1872), ss. 69 and 70—*Suit for contribution—Co-owners—Purchasers of different portions of zamindari—Attachment for arrears of revenue—Payment by a purchaser of the whole amount of arrears—Suit by him for the entire amount against the zamindar and the other purchaser—Personal liability of registered holder only—Liability of share of the other purchaser—Zamindar liable, only for proportionate share—Sale-proceeds of zamindari, liability of—Property partly in Agency Tracts—Defendant-purchaser, resident therein—Jurisdiction of Subordinate Court.*

The plaintiff was a purchaser, in an auction sale held in execution of a decree, of some villages in a zamindari of which the first defendant was the registered

(1) (1911) I.L.R., 34 Mad., 51.

* Appeal No. 93 of 1911.

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holder. The sixth defendant was a similar purchaser of some other villages therein within the jurisdiction of the Agency Court. For default in payment of revenue accruing due subsequent to the plaintiff's purchase, one of the villages purchased by him was attached by the Government; the plaintiff paid the full amount due on the entire zamindari to save his village from revenue sale. The plaintiff brought the suit in the Subordinate Judge's Court against the first defendant, defendants Nos. 2 to 5 (who were his undivided brother, sons and nephew, respectively) and the sixth defendant, to recover the full amount paid by him from all the defendants personally and from the sale-proceeds of the rest of the zamindari kept in deposit in the Government treasury. The defendants pleaded non-liability in law for the full amount, while the sixth defendant raised the further plea that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against him.

Held:

(a) that the only person who is personally bound to pay the revenue to the Government is the registered holder;

(b) that a co-owner who pays to the Government the whole revenue due on an estate is not entitled to a personal decree against the other co-owners who, not being registered holders, are not under a personal obligation to pay the revenue, though it may be a charge on the lands in their holding;

(c) that section 70 of the Indian Contract Act does not apply to such a case;

(d) that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against the sixth defendant to enforce the charge on the villages purchased by him, as the lands did not lie within its jurisdiction;

(e) that section 69 of the Indian Contract Act does not apply to a suit for contribution, as "the person interested in the payment of money" must be a person who is not himself bound to pay the whole or any portion of the amount;

(f) that the plaintiff was entitled to sue the first defendant only for contribution and to recover from him and from the sale-proceeds in deposit only the share of revenue payable on account of the property in the hands of the first defendant.

Subramania Chetti v. Mahalingasami Sivan (1910) I.L.R., 33 Mad., 41, *Paruykvi v. Pakram Hoji* (1912) 15 I.C., 202, *Narain Pai v. Appu* (1915) 28 I.C., 456 and *Futteh Ali v. Gunganath Roy* (18*2) I.L.R., 8 Calc., 113, followed.

Raja of Vizianagaram v. Raja Setrucherla Somasekhararaz (1903) I.L.R., 26 Mad., 798, distinguished.

Gajapathi Kistna Chandra Deo v. Srinivasa Charlu (1914) 25 M.L.J., 433, *Raja of Pittapuram v. Secretary of State* (1*14) 13 M.L.T., 375, *Yogambal Boyes Ammani Ammal v. Naina Pillai Markayar* (1910) I.L.R., 33 Mad., 15, *Mahgalathammal v. Narayanaswami Aiyar* (1907) 17 M.L.J., 250, *Munindra Chandra Nandy v. Jamahir Kumari* (1905) I.L.R., 32 Calc., 643 and *Moule v. Garrett* (1872) 7 Ex., 101 at p. 104, referred to.

APPEAL against the decree of D. RAGHAVENDRA RAO, the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 46 of 1908.

The first defendant was the zamindar of Pachipenta. In execution of a decree obtained by *B* against the first defendant, the plaintiff purchased in auction four villages in the zamindari on the 8th January 1906, and the sixth defendant purchased in auction 69 other villages in the Agency tracts within the jurisdiction of the Agency Court on the 26th March 1908, and the remaining portion of the zamindari was also sold and the sale-proceeds were deposited in the Taluk treasury. The plaintiff alleged in the plaint that the first defendant, and defendants Nos. 2 to 5 who were the undivided brother, sons and nephew, respectively, of the first defendant, failed to pay the peshkash or revenue due on the Pachipenta estate from April 1907 to the end of November 1908; that, for the recovery of the amount that was due, the Deputy Tahsildar of Salur attached a village purchased by the first defendant, and that, to save the property from revenue sale, he paid the full amount of the revenue. The plaintiff brought this suit in the Subordinate Judge's Court of Vizagapatam to recover the whole amount so paid by him from all the defendants personally and from the sale-proceeds of the rest of the zamindari (which had also been sold), which were in deposit in the Taluk treasury to the credit of the first defendant. The defendants Nos. 1 to 5 pleaded that they were not liable to pay the entire amount as the plaintiff and the sixth defendant were bound to pay a portion each, and that the suit as brought was not maintainable. The sixth defendant, who was subsequently added, pleaded inter alia that the Subordinate Judge's Court had no jurisdiction to entertain the suit against him as the portion of the zamindari purchased by him was in the Agency tracts and he also resided therein, and, on the merits, that he was not liable to pay any amount as no arrears were due on the portion purchased by him prior to his purchase and even if they were due he would not be liable in law to pay any amount to the plaintiff. The Subordinate Judge dismissed the suit as against the sixth defendant on the ground of want of jurisdiction but passed a decree for the plaintiff as against the first to fifth defendants and the sale-proceeds of the zamindari in deposit in the Taluk treasury for an amount which represented the share of revenue payable by the defendants Nos. 1 to 5 in respect of the lands left with them after deducting the portions purchased by the plaintiff and the sixth

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defendant. The plaintiff preferred an appeal against the decree and claimed to recover the whole amount of revenue paid by him from all the defendants personally and as a charge on the amount in deposit in the Taluk treasury.

The Honourable Mr. *B. Narasimheswara Sarma* for the appellants.

V. Ramesam for the respondents Nos. 1 to 5.

S. Srinivasa Ayyangar for the sixth respondent.

SRINIVASA
AYYANGAR, J.

SRINIVASA AYYANGAR, J.—Two points are raised in this appeal, first as to the liability of the sixth defendant, second as to the amount recoverable from the first defendant, the registered holder.

So far as the sixth defendant is concerned it is clear that the plaintiff cannot recover anything personally from him as he was under no personal obligation to pay the proportionate revenue to the Government. It is now settled that the only person who is personally bound to pay the revenue to Government is the registered holder, who is called the defaulter in the Revenue Recovery Act, and that co-owners or co-sharers who are not also registered holders are not under any such obligation, though the Government revenue may be a charge on the lands in their holding—*Subramania Chetti v. Mahalingasami Sivan*(1). Payment of the revenue by the plaintiff could not give him a larger or higher right than what the Government had. See Ghose on Mortgages, page 371, and Freeman on Co-tenancy, pages 254 and 349. On this principle this Court has held in *Paruyki v. Pakram Haji*(2) and *Narain Pai v. Appu*(3), that a person who pays the whole revenue to the Government under circumstances similar to the present case is not entitled to a personal decree against the co-owners or co-sharers who were not under a personal obligation to pay to the Government. The observations of BHASHYAM AYYANGAR, J., in *Raja of Vizianagram v. Raja Setrucherlu Soma-sekhararaz*(4) were based on the assumption that all the co-owners or co-sharers were liable personally to pay to the Government. Nor do we think that section 70 of the Contract Act has any application to the present case. *Gajapathi Kistna Chendra Deo v. Srinivasa Charlu*(5), on which Mr. Sarma relied has not been

(1) (1910) I.L.R., 33 Mad., 41. (2) (1912) 15 I.C., 262.

(3) (1915) 28 I.C., 456.

(4) (1908) I.L.R., 26 Mad., 798 at p. 818.

(5) (1914) 25 M.L.J., 433.

followed in *Raja of Pittapuram v. Secretary of State*(1) in which all the previous cases were reviewed by SPENCER, J., and this case was followed in *Narain Pai v. Appu*(2) by SADASIVA AYYAR, J., who was himself a party to the decision in *Gajapathi Kistna Chendra Deo v. Srinivasa Charlu*(3). *Yogambal Boyee Ammani Ammal v. Naina Pillai Markayar*(4) is also to the same effect. If the sixth defendant had been personally liable to pay, the Subordinate Judge's Court of Vizagapatam would have jurisdiction to pass a money decree, though the sixth defendant was residing in the Agency tracts, as the cause of action arose at least in part within the jurisdiction of the Vizagapatam Subordinate Judge's Court ; but that Court has no jurisdiction to enforce a charge over the portion of the estate purchased by the sixth defendant as it is situated in the Agency tracts, and the plaintiff must be left to enforce his charge in the Agency Courts. We therefore confirm the decree of the lower Court as regards the sixth defendant.

The next question which alone admits of any doubt is the amount, which the plaintiff is entitled to recover from the first defendant, the registered holder. The plaintiff, the first defendant and the sixth defendant are each in possession of portions of the estate. The Government revenue paid by the plaintiff accrued due after the purchase by the plaintiff and the sixth defendant of portions of the property in execution of a mortgage decree. If it was a case of a private sale under section 56 of the Transfer of Property Act, the plaintiff and the sixth defendant would each be bound to pay the proportionate share of the Government revenue due on the lands in their possession ; the fact that the purchase was made in a Court-sale does not make any difference. The position therefore is this : There was a charge on the whole estate in favour of the Government, and the registered holder, the first defendant, was also personally liable to pay the amount of the charge to the Government. (We are assuming that the statutory liability of the registered holder is a personal liability.) The case is analogous to that of a mortgagor who had covenanted to pay the mortgage money and who afterwards sells portions of the mortgaged property to

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(1) (1914) 16 M.L.T., 375.

(2) (1915) 28 I.C., 456.

(3) (1914) 25 M.L.J., 433.

(4) (1910) I.L.R., 33 Mad., 15.

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several persons subject to the mortgage. As between the mortgagor and his vendees, the mortgagor would be liable in proportion to the value of the property in his hands, while his vendees would be liable in proportion to the value of the property in their hands. This of course would not affect the right of the mortgagee to enforce the personal covenant against the mortgagor or the charge against any portion of the mortgaged property. If in such a case the whole amount is collected from the mortgagor on his personal liability or by the sale of the property in the hands of any one of the owners, the person who so paid the money or out of whose property the mortgage amount was realized would be entitled to contribution from the property of the other owners under section 82 of the Transfer of Property Act. The mortgaged property is considered the primary fund for payment of the mortgage debt: Jones on Mortgages, sections 736 and 740; also see *Palmer v. Hendrie*(1). If therefore the present plaintiff had asked for contribution out of the properties, he could not have recovered more than the amount payable by the first defendant, in proportion to the value of the property in his hands. For example if the plaintiff was the purchaser of one-third share, sixth defendant another one-third, the first defendant remaining in possession of the other third, whoever paid the whole of the charge, whether plaintiff or the sixth defendant or the first defendant, would be entitled to recover one-third from each of the remaining two as a charge on the property. Does the fact that the plaintiff sues under section 69 of the Contract Act to recover the money personally from the registered holder make any difference as regards the amount claimable from him? Reading the terms of section 69 literally, in the case supposed, the plaintiff, it may be contended, would be entitled to recover the whole amount and not merely two-thirds or one-third personally from the registered holder, for the first defendant was the person who in law was bound to pay the revenue; the plaintiff of course was interested in the payment, i.e., he was not a volunteer. That, I think, would be manifestly absurd, for the property in the hands of the plaintiff is itself liable to pay one-third of the Government revenue, and it is this liability on his part that gives him a right to make the payment at all to the

(1) (1869) 27 Beavan, 349.

Government, so as to enable him to recover back from the co-owners the share of the revenue which they personally were bound to pay or for which the property in their hands was liable. A simple illustration will make this matter clear. *A* mortgages certain lands to *B* and sells the property subject to the mortgage to *C*. Supposing *B* sues *C* on the mortgage, and *C* to save the property pays the mortgagee; could *C* recover the money from *A*, he being the person who under law was bound to pay within the meaning of section 69? clearly not; for as between *A* and *C*, *C* is the person who is bound to discharge the debt, though so far as *B*, the mortgagee, is concerned there is no novation of the liability of *A*; the position of *A* in such cases is said to be analogous to that of a surety, *C* being the principal debtor. It is the ultimate liability that determines the right to recover the amount paid to discharge the original liability. It is possible to contend in the case above said that *C* is entitled to recover from *A* personally the amount of the mortgage debt, but that *A* in his turn would be entitled to a charge upon the mortgaged property for the sum which he paid to *C* and recover as much as he can from the mortgaged property, which amount may conceivably be less than the amount which he paid; this would be untenable, because the purchaser of the property subject to the mortgage would then be entitled indirectly to recover back the amount paid by him for the sale of the equity of redemption. To put the converse case, if *A* had been sued by the mortgagee personally and had been obliged to pay *B*, he certainly would be entitled to call on *C* to pay back the money which he paid. In an English conveyance on sale of the equity of redemption a covenant would be implied on the part of the vendee to indemnify the vendor from all the consequences of non-payment of the mortgage amount by the vendee. Under the Transfer of Property Act, section 55, though there is no implied covenant of indemnity the same result would follow as the statute makes it obligatory on the part of the vendee to discharge the mortgage as between him and his vendor though the liability of the vendor-mortgagor to his mortgagee is not affected. It is clear therefore that the person who is interested in the payment mentioned in section 69 must be a person who as between himself and the defendant was not bound to pay though the defendant may be under an obligation to pay to a third

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party. See *Mangalathammal v. Narayanaswami Aiyar*(1) and *Manindra Chandra Nandy v. Jamahir Kumari*(2). Whether the basis of section 69 is the Common Law action of "money paid at the defendant's request" or the equitable doctrine of subrogation does not much matter as the plaintiff can in either case recover only from the person ultimately liable. See *Maula v. Garrett*(3) per COCKBURN, C.J., citing Leake, page 45, sixth edition Sheldon on Subrogation, page 15, section 11. In this case, if the plaintiff and the first defendant were the only two persons who had an interest in the property, and if the plaintiff had paid the whole of the Government revenue he could not have recovered more than the share payable on account of the property in the hands of the defendant. Is the plaintiff also entitled to recover from the first defendant the proportionate share of the revenue payable on account of the properties in the hands of sixth defendant, because the plaintiff is not the person liable to pay that sum? If the plaintiff is allowed to recover from the first defendant the amount payable both on account of the properties in his hands and in the hands of the sixth defendant, unless the first defendant is in his turn subrogated to the rights of the plaintiff (which is more than doubtful), the first defendant would have been compelled to pay the amount really payable by the sixth defendant; that, I think, would be unfair. The present suit is a suit for contribution and it was of course necessary to make all persons who are liable to contribute, whether personally or out of their properties, parties, in order to fix the proportionate amount which each person was ultimately bound to pay. If section 69 applies to a suit for contribution it may be that no effective relief could be given against all the parties so as to dispose of all matters in controversy and avoid multiplicity of suits. In *Futteh Ali v. Gunganath Roy*(4), it was doubted whether a suit for contribution comes within the scope of section 69.

"The person interested in the payment of money" must, we think, be a person who is not himself bound to pay *the whole or any portion of the amount*. It is to be noted that there are express provisions in the Contract Act for contribution in the cases of joint promisors and co-sureties. (Section 43, clause 2,

(1) (1907) 17 M.L.J., 250.

(2) (1905) I.L.R., 32 Calc., 643.

(3) (1872) L.R., 7 Ex., 101 at p. 104.

(4) (1882) I.L.R., 8 Calc., 113.

and sections 146 and 147.) We are therefore inclined to hold that section 69 does not apply to a suit for contribution at all. The result is the appeal is dismissed with costs.

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WALLIS, C.J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

PARVATHI AMMAL (APPELLANT IN SECOND APPEAL
No. 1127 AND RESPONDENT IN SECOND APPEAL
No. 1147 OF 1914), DEFENDANT,

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GOVINDASAMI PILLAI (RESPONDENT IN SECOND APPEAL
No. 1127 AND APPELLANT IN SECOND APPEAL
No. 1147 OF 1914), PLAINTIFF.*

Execution sale set aside for irregularities of decree-holder—Right of purchaser to return of poundage fees and to interest on purchase money—Right of suit—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, no bar by.

A Court-sale was set aside on account of irregularities in its conduct, perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage fees not returned to him and interest on the purchase money paid by him.

Held (overruling the objection that remedy for the return of the poundage fees lay only in execution), that a suit was maintainable for the recovery of the same.

Powell v. Powell (1875) 19 Eq., 422, followed.

The poundage fee is really part of the purchase money paid.

Held also, that the purchaser was entitled to interest on the purchase money paid by him.

Raghubir Dayal v. The Bank of Upper India, Ltd. (1882) 1 L.R., 5 All., 364, followed.

SECOND APPEALS against the decree of G. KODANDARAMANJULU NAYUDU, the Subordinate Judge of Tanjore, in Appeals Nos. 690 and 718 of 1912, respectively, preferred against the decree of P. C. THIRUVENKATA ACHARIYAR, the District Munsif of Tanjore, in Original Suit No. 271 of 1911.